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Contents

Federal Register
Vol. 69, No. 12
Tuesday, January 20, 2004

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.
To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

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.

Rules and Regulations

Federal Register
Vol. 69, No. 12
Tuesday, January 20, 2004

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 02–096–2]

Oriental Fruit Fly; Designation of Quarantined Area

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the Oriental fruit fly regulations by quarantining a portion of Los Angeles and San Bernardino Counties, CA, and restricting the interstate movement of regulated articles from that area. This action is necessary on an emergency basis to prevent the spread of the Oriental fruit fly into noninfested areas of the United States.

DATES: This interim rule was effective January 13, 2004. We will consider all comments that we receive on or before March 22, 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. 02–096–2, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 02–096–2. If you use e-mail, address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 02–096–2" on the subject line.

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

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

FOR FURTHER INFORMATION CONTACT: Mr. Stephen A. Knight, Senior Staff Officer, PPQ, APHIS, 4700 River Road, Unit 134, Riverdale, MD 20737–1236; (301) 734–8247.

SUPPLEMENTARY INFORMATION:

Background

The Oriental fruit fly, *Bactrocera dorsalis* (Hendel), is a destructive pest of citrus and other types of fruit, nuts, vegetables, and berries. The short life cycle of the Oriental fruit fly allows rapid development of serious outbreaks, which can cause severe economic losses. Heavy infestations can cause complete loss of crops.

The Oriental fruit fly regulations, contained in 7 CFR 301.93 through 301.93–10 (referred to below as the regulations), were established to prevent the spread of the Oriental fruit fly into noninfested areas of the United States.

Section 301.93–3(a) provides that the Administrator will list as a quarantined area each State, or each portion of a State, in which the Oriental fruit fly has been found by an inspector, in which the Administrator has reason to believe that the Oriental fruit fly is present, or that the Administrator considers necessary to regulate because of its proximity to the Oriental fruit fly or its inseparability for quarantine purposes from localities in which the Oriental fruit fly has been found. The regulations impose restrictions on the interstate movement of regulated articles from the quarantined areas. Quarantined areas are listed in § 301.93–3(c).

Less than an entire State will be designated as a quarantined area only if the Administrator determines that: (1) The State has adopted and is enforcing restrictions on the interstate movement of the regulated articles that are substantially the same as those imposed on the interstate movement of regulated articles and (2) the designation of less than the entire State as a quarantined area will prevent the interstate spread of the Oriental fruit fly.

Recent trapping surveys by inspectors of California State and county agencies and by inspectors of the Animal and Plant Health Inspection Service reveal that a portion of Los Angeles and San Bernardino Counties, CA, is infested with the Oriental fruit fly.

State agencies in California have begun an intensive Oriental fruit fly eradication program in the quarantined area in Los Angeles and San Bernardino Counties. Also, California has taken action to restrict the intrastate movement of regulated articles from the quarantined area.

Accordingly, to prevent the spread of the Oriental fruit fly to noninfested areas of the United States, we are amending the regulations in § 301.93–3 by designating a portion of Los Angeles and San Bernardino Counties, CA, as a quarantined area for the Oriental fruit fly. The quarantined area is described in the rule portion of this document.

Prior Designation of Quarantined Area

In an interim rule effective on October 2, 2002, and published in the **Federal Register** on October 8, 2002 (67 FR 62627–62628, Docket No. 02–096–1), we amended the regulations by designating a portion of Los Angeles and San Bernardino Counties, CA, as a quarantined area. Based on trapping surveys by inspectors of California State and county agencies, the State of California lifted its interior quarantine on December 12, 2002, based on the determination that Oriental fruit fly had been eradicated from the quarantined area. In these types of situations, we normally follow the State's action by lifting the corresponding Federal quarantine on the particular area; however, in this case that did not occur. Therefore, in this interim rule, we are removing the quarantined area established in our October 2002 interim rule. The description of the new quarantined area discussed previously replaces the description of the October 2002 quarantined area in § 301.93–3(c).

Emergency Action

This rulemaking is necessary on an emergency basis to prevent the Oriental fruit fly 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 rule amends the Oriental fruit fly regulations by adding a portion of Los Angeles and San Bernardino Counties, CA, to the list of quarantined areas. The regulations restrict the interstate movement of regulated articles from a quarantined area.

County records indicate there are approximately 29 acres of fruits and vegetables, 6 farmers markets, 1 food bank, 2 fruit haulers, 15 growers, 83 markets and produce vendors, 4 packers, 60 nurseries, and 26 swap meets within the quarantined area that may be affected by this rule.

We expect that any small entities located within the quarantined area that sell regulated articles do so primarily for local intrastate, not interstate, movement, so the effect, if any, of this rule on those entities appears to be minimal. The effect on any small entities that may move regulated articles interstate will be minimized by the availability of various treatments that, in most cases, will allow these small entities to move regulated articles interstate with very little additional cost.

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.

National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this interim rule. The site-specific environmental assessment provides a basis for the conclusion that the implementation of integrated pest management to eradicate the Oriental fruit fly will not have a significant impact on human health and the natural environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Copies of the environmental assessment and finding of no significant impact are available for public inspection in our reading room (information on the location and hours of the reading room is provided under the heading **ADDRESSES** at the beginning of this document). In addition, copies may be obtained from the individual listed under **FOR FURTHER INFORMATION CONTACT.**

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. In § 301.93–3, paragraph (c) is revised to read as follows:

§ 301.93–3 Quarantined areas.

* * * * *

(c) The areas described below are designated as quarantined areas:

CALIFORNIA

Los Angeles and San Bernardino Counties. That portion of Los Angeles and San Bernardino Counties in the Ontario area bounded by a line as follows: Beginning at the intersection of the San Antonio Channel and the State Route 210 Freeway; then east on State Route 210 Freeway to Etiwanda Avenue; then south on Etiwanda Avenue to South Etiwanda Avenue; then south on South Etiwanda Avenue to Philadelphia Street; then west on Philadelphia Street to South Milliken Avenue; then south on South Milliken Avenue to Hamner Avenue; then south on Hamner Avenue to Edison Avenue; then west on Edison Avenue to Archibald Avenue; then south on Archibald Avenue to the San Bernardino County line; then southwest, south, and west along the San Bernardino County line to the Chino Valley Freeway; then northwest on the Chino Valley Freeway to Pine Avenue; then west on Pine Avenue to Butterfield Ranch Road; then northwest on Butterfield Ranch Road to Soquel Canyon Parkway; then southwest and west on Soquel Canyon Parkway to Pipeline Avenue; then north on Pipeline Avenue to Woodview Road; then southwest on Woodview Road to Peyton Drive; then north on Peyton Drive to Chino Hills Parkway; then southwest, northwest, and north on Chino Hills Parkway to Rio Rancho Road; then southeast, northeast, and east on Rio Rancho Road to East Philadelphia Street; then east on East Philadelphia Street to Towne Avenue; then north on Towne Avenue to Interstate 10; then northeast and east on Interstate 10 to the San Antonio Channel; then northeast along the San Antonio Channel to the point of beginning.

Done in Washington, DC, this 13th day of January 2004 .

Bobby R. Acord,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–1067 Filed 1–16–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–167–AD; Amendment 39–13433; AD 2004–01–19]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and –11F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes, that requires replacement of the wire assembly connectors of the bag rack lighting with new, moisture-resistant connectors and reidentification of the bag racks. This action is necessary to prevent arcing of the wire assembly connectors of the overhead storage bin, and service module and bin extension assemblies, and consequent smoke/fire in the cabin. This action is intended to address the identified unsafe condition.

DATES: Effective February 24, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 24, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5350; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes was published in the **Federal Register** on July 24, 2003 (68 FR 43681). That action proposed to require replacement of the wire assembly connectors of the bag rack lighting with new, moisture-resistant connectors and reidentification of the bag racks.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Requests To Revise Applicability

Two commenters request that the applicability of the proposed AD be revised to exclude airplanes with certain manufacturer's fuselage numbers (MSN) that have been modified from a passenger-to-freighter configuration. One commenter notes that the proposed AD affects both Model MD–11 (passenger) and –11F (freighter) airplanes, as listed in Boeing Alert Service Bulletin MD11–33A064, dated March 6, 2002. The commenters also note that the effectivity listing of the referenced service bulletin includes manufacturer's fuselage numbers (MFN) 530, 537, 540, 547, 550, 554, and 574. The commenters state that, at the time the service bulletin was written, these MFNs were passenger airplanes; however, Boeing has since converted these MFNs to freighters. The commenters conclude that these MFNs no longer have approved configurations that include the components affected by the proposed AD.

We agree. We have revised the applicability to exclude airplanes that have been converted from a passenger-to-freighter configuration, on which passenger configuration equipment has been removed per Boeing-approved drawings after March 6, 2002 (the issue date of Boeing Alert Service Bulletin MD11–33A064).

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 111 Model MD–11 and –11F airplanes of the affected design in the worldwide fleet. The FAA estimates that 26 airplanes of U.S. registry will be affected by this AD.

For Group 1 airplanes identified in the referenced service bulletin, it will take approximately 11 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Required parts will cost between $1,140 and $1,406 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $1,855 and $2,121 per airplane.

For Group 2 airplanes identified in the referenced service bulletin, it will take approximately 13 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Required parts will cost between $1,140 and $1,406 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $1,985, and $2,251 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the 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. The manufacturer may cover the cost of replacement parts associated with this AD, subject to warranty conditions. Manufacturer warranty remedies may also be available for labor costs associated with this AD.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a

"significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–01–19 McDonnell Douglas: Amendment 39–13433. Docket 2001–NM–167–AD.

Applicability: Model MD–11 and –11F airplanes, as listed in Boeing Alert Service Bulletin MD11–33A064, dated March 6, 2002; certificated in any category; excluding those airplanes that have been converted from a passenger-to-freighter configuration, on which passenger configuration equipment has been removed per Boeing-approved drawings after March 6, 2002 (the issue date of Boeing Alert Service Bulletin MD11–33A064).

Compliance: Required as indicated, unless accomplished previously.

To prevent arcing of the wire assembly connectors of the overhead storage bin, and service module and bin extension assemblies, and consequent smoke/fire in the cabin, accomplish the following:

Replacement and Reidentification

(a) Within 12 months after the effective date of this AD, replace the wire assembly connectors of the bag rack lighting with new, moisture-resistant connectors and reidentify the bag racks, per Boeing Alert Service Bulletin MD11–33A064, dated March 6, 2002.

Alternative Methods of Compliance

(b) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(c) The replacement shall be done in accordance with Boeing Alert Service Bulletin MD11–33A064, dated March 6, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(d) This amendment becomes effective on February 24, 2004.

Issued in Renton, Washington, on January 2, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–764 Filed 1–16–04; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–165–AD; Amendment 39–13432; AD 2004–01–18]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and –11F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes, that requires revising the vent fan wiring in the right forward cabin drop ceiling, right mid cabin drop ceiling, and right forward cargo compartment, as applicable. This action is necessary to prevent fire and/or smoke in the right forward cabin drop ceiling, right mid cabin drop ceiling, or right forward cargo compartment. This action is intended to address the identified unsafe condition.

DATES: Effective February 24, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 24, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5350; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes was published in the **Federal Register** on July 24, 2003 (68 FR 43698). That action proposed to require revising the vent fan wiring in the right forward cabin drop ceiling, right mid cabin drop ceiling, and right forward cargo compartment, as applicable.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 195 Model MD–11 and –11F airplanes of the affected design in the worldwide fleet. We estimate that 67 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Required parts will cost approximately between $14 and $113 per airplane (depending on

airplane configuration). Based on these figures, the cost impact of the AD on U.S. operators is estimated to be between $79 and $178 per airplane (depending on airplane configuration).

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the 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. Manufacturer warranty remedies may be available for labor costs associated with this AD. Manufacturer warranty remedies may also be available for labor costs associated with this AD. As a result, the costs attributable to the AD may be less than stated above.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

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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:

2004–01–18 McDonnell Douglas: Amendment 39–13432. Docket 2002–NM–165–AD.

Applicability: Model MD–11 and –11F airplanes, as listed in Boeing Alert Service Bulletin MD11–24A196, Revision 01, dated November 20, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent fire and/or smoke in the right forward cabin drop ceiling, right mid cabin drop ceiling, or right forward cargo compartment, accomplish the following:

Revise Vent Fan Wiring

(a) Within 6 months after the effective date of this AD, revise the vent fan wiring in the right forward cabin drop ceiling, right mid cabin drop ceiling, and right forward cargo compartment, as applicable, per Boeing Alert Service Bulletin MD11–24A196, Revision 01, dated November 20, 2002.

(b) Revisions of the vent fan wiring accomplished before the effective date of this AD per Boeing Alert Service Bulletin MD11–24A196, dated December 17, 2001, are acceptable for compliance with the requirements of paragraph (a) of this AD.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

Incorporation by Reference

(d) Unless otherwise specified by this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin MD11–24A196, Revision 01, dated November 20, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(e) This amendment becomes effective on February 24, 2004.

Issued in Renton, Washington, on January 2, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–763 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–164–AD; Amendment 39–13431; AD 2004–01–17]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and –11F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes, that requires an initial general visual inspection of the power feeder cables of the integrated drive generator (IDG) and the fuel feed lines of engine pylons No. 1 and No. 3 on the wings for proper clearance and damage; corrective actions if necessary; and repetitive general visual inspections and a terminating action for the repetitive inspections. This action is necessary to prevent potential chafing of the power feeder cables of the IDG in engine pylons No. 1 and No. 3 on the wings, and consequent arcing on the fuel lines in the engine pylons and possible fuel fire. This action is intended to address the identified unsafe condition.

DATES: Effective February 24, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 24, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood,

California 90712; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627–5350; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes was published in the **Federal Register** on June 18, 2003 (68 FR 36520). That action proposed to require an initial general visual inspection of the power feeder cables of the integrated drive generator (IDG) and the fuel feed lines of engine pylons No. 1 and No. 3 on the wings for proper clearance and damage; corrective actions if necessary; and repetitive general visual inspections and a terminating action for the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comment received.

Request To Allow Accomplishment of Previous Service Bulletin Revision

One commenter requests that actions accomplished before the effective date of the AD, per Revision 01 of Boeing Alert Service Bulletin MD11–54A011, dated August 22, 2001, be considered acceptable for compliance with the requirements of this AD. The commenter also asks whether, when an AD mandates a service bulletin that contains the statement "No more work is necessary on airplanes changed as shown in Revision 01 of the service bulletin," it can assume that the AD allows actions to be accomplished per the earlier revision of the service bulletin.

The FAA partially agrees. We agree that actions accomplished before the effective date of this AD per Revision 01 of Boeing Alert Service Bulletin MD11–54A011, dated August 22, 2001, are acceptable for compliance with the requirements of this AD. Because paragraph (e) of this AD already provides this option, no change to the final rule is necessary in this regard.

We do not agree that an operator may assume that the AD allows actions to be accomplished per an earlier revision of the service bulletin when the service bulletin includes the statement that "No more work is necessary on airplanes changed as shown in Revision * * * of the service bulletin." The AD must specifically address whether or not a previous version of a service bulletin will satisfy the intent of the AD. No change to the final rule is necessary in this regard.

Explanation of Changes Made to the Proposed AD

For clarification, the FAA has revised the definition of a "general visual inspection" in this final rule.

We have also revised the citation for Boeing Alert Service Bulletin MD11–54A011, dated August 22, 2001, to correctly cite the issue date of that service bulletin.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Changes to 14 CFR Part 39/Effect on the AD

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's airworthiness directives system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. However, for clarity and consistency in this final rule, we have retained the language of the NPRM regarding that material.

Increase in Labor Rate

We have reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $60 per work hour to $65 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Cost Impact

There are approximately 195 Model MD–11 and –11F airplanes of the affected design in the worldwide fleet. The FAA estimates that 74 airplanes of U.S. registry will be affected by this, that it will take approximately 1 work hour per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $4,810, or $65 per airplane, per inspection cycle.

It will take approximately 4 work hours per airplane to accomplish the terminating action, at an average labor rate of $65 per work hour. Required parts will cost approximately $91 per airplane. Based on these figures, the cost impact of this terminating action is estimated to be $25,974, or $351 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the 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. Manufacturer warranty remedies may be available for labor costs associated with this proposed AD. As a result, the costs attributable to the proposed AD may be less than stated above.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–01–17 McDonnell Douglas: Amendment 39–13431. Docket 2001–NM–164–AD.

Applicability: Model MD–11 and –11F airplanes, as listed in Boeing Alert Service Bulletin MD11–54A011, Revision 02, dated May 31, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent potential chafing of the power feeder cables of the integrated drive generator (IDG) in engine pylons No. 1 and No. 3 on the wings, and consequent arcing on the fuel lines in the engine pylons and possible fuel fire, accomplish the following:

Note 1: Boeing has issued Information Notice MD11–54A011 R02 IN 02, dated July 11, 2002. The information notice informs operators of a typographical error for the string tie part number (P/N) specified in the Boeing Alert Service Bulletin MD11–54A011, Revision 02. The service bulletin specifies string tie P/N 190L0F21G/A; the correct P/N is 109 LOF 21G/A.

Initial Inspection

(a) Within 30 days after the effective date of this AD, do a general visual inspection of the power feeder cables of the IDG and the fuel feed lines of engine pylons No. 1 and No. 3 on the wings for proper clearance and damage, per Boeing Alert Service Bulletin MD11–54A011, Revision 02, dated May 31, 2002.

Note 2: For the purposes of this AD, a general visual inspection is defined as: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

Condition 1: Proper Clearance and No Damage

(b) If proper clearance exists and no damage is detected during any inspection required by paragraph (a) of this AD, do the action(s) specified in paragraphs (b)(1), (b)(2), and (b)(3) of this AD, as applicable, per Boeing Alert Service Bulletin MD11–54A011, Revision 02, dated May 31, 2002.

(1) For Group 1 and Group 2 airplanes identified in the service bulletin: Repeat the inspection required by paragraph (a) of this AD every 6 months until the modification required by paragraph (b)(2) or (b)(3) of this AD, as applicable, has been done.

(2) For Group 1 airplanes identified in the service bulletin: Within 18 months after the effective date of this AD, install the brackets to support the IDG harness, and install new clamps on the power feeder cables of the IDG of the No. 1 and No. 3 pylons.

(3) For Group 2 airplanes identified in the service bulletin: Within 18 months after the effective date of this AD, replace the existing fairlead with a new clamp, and install new tape.

Condition 2: Improper Clearance and No Damage

(c) If improper clearance exists and no damage is detected during any inspection required by paragraph (a) of this AD, do the action(s) specified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, as applicable, per Boeing Alert Service Bulletin MD11–54A011, Revision 02, dated May 31, 2002.

(1) For Group 1 and Group 2 airplanes identified in the service bulletin: Before further flight, reposition cables, and repeat the inspection required by paragraph (a) of this AD every 6 months until the modification required by paragraph (c)(2) or (c)(3) of this AD, as applicable, has been done.

(2) For Group 1 airplanes identified in the service bulletin: Within 18 months after the effective date of this AD, install the brackets to support the IDG harness, and install new clamps on the power feeder cables of the IDG of engine pylons No. 1 and No. 3.

(3) For Group 2 airplanes identified in the service bulletin: Within 18 months after the effective date of this AD, replace the existing fairlead with a new clamp, and install new tape.

Condition 3: Improper Clearance and Damage Detected

(d) If improper clearance exists and any damage is detected during any inspection required by paragraph (a) of this AD, do the action(s) specified in paragraphs (d)(1), (d)(2), and (d)(3) of this AD, as applicable, per Boeing Alert Service Bulletin MD11–54A011, Revision 02, dated May 31, 2002.

(1) For Group 1 and Group 2 airplanes identified in the service bulletin: Before further flight, reposition cables; repair damage or replace damaged cables or fuel feed lines with new or serviceable cables or fuel feed lines; and repeat the inspection required by paragraph (a) of this AD every 6 months until the modification required by paragraph (d)(2) or (d)(3) of this AD, as applicable, has been done.

(2) For Group 1 airplanes identified in the service bulletin: Within 18 months after the effective date of this AD, install the brackets to support the IDG harness, and install new clamps on the power feeder cables of the IDG of engine pylons No. 1 and No. 3.

(3) For Group 2 airplanes identified in the service bulletin: Within 18 months after the effective date of this AD, replace the existing fairlead with a new clamp, and install new tape.

Credit for Earlier Service Bulletin

(e) Accomplishment of the actions specified in this AD before the effective date of this AD per Boeing Alert Service Bulletin MD11–54A011, Revision 01, dated August 22, 2001, is acceptable for compliance with the requirements of this AD.

Alternative Methods of Compliance

(f) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(g) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin MD11–54A011, Revision 02, dated May 31, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(h) This amendment becomes effective on February 24, 2004.

Issued in Renton, Washington, on January 2, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–762 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–161–AD; Amendment 39–13430; AD 2004–01–16]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and –11F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes, that requires revising the wire connection stackups for the terminal strip of the generator feeder tail compartment of the auxiliary power unit (APU), and removing a nameplate, as applicable. For certain airplanes, this AD also requires replacing the terminal strips and revising the terminal hardware stackup for the feeder of the center cargo loading system. This action is necessary to prevent arcing damage to the terminal strips and damage to the adjacent structure, which could result in smoke and/or fire in the center and/or aft cargo compartments. This action is intended to address the identified unsafe condition.

DATES: Effective February 24, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 24, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627–5350; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes was published in the **Federal Register** on July 24, 2003 (68 FR 43693). That action proposed to require revising the wire connection stackups for the terminal strip of the generator feeder tail compartment of the auxiliary power unit (APU), and removing a nameplate, as applicable. For certain airplanes, that action also proposed to require replacing the terminal strips and revising the terminal hardware stackup for the feeder of the center cargo loading system.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Editorial Clarification

The FAA has revised the spelling of a word from "namplate" to "nameplate" in this AD.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule with the change described previously. The FAA has determined that this change will neither increase the economic burden on any operator nor increase the scope of this AD.

Cost Impact

There are approximately 154 Model MD–11 and –11F airplanes of the affected design in the worldwide fleet. We estimate that 67 airplanes of U.S. registry will be affected by this AD, that it will take approximately between 1 and 2 work hours per airplane (depending on the airplane configuration) to accomplish the required actions, and that the average labor rate is $65 per work hour. Required parts will cost approximately $102 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to between $11,189 and $15,544, or between $167 and $232 per airplane (depending on the airplane configuration).

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. However, for affected airplanes within the period under the warranty agreement, we have been advised that the manufacturer has committed previously to its customers that it will bear the cost of replacement parts. We also have been advised that manufacturer warranty remedies are available for labor costs associated with accomplishing the actions required by this AD. Therefore, the future economic cost impact of this AD may be less than the cost impact figure indicated above.

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 adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–01–16 McDonnell Douglas: Amendment 39–13430. Docket 2001–NM–161–AD.

Applicability: Model MD–11 and –11F airplanes, as listed in McDonnell Douglas Alert Service Bulletin MD11–24A173,

Revision 02, dated May 2, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent arcing damage to the terminal strips and damage to the adjacent structure, which could result in smoke and/or fire in the center and/or aft cargo compartments, accomplish the following:

For Group 1 and Group 2 Airplanes: Revise Wire Connection Stackups, Remove Nameplate, and Inspect for Damage

(a) For Group 1 and Group 2 airplanes listed in McDonnell Douglas Alert Service Bulletin MD11–24A173, Revision 02, dated May 2, 2002: Within 18 months after the effective date of this AD, do the actions specified in paragraphs (a)(1) and (a)(2) of this AD per the service bulletin. Although the service bulletin references a reporting requirement in paragraph 4, "Appendix," such reporting is not required by this AD.

(1) Revise the wire connection stackups for the terminal strip of the generator feeder tail compartment of the auxiliary power unit (APU), and remove the nameplate, as applicable.

(2) Do a general visual inspection to detect arcing damage of the surrounding structure, adjacent system components, and electrical cables in the center cargo and aft cargo compartments.

Note: For the purposes of this AD, a general visual inspection is defined as "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight, and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

For Group 2 Airplanes: Replace Terminal Strips, Revise Terminal Hardware Stackup, Remove Nameplate, and Inspect for Damage

(b) For Group 2 airplanes listed in McDonnell Douglas Alert Service Bulletin MD11–24A173, Revision 02, dated May 2, 2002: Within 18 months after the effective date of this AD, do the actions specified in paragraphs (b)(1) and (b)(2) of this AD per the service bulletin. Although the service bulletin references a reporting requirement in paragraph 4, "Appendix," such reporting is not required by this AD.

(1) Replace the terminal strips and revise the terminal hardware stackup for the feeder of the center cargo loading system, and remove the nameplate, as applicable.

(2) Do a general visual inspection to detect arcing damage of the surrounding structure, adjacent system components, and electrical cables in the center cargo and aft cargo compartments.

Corrective Action if Necessary

(c) If any damage is detected during any inspection required by paragraph (a) or (b) of this AD, before further flight, repair damage or replace the damaged part with a new part, per McDonnell Douglas Alert Service Bulletin MD11–24A173, Revision 02, dated May 2, 2002. If the type of structural material that has been damaged is not covered in the structural repair manual, repair per a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. Although the service bulletin references a reporting requirement in paragraph 4, "Appendix," such reporting is not required by this AD.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, Los Angeles ACO, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with McDonnell Douglas Alert Service Bulletin MD11–24A173, Revision 02, dated May 2, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) This amendment becomes effective on February 24, 2004.

Issued in Renton, Washington, on January 2, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–761 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–12–AD; Amendment 39–13434; AD 2004–01–20]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls-Royce plc (RR) RB211–22B series, RB211–524B, –524C2, –524D4, –524G2, –524G3, and –524H series, and RB211–535C and –535E series turbofan engines with high pressure compressor (HPC) stage 3 disc assemblies, part numbers (P/Ns) LK46210, LK58278, LK67634, LK76036, UL11706, UL15358, UL22577, UL22578, and UL24738 installed. This AD allows disc assemblies not modified by a certain RR service bulletin to reach their full life only after the disc assemblies are modified with anti-corrosion protection. This AD results from the manufacturer's reassessment of the corrosion risk on HPC stage 3 disc assemblies that have not yet been modified with sufficient application of anti-corrosion protection. We are issuing this AD to prevent corrosion-induced uncontained disc failure, resulting in damage to the airplane.

DATES: This AD becomes effective February 24, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 24, 2004.

ADDRESSES: You can get the service information identified in this AD from Rolls-Royce plc, PO Box 31, Derby, England, DE248BJ; telephone: 011–44–1332–242424; fax: 011–44–1332–245–418.

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with a proposed airworthiness directive (AD). The proposed AD applies to RR RB211–22B series, RB211–524B, –524C2, –524D4, –524G2, –524G3, and –524H series, and RB211–535C and –535E series turbofan engines with HPC stage 3 disc assemblies, P/Ns LK46210, LK58278, LK67634, LK76036, UL11706, UL15358, UL22577, UL22578, and UL24738 installed. We published the proposed AD in the **Federal Register** on July 30, 2003 (68 FR 44672). That action proposed to allow disc assemblies not modified by a certain RR service bulletin to reach their full life only after the disc assemblies are modified with anti-corrosion protection.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Request To Add a Service Bulletin Reference

Three commenters request that the FAA include a reference to RR Mandatory Service Bulletin (MSB) No. RB.211–72–9661, since the AD action is based on compliance with the procedures in this service bulletin.

We agree that the AD action is based on performing the procedures in (MSB) No. RB.211–72–9661, however, we included all pertinent compliance requirements in the AD and chose to not incorporate by reference that MSB. However, because that MSB is the basis for the AD action, we have added a reference to it in the Related Information paragraph.

Request To Change Compliance Date

One commenter requests that the AD be changed to have the same compliance dates as Service Bulletin (SB) No. RB.211–72–9434, Revision 4, dated January 12, 2002. The commenter points out that the SB compliance time for discs in service more than 12 years is from the date of introduction of the original SB. The commenter also points out that the compliance time is based on the date of the SB revision date of January 4, 2002, and would, therefore, require rework to be completed before January 4, 2007.

We partially agree. While the commenter is correct regarding the compliance date differences between the AD and the SB, the intent of the SB is met because the AD is consistent with the SB by mandating rework before exceeding the upper cyclic limit of the discs. Further, we agree that removal of discs in service more than 12 years from the date of the SB revision date, would require the AD to reference 1990 instead of 1992. Therefore, we have changed this date in the AD accordingly.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Changes to 14 CFR Part 39—Effect on the AD

On July 10, 2002, the FAA published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's AD system. That regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. The material previously was included in each individual AD. Since the material is included in 14 CFR part 39, we will not include it in future AD actions.

Cost of Compliance

There are about 2,000 RR RB211–22B series, RB211–524B, –524C2, –524D4, –524G2, –524G3, and –524H series, and RB211–535C and –535E series turbofan engines of the affected design in the worldwide fleet. We estimate that 1,000 engines installed on airplanes of U.S. registry would be affected by this AD. We also estimate that it would take about 31 work hours per engine to perform the actions, and that the average labor rate is $65 per work hour. Required parts would cost about $38,000 per engine. Based on these figures, the total cost of the AD to U.S. operators is estimated to be $40,015,000.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 2003–NE–12–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2004–01–20 Rolls-Royce plc: Amendment 39–13434. Docket No. 2003-NE–12-AD.

Effective Date

(a) This AD becomes effective February 24, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Rolls-Royce plc (RR) RB211–22B series, RB211–524B, –524C2, –524D4, –524G2, –524G3, and –524H series, and RB211–535C and—535E series turbofan engines with high pressure compressor (HPC) stage 3 disc assemblies, part numbers (P/Ns) LK46210, LK58278, LK67634, LK76036, UL11706, UL15358, UL22577, UL22578, and UL24738 installed. These engines are installed on, but not limited to, Boeing 747, Boeing 757, Boeing 767, Lockheed L–1011, and Tupolev Tu204 series airplanes.

Unsafe Condition

(d) This AD results from the manufacturer's reassessment of the corrosion risk on HPC stage 3 disc assemblies that have not yet been modified with sufficient application of anti-corrosion protection. The actions specified in this AD are intended to prevent corrosion-induced uncontained disc failure, resulting in damage to the airplane.

Compliance

(e) Compliance with this AD is required as indicated, unless already done.

Removal of HPC Stage 3 Discs

(f) Remove from service affected HPC stage 3 disc assemblies identified in the following Table 1, using one of the following criteria:

TABLE 1.—AFFECTED HPC STAGE 3 DISC ASSEMBLIES

Engine model	Rework band for cyclic life accumulated on disc assemblies P/Ns LK46210 and LK58278 (pre RR service bulletin (SB) No. RB.211–72–5420)	Rework band for cyclic life accumulated on disc assembly P/N LK67634 (pre RR SB No.RB.211–72–5420)	Rework band for cyclic life accumulated on P/Ns LK76036, UL11706, UL15358, UL22577, UL22578, and UL24738 disc assemblies (pre RR SB No. RB.211–72–9434)
–22B series	4,000–6,200	7,000–10,000	11,500–14,000
–535E4 series	N/A	N/A	9,000–15,000
–524B–02, B–B–02, B3–02, and B4 series, Pre and SB No. 72–7730	4,000–6,000	7,000–9,000	11,500–14,000
–524B2 and C2 series, Pre SB No. 72–7730	4,000–6,000	7,000–9,000	11,500–14,000
–524B2–B–19 and C2–B–19, SB No. 72–7730	4,000–6,000	7,000–9,000	8,500–11,000
–524D4 series, Pre SB No. 72–7730	4,000–6,000	7,000–9,000	11,500–14,000
–524D4–B series, SB No. 72–7730	4,000–6,000	7,000–9,000	8,500–11,000
–524G2, G3, H, and H2 series	4,000–6,000	7,000–9,000	8,500–11,000

(1) For discs that entered into service before 1990, remove disc and rework as specified in paragraph (g)(2) of this AD, within five years from the effective date of this AD, but not to exceed the upper cyclic limit of Table 1 of this AD before rework. Discs reworked may not exceed the manufacturer's published cyclic limit in the time limits section of the manual.

(2) For discs that entered into service in 1990 or later, remove disc within the cyclic life rework bands in Table 1 of this AD, or within 17 years after the date of the disc assembly entering into service, whichever is sooner, but not to exceed the upper cyclic limit of Table 1 of this AD before rework. Discs reworked may not exceed the manufacturer's published cyclic limit in the time limits section of the manual.

(3) For disc assemblies that when new, were modified with an application of anti-corrosion protection and re-marked to P/N LK76036 (not previously machined) as specified by Part 1 of the original issue of RR service bulletin (SB) No. RB.211–72–5420, dated April 20, 1979, remove RB211–22B disc assemblies before accumulating 10,000 cycles-in-service (CIS), and remove RB211–524 disc assemblies before accumulating 9,000 CIS.

(4) If the disc assembly date of entry into service cannot be determined, the date of disc manufacture may be obtained from RR and used instead.

Optional Rework of HPC Stage 3 Discs

(g) Rework HPC stage 3 disc assemblies that were removed in paragraph (f) of this AD as follows:

(1) For disc assemblies that when new, were modified with an application of anti-corrosion protection and re-marked to P/N LK76036 (not previously machined) as specified by Part 1 of the original issue of RR SB RB.211–72–5420, dated April 20, 1979, rework disc assemblies and re-mark to either LK76034 or LK78814 using paragraph 2.B. of the Accomplishment Instructions of RR SB No. RB.211–72–5420, Revision 4, dated February 29, 1980. This rework constitutes terminating action to the removal requirements in paragraph (f) of this AD.

(2) For all other disc assemblies, rework using Paragraph 3B. of the Accomplishment Instructions of RR SB No. RB.211–72–9434, Revision 4, dated January 12, 2000. This rework constitutes terminating action to the removal requirements in paragraph (f) of this AD.

Note 1: If rework is done on disc assemblies that are removed before the disc assembly reaches the lower life of the cyclic life rework band in Table 1 of this AD, artificial aging of the disc to the lower life of the rework band, at time of rework, is required.

Alternative Methods of Compliance

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

Material Incorporated by Reference

(i) You must use Rolls-Royce Service Bulletin No. RB.211–72–5420, Revision 4, dated February 29, 1980, and Rolls-Royce Service Bulletin No. RB.211–72–9434, Revision 4, dated January 12, 2000, to perform the rework required by this AD. The Director of the Federal Register approved the incorporation by reference of these service bulletins in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You can get copies from Rolls-Royce plc, PO Box 31, Derby, England, DE248BJ; telephone: 011–44–1332–242424; fax: 011–44–1332–245–418. You can review copies at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Related Information

(j) Civil Aviation Authority airworthiness directive 004–01–94, dated January 4, 2002, and RR Mandatory Service Bulletin No. RB.211–72–9661, Revision 3, dated December 20, 1999, pertain to the subject of this AD.

Issued in Burlington, Massachusetts, on January 8, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–759 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 934

[ND–047–FOR, Amendment No. XXXIV]

North Dakota Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving a proposed amendment to the North Dakota regulatory program (the "North Dakota program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). North Dakota proposed revisions to rules that would allow the State to accept letters of credit as the monetary pledge for collateral bonds, would allow phased bonding over a bond area, would clarify provisions on blasting records kept by mining companies, and would standardize terminology in revegetation success standards for bond release. North Dakota intends to revise its program to provide additional safeguards, clarify ambiguities, and improve operational efficiency.

EFFECTIVE DATE: January 20, 2004.

FOR FURTHER INFORMATION CONTACT: Guy Padgett, Telephone: 307/261–6550, Internet address: *GPadgett@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the North Dakota Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the North Dakota program on December 15, 1980. You can find background information on the North Dakota program, including the Secretary's findings, the disposition of comments, and conditions of approval in the December 15, 1980, **Federal Register** (45 FR 82214). You can also find later actions concerning North Dakota's program and program amendments at 30 CFR 934.15, 934.16, and 934.30.

II. Submission of the Proposed Amendment

By letter dated April 23, 2003, North Dakota sent us an amendment to its program (Amendment number XXXIV, Administrative Record No. ND–II–01) under SMCRA (30 U.S.C. 1201 *et seq.*). North Dakota sent the amendment to include changes made at its own initiative. The provisions of the North Dakota Administrative Code (NDAC) that North Dakota proposed to revise are: (1) NDAC 69–05.2–01–02 (Definitions) to add irrevocable letters of credit as one of the financial supports for a collateral bond; (2) NDAC 69–05.2–12–01 (Performance bond—General requirements) to allow the posting of more than one bond to guarantee specific phases of reclamation within the permit area; (3) NDAC 69–05.2–12–04 (Performance bond—Collateral bond) to specify that: (a) The permittee obtain prior North Dakota Public Service (Commission) approval of the bank that will issue the letter of credit, (b) the term of the letter of credit must be at least one year, (c) the bank issuing the credit must give the Commission at least 90 days notice if it intends to terminate the letter of credit at the end of the current term, (d) the Commission will not accept letters of credit in excess of 10 percent of the bank's total equity, and (e) the bank must provide the Commission with notice of any pending action that could result in suspension or revocation of the bank's charter or license to do business; (4) NDAC 69–05.2–17–07 to make a minor editorial change to clarify that other structures (as well as dwellings, schools, churches, and commercial and institutional buildings) may be protected from certain blasting operations; and (5) NDAC 69–05–22–07, minor editorial changes to North Dakota's revegetation success standards that clarify that the standards can be exceeded, as well as met, for demonstrating reclamation success.

We announced receipt of the proposed amendment in the July 7, 2003, **Federal Register** (68 FR 40225). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. ND–II–07).

The public comment period ended on August 6, 2003. We received comments from one Federal agency, one university and one State society. No one requested a public meeting or hearing, therefore we did not conduct one.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment.

A. Minor Revisions to North Dakota's Rules

North Dakota proposed minor wording changes to the following previously-approved rules.

1. *NDAC 69–05.2–17–07. Performance standards—Use of Explosives—Records of blasting operations [30 CFR 816.68]*
2. *NDAC 69–05.2–22–07. Performance standards—Revegetation—Standards for success [30 CFR 816.116]*

Because the above changes are both minor, we find that they will not make North Dakota's rules less effective than the corresponding Federal regulations.

B. Revisions to North Dakota's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations

North Dakota proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations.

1. *NDAC 69–05.2–01–02.13, Definitions (Collateral bond) [30 CFR 800.5]*
2. *NDAC 69–05.2–12–01.11, Performance Bond—General Requirements [30 CFR 800.13(a)(2)]*
3. *NDAC 69–05.2–12–04.2, Performance bond—Collateral bond [30 CFR 800.21(b) and 800.16.(e)]*

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record No. ND–II–03), and one university replied. Duane Hauck, Assistant Director of Agriculture and Natural Resources, wrote in his May 20, 2003, letter, that "The NDSU Extension Service has no additional comments'" (Administrative Record No. ND–II–05)

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the North Dakota program (Administrative Record No. ND–II–03).

Ray McKinney of the Mine Safety and Health Administration replied on June 9, 2003, that "none of the changes have a direct impact upon employee or public health or safety and, consequently, MSHA has no comments or recommendations concerning the changes." (Administrative Record No. ND–II–06).

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i), OSM requested comments on the amendment from EPA (Administrative Record No. ND–II–03). EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the

SHPO and ACHP on amendments that may have an effect on historic properties. On May 5, 2003, we requested comments on North Dakota's amendment (Administrative Record No. ND–II–03), but ACHP did not respond to our request. The SHPO responded on May 14, 2003, that "We have no comments on the document." (Administrative Record No. ND–II–04).

V. OSM's Decision

We approve the rules as proposed by North Dakota with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public. We approve: (1) NDAC 69–05.2–01–02.13, Definition of Collateral Bond; (2) NDAC 69–05.2–12–01.11, Performance Bond—General Requirements; (3) NDAC 69–05.2–12–04.2, Performance Bond—Collateral Bond; (4) NDAC 69–05.2–17–07, Performance standards—Use of Explosives—Records of Blasting Operations; and (5) NDAC 69–05.2–22–07, Performance standards—Revegetation—Standards for success.

To implement the decision to approve the rules, we are amending the Federal regulations at 30 CFR Part 934, which codify decisions concerning the North Dakota program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the state submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 934

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 12, 2003.

Allen D. Klein,

Regional Director, Western Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR part 934 is amended as set forth below:

PART 934—North Dakota

■ 1. The authority citation for part 934 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 934.15 is amended in the table by adding a new entry in chronological order by "date of final publication" to read as follows:

§ 934.15 Approval of North Dakota regulatory program amendments

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	*
4–23–03	1–20–04	NDAC 69–05.2–01–02.13, NDAC 69–05.2–12–01.11, NDAC 69–05.2–12–04.2, NDAC 69–05.2–17–07, NDAC 69–05.2–22–07.

[FR Doc. 04–1064 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01–03–036]

RIN 1625–AA00

Safety and Security Zones; New York Marine Inspection Zone and Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing permanent safety and security zones in portions of the waters around La Guardia and John F. Kennedy airports in Queens, NY, the New York City Police Department (NYPD) ammunition depot on Rodman Neck in Eastchester Bay, the Port Newark and Port Elizabeth, NJ, commercial shipping facilities in Newark Bay, and between the Global Marine and Military Ocean Terminals in Upper New York Bay. This action is necessary to safeguard critical port infrastructure and coastal facilities from sabotage, subversive acts, or other threats. The zones prohibit entry into or movement within these areas without authorization from the Captain of the Port New York.

DATES: This rule is effective January 20, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–03–036) and are available for inspection or copying at room 203, Coast Guard Activities New York, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander W. Morton, Waterways Oversight Branch, Coast Guard Activities New York at (718) 354–4191.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On February 19, 2003, we published a temporary final rule; request for comments (TFR) entitled "Safety and Security Zones; New York Marine Inspection Zone and Captain of the Port Zone" in the **Federal Register** (68 FR 7926). We received no letters commenting on the temporary rule. No public hearing was requested, and none was held.

On August 7, 2003, we published a notice of proposed rulemaking (NPRM) entitled "Safety and Security Zones; New York Marine Inspection Zone and Captain of the Port Zone" in the **Federal Register** (68 FR 46984). We received three letters commenting on the proposed rule. No public hearing was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The Coast Guard operates under a three-tiered system of Maritime Security (MARSEC) conditions that are aligned with the color-coded Homeland Security Advisory System Conditions (HSAS). The port of New York has been elevated to the second highest level of alert MARSEC II/HSAS ORANGE based on recent intelligence information. Vessel control measures for the Coast Guard to establish heightened deterrence and detection of terrorist activities in the port are necessary.

Additionally, the Maritime Administration recently issued MARAD Advisory 03–06 (221500ZDEC 03) informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. Further, the heightened security posture of the country and U. S. maritime interests, described below, continues.

For these reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The measures contemplated by the rule are intended to prevent waterborne acts of sabotage or terrorism, which terrorists have demonstrated a capability to carry out. Immediate action is needed to defend against and deter these terrorist acts. Any delay in the effective date of this rule is impracticable and contrary to the public interest.

Background and Purpose

On September 11, 2001, three commercial aircraft were hijacked and flown into the World Trade Center in New York City, and the Pentagon, inflicting catastrophic human casualties and property damage. National security and intelligence officials warn that future terrorist attacks are likely. The President has continued the national emergencies he declared following the September 11, 2001 terrorist attacks. *See, Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, 67 FR 58317 (September 13, 2002); *Continuation of the National Emergency With Respect To Persons Who Commit, Threaten To Commit, Or Support Terrorism*, 67 FR 59447 (September 20, 2002). The

President also has found pursuant to law, including the Magnuson Act (50 U.S.C. 191 *et seq.*), that the security of the United States is endangered by disturbances in international relations of the United States that have existed since the terrorist attacks on the United States and such disturbances continue to endanger such relations. *Executive Order 13273 of August 21, 2002, Further Amending Executive Order 10173, as Amended, Prescribing Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States*, 67 FR 56215 (September 3, 2002).

Since the September 11, 2001, terrorist attacks, the Federal Bureau of Investigation has issued several warnings concerning the potential for additional attacks within the United States. In addition, the ongoing hostilities in Afghanistan and the war in Iraq have made it prudent for U.S. ports and properties of national significance to be on a higher state of alert because the al Qaeda organization and other similar organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

The Captain of the Port New York recently established six new safety and security zones throughout the New York Marine Inspection Zone and Captain of the Port Zone. (68 FR 2890, January 22, 2003). Subsequently, the Captain of the Port determined that additional safety and security zones are urgently required to meet critical maritime domain security needs that were not addressed by the earlier rule.

On February 19, 2003, we published a Temporary final rule; request for comments entitled "Safety and Security Zones; New York Marine Inspection Zone and Captain of the Port Zone" in the **Federal Register** (68 FR 7926) temporarily establishing these additional safety and security zones. We followed this with the publication of an NPRM to make these additional zones permanent (68 FR 46984, August 7, 2003). We received three letters commenting on the proposed rule. No public hearing was requested, and none was held.

As we proposed in August 2003, the Coast Guard is establishing permanent safety and security zones around La Guardia and John F. Kennedy airports, the New York City Police Department ammunition depot, the Port Newark/Port Elizabeth commercial shipping facilities, and between the Global Marine and Military Ocean Terminals, west of the New Jersey Pierhead Channel.

These safety and security zones are necessary to provide for the safety of the port and to ensure that vessels, facilities, airports, or ammunition depots, are not used as targets of, or platforms for, terrorist attacks. These zones restrict entry into or movement within portions of the New York Marine Inspection and Captain of the Port Zones.

Discussion of Comments and Changes

The Coast Guard received a total of three comments to the notice of proposed rulemaking. What follows is a review of, and the Coast Guard's response to, the issues and questions that were presented by these commenters concerning the proposed regulations.

(1) The Coast Guard received a petition with 75 signatures requesting the waters between the Military Ocean and Global Marine Terminals be authorized for use for recreational boating, crabbing, swimming, fishing, and water skiing as it is asserted to be a quiet anchorage and one of the only areas around Bayonne that can be used by the boaters of Bayonne and Jersey City. The petition suggested the Coast Guard issue identification cards to users after they register with the Coast Guard. The Coast Guard has considered these comments.

The water between the Military Ocean and Global Marine Terminals is not an anchorage area. Recreational boaters may still operate in nearby areas of Newark Bay and Upper New York Bay outside of current safety and security zones. The Coast Guard does not have the resources available, and does not deem it practicable, to regularly conduct background checks, issue identification cards, and check recreational boaters for compliance at the waterway entrance to this commercial and Coast Guard facility. Accordingly, no changes have been made to this rule.

(2) One commenter requested that the Coast Guard consider extending the zones to account for navigational piers extending out into the navigable waters and shifting shorelines, to account for security concerns raised by the commenter. The Coast Guard held two meetings with the commenter to discuss the effects and desirability of any further extensions. Based on the information submitted and the meetings held, the Coast Guard has determined that no additional changes are desired from the proposed rule.

(3) One commenter supported the proposed rulemaking but sought clarification of the Coast Guard's procedures for accessing safety and security zones. The Coast Guard described its current procedures and referred the commenter to the Harbor Operations Safety and Navigation Committee's Web site, *www.harborops.com*, for further information.

No changes have been made to this rulemaking.

Discussion of Proposed Rule

This rule establishes the following safety and security zones:

La Guardia Airport, Bowery and Flushing Bays, Queens, NY

The Coast Guard is establishing a safety and security zone in all waters of Bowery and Flushing Bays within approximately 200 yards of La Guardia Airport. The zone would start at a point onshore in Steinway, Queens (approximate position 40°46′32.1″ N, 073°53′22.4″ W (NAD 1983)), proceeding east/northeast, 200 yards off the shoreline to a point 200 yards off the shoreline and 25 yards southeast of the lighted runway approach extending through Rikers Island Channel, continuing to the northwest, maintaining a distance of 25 yards off the lighted runway approach, to a point 25 yards past the end of the lighted runway approach, to the Rikers Island shoreline in approximate position, 40°47′13.0″ N, 073°53′16.1″ W, thence easterly along the Rikers Island shoreline to approximate position 40°47′12.9″ N, 073°52′17.9″ W, maintaining a distance of 25 yards around the lighted runway approach extending to the east of Rikers Island, to a point 200 yards off the shoreline of La Guardia Field, continuing 200 yards off the shoreline to where it intersects the southern boundary of Flushing Bay Channel, continuing along the southern boundary of Flushing Bay Channel to where it intersects the northern boundary of the western Special Anchorage Area, and continuing along the northern boundary of the Special Anchorage Area to approximate position 40°45′48.4″ N, 073°51′37.0″ W, (NAD 1983) in East Elmhurst, Queens, thence along the shoreline to the point of origin.

Within the boundaries of this zone, the Coast Guard is establishing another safety and security zone in all waters of Bowery and Flushing Bays within approximately 100 yards of La Guardia Airport.

When port security conditions permit, the Captain of the Port will allow vessels to operate within that portion of the 200-yard zone that lies outside of the waters described in the 100-yard zone. Authorization to enter the waters that lie between the outer boundaries of the two zones will be communicated by the Captain of the Port to the public by

marine broadcast, local notice to mariners, or notice posted at *www.harborops.com*. This regulatory framework provides the Captain of the Port with the tools to safeguard airport property and equipment and the flexibility to accommodate local mariners to the maximum extent permissible under the circumstances then existing.

John F. Kennedy (JFK) Airport, Jamaica Bay, Queens, NY

The Coast Guard is establishing four safety and security zones in all waters near JFK Airport bound by the following points:

First, all waters of Bergen Basin north of 40°39′26.4″ N.

Second, all waters of Thurston Basin north of 40°38′21.2″ N.

Third, all waters of Jamaica Bay within approximately 200 yards of John F. Kennedy Airport. The zone starts at a point onshore east of Bergen Basin, Queens in approximate position 40°38′49.0″ N, 073°49′09.1″ W, thence 200 yards offshore to approximate position 40°38′42.5″ N, 073°49′13.2″ W, (NAD 1983) proceeding east/southeast, 200 yards off the shoreline to a point 200 yards off the shoreline and 25 yards off the lighted runway approach extending north of East High Meadow, maintaining a distance of 25 yards around the lighted runway approach, to a point 200 yards off the shoreline, continuing 200 yards off the shoreline to Jamaica Bay Grass Hassock Channel LIGHT 23 (LLNR 34485), continuing along the northern boundary of Head of Bay Channel, maintaining a 200 yard boundary to approximate position thence to 40°38′00.8″ N, 073°44′54.9″ W, about 690 yards northeast of Head of Bay Buoy 30 (LLNR 34545) thence to the shoreline at 40°38′05.1″ N, 073°45′00.3″ W, (NAD 1983) thence along the shoreline to the point of origin.

Fourth, within the boundaries of this zone, the Coast Guard is establishing another safety and security zone in all waters of Jamaica Bay within approximately 100 yards of John F. Kennedy Airport.

When port security conditions permit, the Captain of the Port will allow vessels to operate within that portion of the 200-yard zone in Jamaica Bay that lies outside of the waters described in the 100-yard zone. Authorization to enter the waters that lie between the outer boundaries of those two zones will be communicated by the Captain of the Port to the public by marine broadcast, local notice to mariners, or notice posted at *www.harborops.com*. This regulatory framework provides the Captain of the Port with both the authority to safeguard airport property and equipment and the flexibility to accommodate local mariners to the maximum extent permissible under the circumstances then existing.

NYPD Ammunition Depot, Rodman Neck, Eastchester Bay, NY

The Coast Guard is establishing two safety and security zones in all waters of Eastchester Bay near the NYPD Ammunition Depot bound by the following points:

First, all waters of Eastchester Bay within approximately 150 yards of Rodman Neck. The zone starts at a point on the western shore of Rodman Neck in approximate position 40°51′30.4″ N, 073°48′14.9″ W, thence 150 yards offshore to 40°51′29.9″ N, 073°48′20.7″ W, (NAD 1983) proceeding around the southern end of Rodman Neck and then north to a point onshore in approximate position 40°51′23.5″ N, 073°47′41.9″ W, (NAD 1983), south of the City Island Bridge, thence southwesterly along the shoreline to the point of origin.

Second, within the boundaries of this zone, the Coast Guard is establishing another safety and security zone in all waters of Eastchester Bay within approximately 100 yards of Rodman Neck.

When port security conditions permit, the Captain of the Port will allow vessels to operate within that portion of the 150-yard zone that lies outside of the waters described in the 100-yard zone. Authorization to enter the waters that lie between the outer boundaries of the two zones will be communicated by the Captain of the Port to the public by marine broadcast, local notice to mariners, or notice posted at *www.harborops.com*. This regulatory framework provides the Captain of the Port with the tools to safeguard Police Department property and equipment and the flexibility to accommodate local mariners to the maximum extent permissible under the circumstances then existing.

Port Newark/Port Elizabeth, Newark Bay, NJ

The Coast Guard is establishing a safety and security zone around the Port Newark and Port Elizabeth facilities in Newark Bay. The zone starts at a point onshore at the New Jersey Extension Bridge in approximate position 40°41′49.9″ N, 074°07′32.2″ W, thence to 40°41′46.5″ N, 074°07′20.4″ W, (NAD 1983) at the western edge of Newark Bay North Reach, proceeding along the western edge of Newark Bay Channel south through Newark Bay Channel Buoy 21 (LLNR 37515), Newark Bay Channel Buoy 19A (LLNR 37507), Newark Bay Channel Lighted Buoy 17 (LLNR 37485), Newark Bay Channel Buoy 15A (LLNR 37477), Newark Bay Channel Lighted Buoy 7 (LLNR 37405), thence west to the shoreline in approximate position 40°39′21.5″ N, 074°09′54.3″ W, (NAD 1983) thence northerly along the shoreline to the point of origin.

Global Marine Terminal, Upper New York Bay

The Coast Guard is establishing a safety and security zone that includes all waters of Upper New York Bay between the Global Marine and Military Ocean Terminals, west of the New Jersey Pierhead Channel.

The zones described above are necessary to protect the La Guardia and John F. Kennedy airports, NYPD ammunition depot, the Port Newark/Port Elizabeth commercial shipping facilities, the Global Marine Terminal, others in the maritime community, and the surrounding communities from subversive or terrorist attack against the airports, ammunition depot, and commercial shipping facilities that could potentially cause serious negative impact to vessels, the port, commercial ground shipments by vehicle or rail, airline traffic, or the environment and result in numerous casualties. The Captain of the Port does not expect this rule to interfere with the transit of any vessels through the waterways adjacent to each facility. Vessels would still be able to transit around the safety and security zones at all times. Additionally, vessels will not be precluded from mooring at or getting underway from commercial or recreational piers in the vicinity of the zones.

Any violation of any safety or security zone herein is punishable by, among others, civil penalties (not to exceed $27,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment for not more than 10 years and a fine of not more than $100,000), in rem liability against the offending vessel, and license sanctions. This rulemaking is established under the authority contained in 50 U.S.C. 191, 33 U.S.C. 1223, 1225 and 1226.

No person or vessel may enter or remain in a prescribed safety or security zone at any time without the permission of the Captain of the Port, New York. Each person or vessel in a safety or security zone shall obey any direction or order of the Captain of the Port. The Captain of the Port may take possession and control of any vessel in a security zone and/or remove any person, vessel, article or thing from a security zone.

Regulatory Evaluation

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This finding is based on the fact that: The zones were established by a previous Temporary final rule with a 60-day comment period and no comments were received by the Coast Guard; the zones implicate relatively small portions of the waterway; vessels will be able to transit around the safety and security zones at all times; commercial vessels visiting Port Newark/Port Elizabeth and Global Marine Terminal are already subject to control of the Vessel Traffic Service and previously established safety and security zones while recreational and fishing vessels are unlikely to operate within those areas; and the Captain of the Port will relax the enforcement of the 200-yard zones around airport facilities and the 150-yard zone around the NYPD ammunition depot whenever he determines that the security environment existing within the port allows him to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of the New York Marine Inspection and Captain of the Port Zones in which entry will be prohibited by the safety or security zones.

These safety and security zones will not have a significant economic impact on a substantial number of small entities for the following reasons: The zones implicate relatively small portions of the waterway; vessels will be able to transit around the safety and security zones at all times; commercial vessels visiting Port Newark/Port Elizabeth and the Global Marine Terminal are already subject to control of the Vessel Traffic Service and previously established safety and security zones; and the Captain of the Port will relax the enforcement of the 200-yard zones around airport facilities and the 150-yard zone around the NYPD ammunition depot whenever he determines that the security environment existing within the port allows him to do so.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this temporary rule so that we can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Commander W. Morton, Waterways Oversight Branch, Coast Guard Activities New York at (718) 354–4191.

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 might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We invite your comments on how this rule might impact tribal governments, even if that impact may not constitute a "tribal implication" under the Order.

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 considered the environmental impact of this rule and concluded that, under figure 2–1, paragraph (34)(g), of Commandant Instruction M16475.lD, this rule is categorically excluded from further environmental documentation because it establishes safety and security zones. A "Categorical Exclusion Determination" is 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. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46. Department of Homeland Security Delegation No. 0170.

■ 2. In § 165.169, add paragraphs (a)(7) through (a)(11) to read as follows:

§ 165.169 Safety and Security Zones: New York Marine Inspection Zone and Captain of the Port Zone.

(a) * * *

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(7) *La Guardia Airport, Bowery and Flushing Bays, Queens, NY.* (i) *Location: 200-Yard Zone.* All waters of Bowery and Flushing Bays within approximately 200 yards of La Guardia Airport bound by the following points: Onshore at Steinway, Queens, in approximate position 40°46′32.1″ N, 073°53′22.4″ W, thence to 40°46′52.8″ N, 073°53′09.3″ W, thence to 40°46′54.8″ N, 073°52′54.2″ W, thence to 40°46′59.3″ N, 073°52′51.3″ W, thence to 40°47′11.8″ N, 073°53′17.3″ W, thence to 40°47′13.0″ N, 073°53′16.1″ W on Rikers Island, thence easterly along the Rikers Island shoreline to approximate position 40°47′12.9″ N, 073°52′17.9″ W, thence to 40°47′16.7″ N, 073°52′09.2″ W, thence to 40°47′36.1″ N, 073°51′52.5″ W, thence to 40°47′35.1″ N, 073°51′50.5″ W, thence to 40°47′15.9″ N, 073°52′06.4″ W, thence to 40°47′14.5″ N, 073°52′03.1″ W, thence to 40°47′10.6″ N, 073°52′06.7″ W, thence to 40°47′01.9″ N, 073°52′02.4″ W, thence to 40°46′50.4″ N, 073°52′08.1″ W, thence to 40°46′26.8″ N, 073°51′18.5″ W, thence to 40°45′57.2″ N, 073°51′01.8″ W, thence to 40°45′51.2″ N, 073°50′59.6″ W, thence to 40°45′49.5″ N, 073°51′07.2″ W, thence to 40°45′58.8″ N, 073°51′13.2″ W, thence to 40°46′02.3″ N, 073°51′20.1″ W, thence to 40°45′48.4″ N, 073°51′37.0″ W, (NAD 1983) thence along the shoreline to the point of origin.

(ii) *Location: 100-Yard Zone.* All waters of Bowery and Flushing Bays within approximately 100 yards of La Guardia Airport bound by the following points: Onshore at Steinway, Queens, in approximate position 40°46′32.1″ N, 073°53′22.4″ W, thence to 40°46′50.6″ N, 073°53′07.3″ W, thence to 40°46′53.0″ N, 073°52′50.9″ W, thence to 40°46′57.6″ N, 073°52′47.9″ W, thence to 40°47′11.8″ N, 073°53′17.3″ W, thence to 40°47′13.0″ N, 073°53′16.1″ W on Rikers Island, thence easterly along the Rikers Island shoreline to approximate position 40°47′12.9″ N, 073°52′17.9″ W, thence to 40°47′16.7″ N, 073°52′09.2″ W, thence to 40°47′36.1″ N, 073°51′52.5″ W, thence to 40°47′35.1″ N, 073°51′50.5″ W, thence to 40°47′15.9″ N, 073°52′06.4″ W, thence to 40°47′14.5″ N, 073°52′03.1″ W, thence to 40°47′07.9″ N, 073°52′09.2″ W, thence to 40°47′01.4″ N, 073°52′06.1″ W, thence to 40°46′50.0″ N, 073°52′14.6″ W, thence to 40°46′22.2″ N, 073°51′16.0″ W, thence to 40°45′57.2″ N, 073°51′01.8″ W, thence to 40°45′52.4″ N, 073°51′00.2″ W, thence to 40°45′50.6″ N, 073°51′07.9″ W, thence to 40°45′58.8″ N, 073°51′13.2″ W, thence to 40°46′04.0″ N, 073°51′23.3″ W, thence to 40°45′51.2″ N, 073°51′38.8″ W, (NAD 1983) thence along the shoreline to the point of origin.

(iii) *Enforcement period.* The zones described in paragraph (a)(7) of this section will be effective at all times. When port security conditions permit, the Captain of the Port will allow vessels to operate within that portion of the waters described in paragraph (a)(7)(i) that lies outside of the waters described in paragraph (a)(7)(ii). Authorization to enter the waters that lie between the outer boundaries of the zones described in paragraphs (a)(7)(i) and (a)(7)(ii) will be communicated by the Captain of the Port to the public by marine broadcast, or local notice to mariners, or notice posted at *www.harborops.com.*

(8) *John F. Kennedy Airport, Jamaica Bay, Queens, NY.* (i) *Location: Bergen Basin.* All waters of Bergen Basin north of 40°39′26.4″ N.

(ii) *Location: Thurston Basin.* All waters of Thurston Basin north of 40°38′21.2″ N.

(iii) *Location: 200-Yard Zone.* All waters of Jamaica Bay within approximately 200 yards of John F. Kennedy Airport bound by the following points: Onshore east of Bergen Basin, Queens, in approximate position 40°38′49.0″ N, 073°49′09.1″ W, thence to 40°38′42.5″ N, 073°49′13.2″ W, thence to 40°38′00.6″ N, 073°47′35.1″ W, thence to 40°37′52.3″ N, 073°47′55.0″ W, thence to 40°37′50.3″ N, 073°47′53.5″ W, thence to 40°37′59.4″ N, 073°47′32.6″ W, thence to 40°37′46.1″ N, 073°47′07.2″ W, thence to 40°37′19.5″ N, 073°47′30.4″ W, thence to 40°37′05.5″ N, 073°47′03.0″ W, thence to 40°37′34.7″ N, 073°46′40.6″ W, thence to 40°37′20.5″ N, 073°46′23.5″ W, thence to 40°37′05.7″ N, 073°46′34.9″ W, thence to 40°36′54.8″ N, 073°46′26.7″ W, thence to 40°37′14.1″ N, 073°46′10.8″ W, thence to 40°37′36.9″ N, 073°45′52.8″ W, thence to 40°38′00.8″ N, 073°44′54.9″ W, thence to 40°38′05.1″ N, 073°45′00.3″ W, (NAD 1983) thence along the shoreline to the point of origin.

(iv) *Location: 100-Yard Zone.* All waters of Jamaica Bay within approximately 100 yards of John F. Kennedy Airport bound by the following points: Onshore east of Bergen Basin, Queens, in approximate position 40°38′49.0″ N, 073°49′09.1″ W, thence to 40°38′45.1″ N, 073°49′11.6″ W, thence to 40°38′02.0″ N, 073°47′31.8″ W, thence to 40°37′52.3″ N, 073°47′55.0″ W, thence to 40°37′50.3″ N, 073°47′53.5″ W, thence to 40°38′00.8″ N, 073°47′29.4″ W, thence to 40°37′47.4″ N, 073°47′02.4″ W, thence to 40°37′19.9″ N, 073°47′25.0″ W, thence to 40°37′10.0″ N, 073°47′03.7″ W, thence to 40°37′37.7″ N, 073°46′41.2″ W, thence to 40°37′22.6″ N, 073°46′21.9″ W, thence to 40°37′05.7″ N, 073°46′34.9″ W, thence to 40°36′54.8″ N, 073°46′26.7″ W, thence to 40°37′14.1″ N, 073°46′10.8″ W, thence to 40°37′40.0″ N, 073°45′55.6″ W, thence to 40°38′02.8″ N, 073°44′57.5″ W, thence to 40°38′05.1″ N, 073°45′00.3″ W, (NAD 1983) thence along the shoreline to the point of origin.

(v) *Enforcement period.* The zones described in paragraphs (a)(8) of this section will be effective at all times. When port security conditions permit, the Captain of the Port will allow vessels to operate within that portion of the waters described in paragraph (a)(8)(iii) that lies outside of the waters described in paragraph (a)(8)(iv). Authorization to enter the waters that lie between the outer boundaries of the zones described in paragraphs (a)(8)(iii) and (a)(8)(iv) will be communicated by the Captain of the Port to the public by marine broadcast, local notice to mariners, or notice posted at *www.harborops.com.*

(9) *NYPD Ammunition Depot, Rodman Neck, Eastchester Bay, NY.* (i) *Location: 150-Yard Zone.* All waters of Eastchester Bay within approximately 150 yards of Rodman Neck bound by the following points: Onshore in

approximate position 40°51′30.4″ N, 073°48′14.9″ W, thence to 40°51′29.9″ N, 073°48′20.7″ W, thence to 40°51′16.9″ N, 073°48′22.5″ W, thence to 40°51′07.5″ N, 073°48′18.7″ W, thence to 40°50′54.2″ N, 073°48′11.1″ W, thence to 40°50′48.5″ N, 073°48′04.6″ W, thence to 40°50′49.2″ N, 073°47′56.5″ W, thence to 40°51′03.6″ N, 073°47′47.3″ W, thence to 40°51′15.7″ N, 073°47′46.8″ W, thence to 40°51′23.5″ N, 073°47′41.9″ W, (NAD 1983) thence southwesterly along the shoreline to the point of origin.

(ii) *Location: 100-Yard Zone.* All waters of Eastchester Bay within approximately 100 yards of Rodman Neck bound by the following points: Onshore in approximate position 40°51′30.4″ N, 073°48′14.9″ W, thence to 40°51′30.1″ N, 073°48′19.0″ W, thence to 40°51′16.8″ N, 073°48′20.5″ W, thence to 40°51′07.9″ N, 073°48′16.8″ W, thence to 40°50′54.9″ N, 073°48′09.0″ W, thence to 40°50′49.7″ N, 073°48′03.6″ W, thence to 40°50′50.1″ N, 073°47′57.9″ W, thence to 40°51′04.6″ N, 073°47′48.9″ W, thence to 40°51′15.9″ N, 073°47′48.4″ W, thence to 40°51′23.5″ N, 073°47′41.9″ W, (NAD 1983) thence southwesterly along the shoreline to the point of origin.

(iii) *Enforcement period.* The zones described in paragraph (a)(9) of this section will be effective at all times. When port security conditions permit, the Captain of the Port will allow vessels to operate within that portion of the waters described in paragraph (a)(9)(i) that lies outside of the waters described in paragraph (a)(9)(ii). Authorization to enter the waters that lie between the outer boundaries of the zones described in paragraphs (a)(9)(i) and (a)(9)(ii) will be communicated by the Captain of the Port to the public by marine broadcast, local notice to mariners, or notice posted at *www.harborops.com.*

(10) *Port Newark/Port Elizabeth, Newark Bay, NJ.* All waters of Newark Bay bound by the following points: 40°41′49.9″ N, 074°07′32.2″ W, thence to 40°41′46.5″ N, 074°07′20.4″ W, thence to 40°41′10.7″ N, 074°07′45.9″ W, thence to 40°40′54.3″ N, 074°07′55.7″ W, thence to 40°40′36.2″ N, 074°08′03.8″ W, thence to 40°40′29.1″ N, 074°08′06.3″ W, thence to 40°40′21.9″ N, 074°08′10.0″ W, thence to 40°39′27.9″ N, 074°08′43.6″ W, thence to 40°39′21.5″ N, 074°08′50.1″ W, thence to 40°39′21.5″ N, 074°09′54.3″ W, (NAD 1983) thence northerly along the shoreline to the point of origin.

(11) *Global Marine Terminal, Upper New York Bay.* All waters of Upper New York Bay between the Global Marine and Military Ocean Terminals, west of the New Jersey Pierhead Channel.

* * * * *

Dated: December 31, 2003.

C.E. Bone,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 04–1136 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[SIP NO. SD–001–0016a; FRL–7606–6]

Approval and Promulgation of Air Quality Implementation Plans; State of South Dakota; Regulations for State Facilities in Rapid City

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving State Implementation Plan (SIP) revisions submitted by the State of South Dakota on June 27, 2002. The June 27, 2002, submittal consists of revisions to the administrative rules of South Dakota. These revisions add a new chapter to regulate fugitive emissions of particulate matter from State facilities and State contractors that conduct a construction activity or continuous operation activity in the Rapid City air quality control zone. The intended effect of this action is to make the revisions to the administrative rules of South Dakota federally enforceable. This action is being taken under section 110 of the Clean Air Act.

DATES: This rule is effective on March 22, 2004, without further notice, unless EPA receives adverse comment by February 19, 2004. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Written comments may be submitted by mail to Richard R. Long, Director, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 999 18th Street, Suite 300, Denver, Colorado, 80202. Comments may also be submitted electronically, or through hand delivery/courier. Please follow the detailed instructions described in sections (I)(B)(1)(i) through (iii) of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, EPA, Region 8, 999 18th Street, Suite 300, Mailcode 8P–AR, Denver, Colorado 80202, (303) 312–6144, e-mail *dygowski.laurel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of This Document and Other Related Information ?

1. *The Regional Office has established an official public rulemaking file available for inspection at the Regional Office.* EPA has established an official public rulemaking file for this action under (SD–001–0016). 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 is the collection of materials that is available for public viewing at the Air and Radiation Program, EPA Region 8, 999 18th Street, Suite 300, Denver, CO. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. You may view the public rulemaking file at the Regional Office Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays. Copies of the incorporation by reference material are also available at the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–108 (Mail Code 6102T), 1301 Constitution Ave., NW., Washington, DC 20460.

2. Copies of the State submittal are also available for public inspection during normal business hours, by appointment at the State Air Agency. Copies of the State documents relevant to this action are also available for public inspection at the South Dakota Department of Environmental and Natural Resources, Air Quality Program, Joe Foss Building, 523 East Capitol, Pierre, South Dakota 57501.

3. *Electronic Access.* You may access this **Federal Register** document electronically through the Regulations.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 (SD–001–0016)" 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). Please send any comments to *long.richard@epa.gov* and *dygowski.laurel@epa.gov* and include the text "Public comment on proposed rulemaking (SD–001–0016)" 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" (*see* below), EPA's e-mail system will automatically capture 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. Regulations.gov. Your use of Regulations.gov is an alternative method of submitting electronic comments to EPA. Go directly to Regulations.gov at *http://www.regulations.gov,* then click on the button "TO SEARCH FOR REGULATIONS CLICK HERE," and select Environmental Protection Agency as the Agency name to search on. 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. Send your comments to: Richard R. Long, Director, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Please include the text "Public comment on proposed rulemaking (SD–001–0016)" in the subject line on the first page of your comment.

3. By Hand Delivery or Courier. Deliver your comments to: Richard R. Long, Director, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., 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.

II. Summary of SIP Revision

A. Background

In 1980, the Rapid City Area Air Quality Board (Air Quality Board) was created to address non-point source air pollution in Rapid City after Rapid City was designated nonattainment by EPA for violation of the National Ambient Air Quality Standards (NAAQS) for total suspended particulates (TSP). The Air Quality Board addresses non-industrial sources of fugitive emissions through the Rapid City Municipal Code Chapters 8:34 through 8:44 and Pennington County Ordinance No. 12, including the application of reasonable controls and permit requirements for dust producing activities, such as general construction and road construction.

When EPA changed the TSP standard to the PM10 standard, Rapid City was no longer considered nonattainment for TSP and was designated as unclassifiable for PM10. Subsequent to this, South Dakota determined that under South Dakota law, SDCL 34A–1–36, the Air Quality Board does not have the authority to regulate the State or State contractors since the area is not in violation of the PM10 standard. In addition, the Department of Environment and Natural Resources only addresses point source emissions and fugitive emissions from industrial sources, which means that there are no regulations for controlling fugitive emissions from State agencies and State contractors who conduct a construction activity or continuous operation activity. In addition, State agencies or State contractors who emit fugitive dust have less stringent requirements than contractors conducting non-State business.

To address this, the State of South Dakota developed new State air quality rules for the Rapid City area that establish a State permitting process for State facilities and State contractors that conduct a construction activity or continuous operation activity in the Rapid City air quality control zone. This would address the concern that State

contractors and State agencies would be contributing excessive amounts of fugitive dust that could lead to violations of the PM–10 NAAQS.

B. June 27, 2002, Submittal

On June 27, 2002, the State of South Dakota submitted a revision to the State Implementation Plan (SIP). The June 27, 2002, submittal consists of a revision to the Administrative Rules of South Dakota (ARSD). This revision adds chapter 74:36:18. Chapter 74:36:18, titled Regulations for State Facilities, applies to State contractors and State agencies that conduct a construction activity or continuous operation activity in the Rapid City air quality control zone. The Rapid City air quality control zone is defined as a 10-mile by 14-mile area within the following boundaries: (a) Commencing at the northwest corner of Section 15, Township 2 north, Range 6 east; (b) east to the northeast corner of Section 14, Township 2 north, Range 8 east; (c) south to the southeast corner of Section 35, Township 1 north, Range 8 east; (d) west to the southwest corner of Section 34, Township 1 north, Range 6 east; and (e) north to the point of beginning.

Chapter 74:36:18 was written to closely follow the existing Air Quality Board permitting requirements. Chapter 74:36:18 requires State contractors and State agencies that conduct a construction activity or continuous operation activity in the Rapid City air quality control zone that may cause fugitive emissions of particulate matter (PM) to be released into the ambient air to obtain a permit issued by the State prior to beginning the activity and to apply reasonably available control technology (RACT). RACT must be implemented to prevent fugitive emissions of PM from exceeding the visible emission limit of 20 percent opacity. The opacity limit of 20 percent does not apply if the following three meteorological conditions exist: (a) Five consecutive days of 0.02 inches or less of precipitation each day excluding dry snow; (b) forecasted peak wind gusts greater than 40 miles per hour; and (c) forecasted average hourly wind speed greater than 20 miles per hour.

III. Final Action

EPA is taking direct final action approving a State Implementation Plan (SIP) revision submitted by the State of South Dakota on June 27, 2002. The June 27, 2002, submittal consists of a revision to the administrative rules of South Dakota. This revision adds a new chapter that regulates fugitive emissions of PM from State facilities and State contractors that conduct a construction activity or continuous operation activity in the Rapid City air quality control zone. The intended effect of this action is to make the revision to the administrative rules of South Dakota federally enforceable.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the "proposed rules" section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective March 22, 2004, without further notice unless the Agency receives adverse comments by February 19, 2004. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Review

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

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United

States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 22, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: December 19, 2003.

Kerrigan G. Clough,

Acting Regional Administrator, Region 8.

■ 40 CFR part 52, subpart QQ is amended as follows:

PART 52—[AMENDED]

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

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

Subpart QQ—South Dakota

■ 2. Section 52.2170 is amended by adding paragraph (c)(22) to read as follows:

§ 52.2170 Identification of plan.

* * * * *

(c) * * *

(22) On June 27, 2002, the designee of the Governor of South Dakota submitted revisions to the State Implementation Plan. The June 27, 2002 submittal consists of revisions to the Administrative Rules of South Dakota. These revisions add a new chapter 74:36:18, "Regulations for State Facilities in the Rapid City Area". Chapter 74:36:18 regulates fugitive emissions of particulate matter from state facilities and state contractors that conduct a construction activity or continuous operation activity within the Rapid City air quality control zone.

(i) Incorporation by reference.

(A) Chapter 74:36:18 of the Administrative Rules of South Dakota, effective July 1, 2002.

[FR Doc. 04–1035 Filed 1–16–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7609–6]

Pennsylvania: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: Pennsylvania has applied to EPA for final authorization of changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for final authorization and is authorizing Pennsylvania's changes through this immediate final action. EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we receive written comments which oppose this authorization during the comment period, the decision to authorize Pennsylvania's changes to its hazardous waste program will take effect. If we receive comments that oppose this action, or portions thereof, we will publish a document in the **Federal Register** withdrawing the relevant portions of this rule, before they take effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize changes to Pennsylvania's program that were the subject of adverse comments.

DATES: This final authorization will become effective on March 22, 2004, unless EPA receives adverse written comments by February 19, 2004. If EPA receives any such comments, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization, or portions thereof, will not take effect as scheduled.

ADDRESSES: Send written comments to Charles Bentley, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, Phone number: (215) 814–3379. Comments may also be submitted electronically to: *bentley.pete@epa.gov*, or by facsimile at (215) 814–3163. Comments in electronic format should identify this specific notice. You can view and copy Pennsylvania's application from 8 a.m. to 4:30 p.m., Monday through Friday at the following locations: Pennsylvania Department of Environmental Protection, Bureau of Land Recycling and Waste Management, P.O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105–8471, Phone number (717) 787–6239; Pennsylvania Department of Environmental Protection, Southwest Regional Office, 400 Waterfront Drive, Pittsburgh, PA 15222–4745, Phone number: (412) 442–4120; and EPA Region III, Library, 2nd Floor, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone number: (215) 814–5254. Persons with a disability may use the AT&T Relay Service to contact Pennsylvania Department of Environmental Protection by calling (800) 654–5984 (TDD users), or (800) 654–5988 (voice users).

FOR FURTHER INFORMATION CONTACT: Charles Bentley, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone number: (215) 814–3379.

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes to become more stringent or broader in scope, States must change their programs and apply to EPA to authorize the changes. Authorization of changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must revise their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

B. What Decisions Has EPA Made in This Rule?

EPA concludes that Pennsylvania's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Pennsylvania final authorization to operate its hazardous waste program with the changes described in its application for program revisions,

subject to the procedures described in Section E, below. Pennsylvania has responsibility for permitting treatment, storage, and disposal facilities (TSDFs) within its borders and for carrying out the aspects of the RCRA program described in its application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those HSWA requirements and prohibitions for which Pennsylvania has not been authorized, including issuing HSWA permits, until the State is granted authorization to do so.

C. What Is the Effect of Today's Authorization Decision?

This decision serves to authorize revisions to Pennsylvania's authorized hazardous waste program. This action does not impose additional requirements on the regulated community because the regulations for which Pennsylvania is being authorized by today's action are already effective and are not changed by today's action. Pennsylvania has enforcement responsibilities under its state hazardous waste program for violations of its program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Perform inspections, and require monitoring, tests, analyses or reports;
- Enforce RCRA requirements and suspend or revoke permits; and
- Take enforcement actions regardless of whether Pennsylvania has taken its own actions.

D. Why Wasn't There a Proposed Rule Before Today's Rule?

EPA did not publish a proposal before today's rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the proposed rules section of today's **Federal Register** we are publishing a separate document that proposes to authorize Pennsylvania's program changes. If EPA receives comments which oppose this authorization, or portions thereof, that document will serve as a proposal to authorize the changes to Pennsylvania's program that were the subject of adverse comment.

E. What Happens if EPA Receives Comments That Oppose This Action?

If EPA receives comments that oppose this authorization, or portions thereof, we will withdraw this rule, or portions thereof, by publishing a document in the **Federal Register** before the rule would become effective. EPA will base any further decision on the authorization of Pennsylvania's program changes on the proposal mentioned in the previous section. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

If we receive comments that oppose the authorization of a particular change to the State's hazardous waste program, we will withdraw that part of this rule, but the authorization of the program changes that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization will become effective, and which part is being withdrawn.

F. What Has Pennsylvania Previously Been Authorized for?

Initially, Pennsylvania received final authorization to implement its hazardous waste management program effective May 29, 1986 (51 FR 17739). EPA granted authorization for changes to Pennsylvania's regulatory program on May 10, 2000, effective July 10, 2000 (65 FR 29973).

G. What Changes Are We Authorizing With Today's Action?

On September 25, 2003, Pennsylvania submitted a program revision application in accordance with 40 CFR 271.21, seeking authorization of provisions of its hazardous waste program corresponding to changes made to the Federal hazardous waste regulations between July 7, 1999, and June 28, 2001. The Commonwealth's provisions for which it is seeking authorization are identical to the corresponding Federal provisions because the Commonwealth has incorporated the Federal provisions by reference. The EPA has reviewed Pennsylvania's application, and now makes an immediate final decision, subject to receipt of adverse written comment, that Pennsylvania's hazardous waste program satisfies all of the requirements necessary to qualify for final authorization. Consequently, EPA intends to grant Pennsylvania final authorization for the program modifications contained in the program revision application.

Pennsylvania's program revision application includes regulatory changes to the Commonwealth's authorized hazardous waste program, including the adoption of the Federal hazardous waste regulations published between July 7, 1999 and June 28, 2001, with certain exceptions noted in this section. Pennsylvania is today seeking authority to administer the Federal requirements that are listed in the following chart. This chart also lists the Commonwealth's analogous provisions that are being recognized as equivalent to the corresponding Federal requirements. The regulatory references are to Title 25, Pennsylvania Code (25 Pa.Code), Chapters 260a through 266a, 266b, 268a, and 270a, effective May 1, 1999. Pennsylvania's authority to incorporate subsequent changes to the Federal program is found at 25 Pa. Code, Chapter 260a.3(e).

Federal Register citation and date promulgated [1]	Federal requirement	Analogous Pennsylvania authority
64 FR 56,469, 10–20–99, (RCRA Revision Checklist 183).	40 CFR, Parts 261.32; 262.34(a)(4); 268.7(a)(3)(iii); 268.40(j); 268.40, Table; 268.49(c)(1)(A); and 268.49(c)(1)(B).	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapters 261a.1, 262a.10, and 268a.1.
65 FR 12,378, 3–08–00, (RCRA Revision Checklist 184).	40 CFR Parts 262.34(a)(4); 262.34(g), introduction; 262.34(g)(1); 262.34(g)(2); 262.34(g)(3); 262.34(g)(4), introduction; 262.34(g)(4)(i), introduction; 262.34(g)(4)(i)(A); 262.34(g)(4)(i)(B); 262.34(g)(4)(i)(C), introduction; 262.34(g)(4)(i)(C)(1)&(2); 262.34(g)(4)(ii); 262.34(g)(4)(iii); 262.34(g)(4)(iv); 262.34(g)(4)(v); 262.34(h); and 262.34(i).	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapter 262a.10.

Federal Register citation and date promulgated [1]	Federal requirement	Analogous Pennsylvania authority
65 FR 14,472, 3–17–00, (RCRA Revision Checklist 185).	40 CFR Parts 261.32, Table; 261.33(f), Table; 261, Appendix VII; 261, Appendix VIII; 268.33; 268.40, Table; 268.48(a), Table.	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapters 261a.1 and 268a.1.
65 FR 36,365, 6–8–00, (RCRA Revision Checklist 187).	40 CFR Parts 261.31(a), Table and 268, Appendix VII	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapters 261a.1 and 268a.1.
65 FR 67,068, 11–8–00, (RCRA Revision Checklist 189).	40 CFR Parts 261.32; 261, Appendix VII; 261, Appendix VIII; 268.33(a); 268.33(b), introduction; 268.33(b)(1); 268.33(b)(2); 268.33(b)(3); 268.33(b)(4); 268.33(b)(5); 268.33(c); 268.33(d), introduction; 268.33(d)(1); 268.33(d)(2); 268.40, Table; and 268.48(a), Table.	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapters 261a.1 and 268a.1.
65 FR 81,373, 12–26–00, (RCRA Revision Checklist 190).	40 CFR Parts 268.32(a); 268.32(b), introduction; 268.32(b)(1)(i); 268.32(b)(1)(ii); 268.32(b)(2)(i); 268.32(b)(2)(ii); 268.32(b)(3); 268.32(b)(4); 268.48(a), Table UTS; 268.49(d); and 268, Appendix III.	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code Chapter 268a.1.
66 FR 27,2166, 5–16–01, (RCRA Revision Checklist 192A).	40 CFR Parts 261.3(a)(2)(iii); 261.3(a)(2)(iv); 261.3(c)(2)(i); 261.3(g)(1); 261.3(g)(2); 261.3(g)(2)(i); 261.3(g)(2)(ii); 261.3(g)(3); 261.3(h)(1); 261.3(h)(2); 261.3(h)(2)(i); 261.3(h)(2)(ii); and 261.3(h)(3).	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapter 261a.1.
66 FR 27,266, 5–16–01, (RCRA Revision Checklist 192B).	40 CFR Part 268, Appendix VII, Table I	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapter 268a.1.
66 FR 34,374, 6–28–01, (RCRA Revision Checklist 193).	40 CFR Part 260.11(a)(11)	25 Pa. Code, Chapter 260a.3(e); Incorporated by reference at 25 Pa. Code, Chapter 260a.1.

[1] A Revision Checklist is a document that addresses the specific changes made to the Federal regulations by one or more related final rules published in the FEDERAL REGISTER. EPA develops these checklists as tools to assist States in developing their authorization applications and in documenting specific State analogs to the Federal Regulations. For more information see EPA's RCRA State Authorization web page at *http://www.epa.gov/epaoswer/hazwaste/state.*

The Commonwealth is not seeking authorization for the following RCRA revisions that occurred between July 7, 1999 and June 28, 2000, which contain elements of the Federal used oil regulations. The Commonwealth's used oil regulations are being revised to resemble more closely the Federal standards.

Federal requirement	Regulatory explanation
64 *FR* 52,828, 9–30–99, as amended at 64 *FR* 63, 209, 11–19–99, (RCRA Revision Checklists 182 and 182.1).	NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (MACT Rule).
65 *FR* 42,292, 7–10–00, as amended at 66 *FR* 24,270, 5–14–01, and 66 *FR* 35,087, 7–3–01, (RCRA Revision Checklist 188).	NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Technical Corrections.

H. Where Are the Revised Commonwealth Rules Different From the Federal Rules?

There are no differences in the provisions being authorized today. The Commonwealth's provisions for which it is seeking authorization are identical to the Federal provisions because the Commonwealth has incorporated the Federal provisions by reference.

I. Who Handles Permits After This Authorization Takes Effect?

After authorization, Pennsylvania will issue permits for all the provisions for which it is authorized and will administer the permits it issues. EPA will continue to administer any RCRA hazardous waste permits or portions of permits which it issued prior to the effective date of this authorization. Until such time as formal transfer of EPA permit responsibility to Pennsylvania occurs and EPA terminates its permit, EPA and Pennsylvania agree to coordinate the administration of permits in order to maintain consistency. EPA will not issue any additional new permits or new portions of permits for the provisions listed in Section G after the effective date of this authorization. EPA will continue to implement and issue permits for HSWA requirements for which Pennsylvania is not yet authorized.

J. How Does Today's Action Affect Indian Country (18 U.S.C. 115) in Pennsylvania?

Pennsylvania is not seeking authorization to operate the program on Indian lands, since there are no Federally-recognized Indian Lands in Pennsylvania.

K. What Is Codification and Is EPA Codifying Pennsylvania's Hazardous Waste Program as Authorized in This Rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. EPA does this by referencing the authorized State rules in 40 CFR part 272. EPA reserves the amendment of 40 CFR part 272, subpart NN, for this authorization of Pennsylvania's program changes until a later date.

L. Statutory and Executive Order Reviews

This rule only authorizes hazardous waste requirements pursuant to RCRA 3006 and imposes no requirements other than those imposed by State law (*see* **SUPPLEMENTARY INFORMATION:** Section A. Why Are Revisions to State Programs Necessary?). Therefore, this rule complies with applicable executive orders and statutory provisions as follows.

1. Executive Order 12866: Regulatory Planning Review—The Office of Management and Budget has exempted

this rule from its review under Executive Order (EO) 12866.

2. Paperwork Reduction Act—This rule does not impose an information collection burden under the Paperwork Reduction Act.

3. Regulatory Flexibility Act—After considering the economic impacts of today's rule on small entities under the Regulatory Flexibility Act, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

4. Unfunded Mandates Reform Act—Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act.

5. Executive Order 13132: Federalism—EO 12132 does not apply to this rule because it will not have federalism implications (*i.e.*, 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).

6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments—EO 13175 does not apply to this rule because it will not have tribal implications (*i.e.*, substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes).

7. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks—This rule is not subject to EO 13045 because it is not economically significant and it is not based on health or safety risks.

8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use—This rule is not subject to EO 13211 because it is not a significant regulatory action as defined in EO 12866.

9. National Technology Transfer Advancement Act—EPA approves State programs as long as they meet criteria required by RCRA, so it would be inconsistent with applicable law for EPA, in its review of a State program, to require the use of any particular voluntary consensus standard in place of another standard that meets the requirements of RCRA. Thus, Section 12(d) of the National Technology Transfer and Advancement Act does not apply to this rule.

10. Congressional Review Act—EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This action will be effective on March 22, 2004.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 4, 2003.

James W. Newsom,

Acting Regional Administrator, EPA Region III.

[FR Doc. 04–1042 Filed 1–16–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 15

[ET Docket No. 03–122; FCC 03–287]

Unlicensed Devices in the 5 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's rules to make an additional 255 megahertz of spectrum available in the 5.470–5.725 GHz band for unlicensed National Information Infrastructure (U–NII) devices, including Radio Local Area Networks (RLANs). This action will align the frequency bands used by U–NII devices in the United States with bands in other parts of the world, thus decreasing development and manufacturing costs for U.S. manufacturers by allowing for the same products to be used in most parts of the world. We believe that the increased demand that will result from expanding the markets for U–NII devices, coupled with the operational flexibility provided by the U–NII rules, will lead manufacturers to develop a wide range of new and innovative unlicensed devices and thereby increase wireless broadband access and investment.

DATES: Effective February 19, 2004.

FOR FURTHER INFORMATION CONTACT: Ahmed Lahjouji, Office of Engineering and Technology, (202) 418–2061, TTY (202) 418–2989, e-mail *Ahmed.Lahjouji@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, ET Docket 03–122, FCC 03–287, adopted November 12, 2003, and released November 18, 2003. The full text of this document is available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov*. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the FCC Consumer & Governmental Affairs Bureau at (202) 418–0531 (voice), (202) 418–7365 (TTY).

Summary of the Report and Order

1. The Report amends part 15 of our rules to make an additional 255 megahertz of spectrum available in the 5.470—5.725 GHz band for unlicensed National Information Infrastructure (U–NII) devices, including Radio Local Area Networks (RLANs). This action aligns the frequency bands used by U–NII devices in the United States with bands in other parts of the world, thus decreasing development and manufacturing costs for U.S. manufacturers by allowing for the same products to be used in most parts of the world. We believe that the increased demand that will result from expanding the markets for U–NII devices, coupled with the operational flexibility provided by the U–NII rules, will lead manufacturers to develop a wide range of new and innovative unlicensed devices and thereby increase wireless broadband access and investment.

2. There has been tremendous growth in demand for unlicensed wireless devices in recent years, particularly for devices used for wireless local area networking and broadband access to the internet. Sales of wireless local area network equipment have grown more than 150% since the year 2000. Companies are now offering broadband

access at "hot-spots" in restaurants, hotels, airports and other public gathering places by using unlicensed wireless devices. In cities across the nation, new start-up businesses are offering broadband services using unlicensed wireless devices. In rural areas, entrepreneurs and small businesses have introduced broadband service using unlicensed devices where no service was available before. We anticipate that the additional spectrum we are making available for U–NII devices will allow the continued growth in marketing, deployment and use of unlicensed devices. It will help meet the needs of businesses and consumers for fixed and mobile high-speed digital communications. We believe it will also stimulate the availability of broadband service to those who do not yet have it, and will increase competitive choices for those who do.

3. In addition to making more spectrum available for use by U–NII devices, we are taking steps to minimize the potential for these devices to cause interference to existing operations. Specifically, we are amending the Table of Frequency Allocations in Part 2 of the rules by: (1) Upgrading the Federal Government Radiolocation Service in the 5.46–5.65 GHz band and the non-Federal Government Radiolocation Service in the 5.47–5.65 GHz band to primary status; and (2) adding primary Federal Government allocations and secondary non-Federal Government allocations for the Space Research Service (active) (SRS) in the 5.35–5.57 GHz band and for the Earth Exploration-Satellite Service (active) (EESS) in the 5.46–5.57 GHz band. In addition, we are modifying certain technical requirements for U–NII devices. The amendments made herein are generally consistent with the U.S. proposals for the World Radiocommunication Conference 2003 (WRC–03), and with the resolutions adopted at WRC–03, pertaining to these bands.

Discussion

4. We continue to believe, and the comments support, our position in the Notice, that the spectrum currently available for U–NII devices is insufficient to support long-term growth for unlicensed wireless broadband devices and networks. We believe that the additional spectrum we are making available for unlicensed wireless broadband devices and networks should provide sufficient spectrum to meet consumers' needs, thereby stimulating investment. Ample evidence exists of the enormous growth in the demand for such devices and services. For example, a number of service providers are currently offering or have announced plans to deploy commercial unlicensed wireless broadband networks. Such networks offer significant benefits for American consumers and businesses, including increased competition with other providers of broadband service, such as cable and digital subscriber line (DSL) broadband services, and additional options in areas unserved by other broadband providers. We also believe that additional spectrum will give U–NII devices and networks more flexibility to avoid interference with other services sharing the existing U–NII bands, thereby improving the quality of service experienced by consumers. For these reasons, we are making an additional 255 megahertz available under the U–NII rules to meet the growing demand for new high data rate devices and services and to enable equipment to use spectrum that is harmonized internationally.

Changes to the Table of Frequency Allocations

5. *Proposals.* As noted in the *NPRM,* no change is needed to the Table of Frequency Allocations to make an additional 255 megahertz of spectrum available under the U–NII rules. However, we proposed several changes to the Table of Frequency Allocations to accommodate the spectrum requirements of other radio services. Specifically, we proposed to upgrade the allocations for the Federal Government Radiolocation Service in the 5.46–5.65 GHz band and the non-Federal Government Radiolocation Service in the 5.47–5.65 GHz band from secondary to primary. We further proposed to add primary Federal Government allocations and secondary non-Federal Government allocations for the SRS in the 5.35–5.57 GHz band and for the EESS in the 5.46–5.57 GHz band.

6. *Decision.* Consistent with the outcome of WRC–03, we are adopting the allocations proposed in the *NPRM.* These allocations are needed to meet the Federal Government's requirements for increased interference protection and additional spectrum for certain services. First, we modify the U.S. Table of Frequency Allocations in part 2 of the rules to upgrade the Federal Government Radiolocation service to primary in the 5.46–5.65 GHz band. We similarly upgrade the non-Federal Government Radiolocation Service to co-primary in the 5.47–5.65 GHz band. We note that the Federal Government Radiolocation Service already has a primary allocation in the 5.35–5.46 GHz band. The elevation in status of the Radiolocation Service along with the technical rules adopted will protect operations in that service against interference from U–NII devices. Further, we are adding primary Federal Government allocations and secondary non-Federal Government allocations for the SRS in the 5.35–5.57 GHz band and the EESS in the 5.46–5.57 GHz band. In making these changes to the Table of Frequency Allocations, we are also adopting the additional and modified international, Government, and U.S. footnotes, as generally recommended by NTIA.

Technical Requirements

Additional Spectrum for U–NII Devices

7. *Proposals.* In the *NPRM,* we proposed to modify our part 15 rules by adding the 5.470–5.725 GHz band to the U–NII bands with the same technical requirements that apply to the existing 5.250–5.350 GHz U–NII band. U–NII devices operating in the 5.25–5.35 GHz band may be used indoors and outdoors and are limited to 1 watt equivalent isotropically radiated power (e.i.r.p.). This proposal was consistent with the U.S. position for the WRC–03.

Decision. We continue to believe, as evidenced by the support in the record, that there is need to make the 5.470–5.725 GHz band available for unlicensed U–NII devices. This additional spectrum will relieve the developing congestion in the existing 5.725–5.825 GHz band and provide opportunities for further development of U–NII technologies and system capabilities. We therefore are adopting our proposal to modify the Part 15 rules to allow U–NII devices to operate in the 5.470–5.725 GHz band with 1 watt e.i.r.p. This is consistent with the outcome of WRC–03. We decline to adopt a mobile allocation, as suggested by IEEE 802 and instead will treat these devices similar to all other unlicensed intentional radiators (*i.e.,* they will operate on a non-interference basis under Section 15.15(c) of the rules). Based on the growth of similar unlicensed mobile devices operating in the 2.4 GHz band which also operate on a non-interference basis, we do not believe that such treatment will hinder the development or deployment of U–NII devices. In addition, as this action is consistent with the adoption of a mobile allocation by the ITU, manufacturers will benefit from economies of scale and consumers will benefit by having mobile, interoperable devices on a global basis.

8. We are not persuaded that we should either add or modify our proposed rules as requested by ARRL. As recognized by ARRL, our DFS and TPC requirements, while not specifically designed to protect amateur

operations, will in fact protect amateur operations. In addition, because of the large amount of spectrum we are adding for U–NII devices along with the existing 300 MHz of U–NII spectrum, we expect the density of devices throughout the spectrum to be relatively low. We believe that this low density of devices coupled with our technical requirements will provide adequate protection to all incumbent systems in the band, including amateur satellite uplink systems.

Dynamic Frequency Selection

9. *Proposals.* To ensure protection of Federal Government radar systems, we proposed to require that U–NII devices operating in the 5.25–5.35 GHz and 5.470–5.725 GHz bands employ Dynamic Frequency Selection. DFS is a feature that dynamically instructs a transmitter to switch to another channel whenever a particular condition (such as, for example, the prevailing ambient interference level on a channel) is met. Prior to initiating a transmission, a U–NII device's DFS mechanism would monitor the available spectrum in which it could operate for a radar signal. If a signal is detected, the channel associated with the radar signal would either be vacated and/or flagged as unavailable for use by the U–NII device.

10. We proposed to require that U–NII devices continuously monitor their environment for the presence of radar both prior to and during operation. We further proposed to require that U–NII devices use two detection thresholds to ascertain whether radar signals are present. The proposed threshold levels were –62 dBm for devices with a maximum e.i.r.p less than 200 mW and –64 dBm for devices with a maximum e.i.r.p between 200 mW and 1 W averaged, over 1 μs. Because these levels are referenced to a 1 megahertz bandwidth, we also proposed to require that U–NII devices with less than a 1 megahertz bandwidth use a correction factor when determining whether signals are over or below the threshold. In addition, we sought comment on the minimum number of radar pulses necessary, and the observation time required, for reliable detection of a radar signal. We also proposed a definition of DFS that would require a uniform spreading of loading over all available channels. Our proposals were based on an agreement on the use of DFS that was reached by industry, the National Telecommunications and Information Administration (NTIA), and the Department of Defense prior to WRC–03.

11. We also sought comment on the proper treatment of U–NII systems where multiple devices operate under the control of a central controller or "master". Specifically, we proposed to require only the central controller to have DFS capability. We also requested comment on how to identify remote units that operate only under the control of a central controller and whether DFS should be required for devices that operate in absence of controller, *i.e.*, on an *ad hoc* basis.

12. *Decision.* We are adopting our proposal to require that U–NII devices operating in the 5.25–5.35 GHz and 5.470–5.725 GHz bands employ DFS at the threshold levels proposed in the *NPRM.* We agree with the commenters that DFS is a key element in enabling unlicensed U–NII devices to share spectrum with important U.S. Government radar operations. It is also an ITU accepted mechanism that will allow U–NII devices to be globally marketed. With respect to Arcwave's objection to the DFS requirement on DOCSIS compatibility grounds, we are providing, as explained below, a transition period for implementing the DFS requirement in U–NII devices that operate in the 5.25–5.35 GHz band. Thus, all of Arcwave's existing products that have been certified to be used in the 5.25–5.35 GHz band can continue to be sold during this period and can be used indefinitely, which minimizes many of the potential economic hardships asserted by Arcwave. Moreover, the voluntary standards-making bodies, like IEEE, routinely update their standards to reflect Commission requirements. Thus, Arcwave can pursue changing the DOCSIS standard through the relevant standard-making body, Cable Television Laboratories. Also, we disagree with Works D'Arndt's characterization of the effects of DFS implementation. DFS will determine the RLANs' transmit frequency, but will not incrementally impair the reliability of RLAN communications. Moreover, we note that, as unlicensed devices, RLANs operate on a non-interference basis and must cease their operations should they interfere with other licensed or authorized services.

13. We are not requiring U-NII devices to have bandwidths of 1 megahertz or greater as requested by some commenters. The current rules for U-NII operations in the 5.25–5.35 GHz band, which will now extend to the new 5.470–5.725 GHz band, allow U-NII operations with bandwidths of less than 1 megahertz with a penalty in the form of reduced power levels for such devices. This approach provides incentives for manufacturers to develop broadband applications as was intended, but does not foreclose the ability for manufacturers to produce U-NII devices having bandwidths less than 1 MHz. The requirement that such devices operate with reduced power also diminishes their ability to cause interference.

14. We are adopting our proposal to exempt remote devices that are under the control of a central controller from the DFS requirement. The exclusion of such "client" devices from the radar detection and DFS functions is an integral part of the industry/Government pre-WRC–03 agreement and is also consistent with the final ITU Recommendation. However, we are not exempting controller devices or "masters" from the DFS requirement. We note that exempting a controller device from the DFS requirement would be both inconsistent with both pre-WRC–03 agreements and WRC–03 resolutions. We also agree with Proxim that it shouldn't be necessary to identify remote devices operating under control of a master other than at the time of product certification, since any devices operating without the control of a master will have the DFS capability as required for product certification. With respect to *ad hoc* U-NII devices, we agree with commenters that these devices should not be exempt from the DFS requirement in the 5.25–5.35 GHz and 5.470–5.725 GHz bands at this time because no analyses have been performed to determine the impact this may have on radio services in this spectrum.

15. Finally, we agree with Cisco that codifying requirements for a minimum number of pulses and observation time required to reliably detect the radar signals before the work on compliance testing procedures is completed could be overly burdensome and limit the flexibility for DFS implementations in particular devices. These parameters will be addressed under the compliance test procedures, as described below. Additionally, several commenters also requested that we distinguish between the DFS "mechanism" and the "radar detection" function. We are clarifying the rules to indicate that radar detection (sub-function) is part of the overall DFS function. Finally, we are adopting rules to clarify DFS detection that require a master device and associated client devices to dedicate periods of no transmissions before, during, or after each packet or frame. During these listen periods, successive averaging periods, not to exceed 1 microsecond, will be used and any power level above the detection threshold found in any one of these averaging periods will trigger the DFS detection circuit.

Transmit Power Control

16. *Proposals.* TPC can generally be defined as a mechanism that regulates a device's transmit power in response to an input signal or a condition (e.g., a command signal is issued by a controller when the received signal falls below a predetermined threshold). In the *NPRM*, we proposed to require U-NII devices operating in the 5.470–5.725 GHz band to employ a transmit power control (TPC) mechanism to further protect EESS and SRS operations. We also proposed to require that when TPC is triggered, the U-NII device's power level be reduced by 6 dB and requested comments on identifying a suitable triggering mechanism for TPC. In addition, we requested comments on whether TPC is necessary for U-NII devices that operate at maximum e.i.r.p less than or equal to 500 mW, *i.e.*, ≥3 dB below maximum e.i.r.p. of 1 Watt. Further, we requested comments on how TPC should be applied to system configurations where multiple devices may operate under the control of a central device.

17. *Decision.* We will require TPC for U-NII devices operating in the 5.250–5.350 GHz and 5.470–5.725 GHz bands. Although we did not propose applying the TPC requirement to the 5.250–5.350 GHz band in the *NPRM*, we believe that this requirement is also appropriate for U-NII devices in that band. At the time the *NPRM* was issued, there was no call to require TPC for the 5.25–5.35 GHz band. However, at WRC–03, there was strong support to require TPC for this band and the United States partners agreed to support this new requirement after consulting with their representatives from industry and Government who were present at the conference. The current 802.11 standards require TPC in the 5 GHz band. We are therefore adopting a requirement that U-NII devices operating in the 5.25–5.35 GHz band have TPC. We believe that the majority of devices that will be affected by this rule will already have the TPC feature built into them, since only TPC equipped devices will be able to take advantage of the new band. Also, requiring TPC for the 5.25–5.35 GHz band is also consistent with some commenters' call for uniform rules for the U-NII bands both domestically and internationally. We agree with the commenters arguments that there is no need to require TPC for low-power U-NII devices and therefore will only require TPC for U-NII operating at power levels higher than 500mW.

18. We recognize that the benefits of requiring a well defined TPC algorithm must be weighed against the burden it would impose. We agree with commenters that codifying a specific TPC algorithm into our rules is likely to hinder innovation, and therefore, eventually, increase equipment costs. We, therefore, decline to adopt requirements for a specific TPC triggering mechanism into our rules. Instead, we will require applicants seeking equipment authorization for U-NII devices to provide a statement in their certification application explaining how the equipment complies with our TPC rules.

Test Procedures

19. *Proposals.* In the *NPRM*, we requested comments on the test procedures needed to ensure compliance with the DFS and TPC requirements adopted herein. Specifically, we requested comments on how U-NII devices can be tested for compliance with TPC requirements to implement reduced power without placing unnecessary restrictions on device design. In addition, we requested comments on the extent to which devices under development may have unique or novel transmission waveforms that may require special measurement instrumentation settings, *e.g.*, integration times, that differ from those used for measuring compliance of previous U-NII band devices.

20. *Decision.* In order to allow the immediate implementation of U-NII devices in accordance with the rules adopted in the R&On, we are providing an interim test procedure drafted by the 5 GHz Project Team to be used in obtaining equipment certifications for U-NII devices. We have reviewed this draft procedure and believe its provisions are adequate to provide satisfactory testing and certification of U-NII devices containing DFS capabilities. We recognize that this procedure may need to be modified as equipment is developed and as the testing methodologies are refined. Therefore, consistent with existing practice, our Laboratory may issue updated measurement procedures in the future. The interim test procedure is set forth in Appendix C of the R&O.

Transition Period

21. *Proposals.* In the *NPRM*, we proposed transition rules for the U-NII equipment operating in the 5.250–5.350 GHz and 5.470–5.725 GHz bands. Specifically, we proposed to require that U-NII equipment, operating in the new 5.470–5.725 GHz band meet all of the technical requirements, including DFS and TPC, on the effective date of these rules. In addition, we proposed that in the 5.25–5.35 GHz band, U-NII equipment comply with the DFS requirement effective one year from the date of publication of the Report and Order in this proceeding in the **Federal Register**. We also proposed that all U-NII devices operating in the 5.25–5.35 GHz band that are imported or shipped in interstate commerce on or after two years from the date of publication in the **Federal Register** comply with these standards. We requested comments on our proposed transition provisions.

22. *Decision.* We are requiring that any product that has the capability to operate in the new spectrum at the 5.470–5.725 GHz band, including equipment designed to operate in both the 5.25–5.35 GHz and 5.470–5.725 GHz band, must meet all the rules contained in this Report and Order in accordance with the specified measurement procedures to obtain equipment certification. For all other equipment, we will provide a transition period. This will minimize economic hardships on manufacturers by allowing them, during the transition period, to continue producing and selling existing equipment while modifying their products to meet the new requirements. Thus, we are adopting our proposal to implement a cut-off date of one year from date of publication of this Report and Order in the **Federal Register** for applications for equipment certification of products that operate under the current rules in only the 5.25–5.35 GHz band. That is, equipment designed to operate in only the 5.25–5.35 GHz band may continue to obtain certification without having DFS and TPC so long as the application for equipment certification is filed prior to the cut-off date of one year. After that time, all devices for which an application for equipment certification is filed for U-NII equipment operating in the 5.25–5.35 GHz band must meet the rules adopted in the Report and Order. In addition, we are adopting a two-year cutoff date for marketing and importation of equipment designed to operate in only the 5.23–5.35 GHz band. This will prevent equipment that may be built in countries which do not have DFS and TPC requirements from continuing to be imported and marketed indefinitely. Finally, we note that users who obtain equipment prior to any of these cut-off dates may continue to use that equipment indefinitely.

Final Regulatory Flexibility Analysis

23. As required by the Regulatory Flexibility Act of 1980 as amended,[1] an

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business

Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making, Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) devices in the 5 GHz band.*[2] The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis conforms to the RFA.[3]

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

24. This Report and Order amends part 15 of our rules governing the operation of unlicensed National Information Infrastructure (U-NII) devices, including Radio Local Area Networks (RLANs), to make available an additional 255 megahertz of spectrum in the 5.47–5.725 GHz band for the growth and development of unlicensed wireless broadband networks. This action responds to the petition for rule making submitted by the Wireless Ethernet Compatibility Alliance (WECA—now known as Wi-Fi Alliance).[4]

25. In addition to making more spectrum available for use by U-NII devices, the Report and Order also makes several other rule changes in the 5 GHz band that will further facilitate the use of this band for U-NII devices, while at the same time ensuring sufficient protection for various incumbents in the band. Specifically, it modifies the U.S. Table of Frequency Allocations in part 2 of the rules to upgrade the status of the Federal Government Radiolocation service to primary in the 5.46–5.65 GHz band. It similarly upgrades the non-Federal Government radiolocation service to primary in the 5.47–5.65 GHz band. It further adds primary allocations for the Federal Government and the non-Federal Government Space Research Service (active) (SRS) in the 5.35–5.46 GHz band and the Earth Exploration-Satellite Service (active) (EESS) and SRS (active) in the 5.46–5.57 GHz band.

26. The Report and Order also modified certain technical requirements for U-NII devices in the part 15 rules. In addition to applying the existing technical requirements for the 5.250–5.350 GHz sub-band to the new 5.470–5.725 GHz band, it requires that U-NII devices operating in both the existing 5.25–5.35 GHz sub-band and the new 5.470–5.725 GHz sub-band employ a listen-before-talk mechanism called dynamic frequency selection (DFS). DFS is an interference avoidance mechanism. Prior to the start of any transmissions, and through constant monitoring, the device (*e.g.*, RLAN) equipped with such a mechanism monitors the radio environment for the presence of radar. If the U-NII device determines that a radar signal is present, it either moves to another channel or enters a sleep mode if no channels are available.

27. The Report and Order also requires a transmit power control (TPC) mechanism in both the existing 5.25–5.35 GHz sub-band and the new 5.470–5.725 GHz sub-band to further reduce the potential for impact on EESS and SRS operations. TPC can generally be defined as a mechanism that regulates a device's transmit power in response to an input signal or a condition (*e.g.*, a command signal may be issued by a controller when the received signal falls below a predetermined threshold). TPC will allow the transmitter to operate at less than the maximum power for most of the time. As the signal level at the receiver rises or falls, the transmit power will be decreased or increased as needed. Because TPC equipped devices adjust their transmit power to the minimum necessary to achieve the desired performance, the average interference power from a large number of devices is reduced, the power consumption is minimized and network capacity is increased.

28. U-NII devices currently operate in the 5.25–5.35 GHz band without DFS capability. As a result, some period of time will be needed to implement the new DFS requirement for U-NII equipment operating in the 5.25–5.35 GHz band. The Report and Order requires U-NII equipment operating in the 5.25–5.35 GHz band that are authorized under the certification procedures on or after January 20, 2005 to comply with the DFS and TPC requirements specified in § 15.407 of the rules. U-NII equipment operating in the 5.25–5.35 GHz band that are imported or marketed January 20, 2006 shall comply with the DFS and TPC requirements in § 15.407 of the rules.

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

29. We received no comments directly in response to the IRFA in this proceeding. We did, however, receive a comment from one small business, ArcWave, which stated that its use of the DOCSIS protocol will be compromised by the imposition of the DFS feature.[5] On consideration of ArcWave's comment regarding DFS and DOCSIS, we find their comment is unpersuasive. We believe that the beneficial value of DFS far outweighs the possible, but unproven, negative impact of DFS on a single commenter, ArcWave. However, as explained in the text and below, we have taken action in the form of a transition period that will ease any economic impact to entities, including small entities, that develop products in the 5.25–5.35 GHz band.[6]

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

30. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[7] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[8] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[9] A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[10]

31. The Commission has not developed a definition of small entities applicable to unlicensed communications devices manufacturers. Therefore, we will utilize the SBA definition application to manufacturers of Radio and Television Broadcasting and Communications Equipment. According to the SBA regulations, unlicensed transmitter manufacturers must have 750 or fewer employees in order to qualify as a small business concern.[11] Census Bureau indicates that

Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, Stat. 857 (1996).

[2] *See* Notice of Proposed Rulemaking, ET Docket No. 03–122, 18 FCC Rcd 11581 (2003).

[3] *See* 5 U.S.C. 604(a).

[4] *See* WECA Petition for Rulemaking, RM–10371, filed on January 15, 2002, Public Notice Report No. 2527, January 29, 2002.

[5] *See* ¶ 25 of the R&O.

[6] *See* ¶ 36 of this FRFA, *supra*.

[7] *See* U.S.C. 604(a)(3).

[8] Id. 601(6).

[9] 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**."

[10] Id. 632.

[11] *See* 13 CFR 121.201, NAICS Code 334220 (SIC Code 3663). Although SBA now uses the NAICS

Continued

there are 858 U.S. companies that manufacture radio and television broadcasting and communications equipment, and the 778 of these firms have fewer than 750 employees and would be classified as small entities.[12] We do not believe this action would have a negative impact on small entities that manufacture unlicensed U-NII devices. Indeed, we believe the actions should benefit small entities because it should make available increased business opportunities to small entities.

D. Description of Projected Reporting, Record Keeping and Other Compliance Requirements for Small Entities

32. Part 15 transmitters are already required to be authorized under the Commission's certification procedures as a prerequisite to marketing and importation. Under the amendments in the NPRM, manufacturers will be required to demonstrate that U-NII devices operating in the bands 5.250–5.350 GHz and 5.470–5.725 GHz have Dynamic Frequency Selection (DFS) Capabilities and transmit power control (TPC) capabilities. The reporting and recordkeeping requirements associated with these equipment authorizations would not be changed by the rule revisions in the Report and Order.

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

33. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[13]

34. We have taken a significant step to minimize economic impact to small entities. As described in the Report and Order, we have provided a transition period for the U-NII devices operating in the 5.25–5.35 GHz band.[14] This period will provide entities with time to redesign existing products to comply with the rules while permitting them to continue manufacturing and marketing existing products. In addition, we note that one commenter, Works D'Arndt opposed the adoption of a requirement that equipment possess a DFS and a TPC requirement. We rejected this alternative because the DFS and TPC requirement will ensure that all entities can share the band with a minimal risk of causing harmful interference. All entities, including small entities, having an interest in this band will benefit from this requirement.

F. Report to Congress

35. The Commission will send a copy of the Report and Order, including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. 604(b).

Ordering Clauses

36. Pursuant to sections 1, 4, 301, 302(a), 303, 307, 309, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 301, 302(a), 303, 307, 309, 316, 332, 334, and 336, the Report and Order *is hereby adopted.*

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

List of Subjects in 47 CFR Parts 2 and 15

Communications equipment, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 2 and 15 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

■ a. Revise pages 56, 57, and 58.

■ b. In the list of International footnotes, add footnotes 5.446A, 5.446B, 5.447E, 5.447F, 5.448C, 5.448D, 5.450A, and 5.450B; and revise footnotes 5.447, 5.448, 5.448A, 5.448B, 5.450, 5.453, 5.454, and 5.455.

■ c. In the list of United States (US) footnotes, add footnote US390.

■ d. In the list of Federal Government (G) footnotes, revise footnotes US50 and US51; and add footnotes G130 and G131.

§ 2.106 Table of Frequency Allocations.

The revisions and additions read as follows:

* * * * *

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classifications, instead of SIC, the size standard remains the same.

[12] *See* U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC category 3663 (NAICS Code 334220).

[13] *See* 5 U.S.C. 603(c).

[14] *See* ¶ 1 of the FRFA, *supra.*

5150-5250 AERONAUTICAL RADIONAVIGATION FIXED-SATELLITE (Earth-to-space) 5.447A MOBILE except aeronautical mobile 5.446A 5.446B 5.446 5.447 5.447B 5.447C	5.367 US211 US307 US344 US370	5150-5250 AERONAUTICAL RADIO-NAVIGATION US260 FIXED-SATELLITE (Earth-to-space) 5.447A US344 5.447C US211 US307	RF Devices (15) Satellite Communications (25) Aviation (87)
5250-5255 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH 5.447D MOBILE except aeronautical mobile 5.446A 5.447F 5.448 5.448A 5.447E	5250-5255 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH (active) 5.447D 5.448A	5250-5255 Earth exploration-satellite (active) Radiolocation Space research 5.558A	RF Devices (15) Private Land Mobile (90)
5255-5350 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) MOBILE except aeronautical mobile 5.446A 5.447F 5.448 5.448A 5.447E	5255-5350 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH (active) 5.448A	5255-5350 Earth exploration-satellite (active) Radiolocation Space research (active) 5.448A	
5350-5460 EARTH EXPLORATION-SATELLITE (active) 5.448B SPACE RESEARCH (active) 5.448C AERONAUTICAL RADIONAVIGATION 5.449 RADIOLOCATION 5.448D	5350-5460 EARTH EXPLORATION-SATELLITE (active) 5.448B SPACE RESEARCH (active) AERONAUTICAL RADIO-NAVIGATION 5.449 RADIOLOCATION G56 US390 G130	5350-5460 AERONAUTICAL RADIO-NAVIGATION 5.449 Earth exploration-satellite (active) 5.448B Space research (active) Radiolocation US390	Aviation (87) Private Land Mobile (90)
5460-5470 RADIONAVIGATION 5.449 EARTH EXPLORATION-SATELLITE (active) SPACE RESEARCH (active) RADIOLOCATION 5.448D 5.448B	5460-5470 RADIONAVIGATION 5.449 US65 EARTH EXPLORATION-SATELLITE (active) SPACE RESEARCH (active) RADIOLOCATION G56 5.448B US49 G130	5460-5470 RADIONAVIGATION 5.449 US65 Earth exploration-satellite (active) Space research (active) Radiolocation 5.448B US49	Private Land Mobile (90)
5470-5570 MARITIME RADIONAVIGATION MOBILE except aeronautical mobile 5.446A 5.450A EARTH EXPLORATION-SATELLITE (active) SPACE RESEARCH (active) RADIOLOCATION 5.450B 5.450 5.451 5.452 5.448B	5470-5570 MARITIME RADIONAVIGATION US65 EARTH EXPLORATION-SATELLITE (active) SPACE RESEARCH (active) RADIOLOCATION G56 5.448B US50 G131	5470-5570 MARITIME RADIONAVIGATION US65 RADIOLOCATION Earth exploration-satellite (active) Space research (active) US50	RF Devices (15) Maritime (80) Private Land Mobile (90)

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
5570-5650 MARITIME RADIONAVIGATION MOBILE except aeronautical mobile 5.446A 5.450A RADIOLOCATION 5.450B			5570-5600 MARITIME RADIONAVIGATION US65 RADIOLOCATION G56 US50 G131	5570-5600 MARITIME RADIONAVIGATION US65 RADIOLOCATION US50	RF Devices (15) Maritime (80) Private Land Mobile (90)
			5600-5650 MARITIME RADIONAVIGATION US65 METEOROLOGICAL AIDS RADIOLOCATION G56	5600-5650 MARITIME RADIONAVIGATION US65 METEOROLOGICAL AIDS RADIOLOCATION	
5.450 5.451 5.452			5.452 US50 G131	5.452 US50	
5650-5725 RADIOLOCATION MOBILE except aeronautical mobile 5.446A 5.450A Amateur Space research (deep space)			5650-5925 RADIOLOCATION G2	5650-5830 Amateur	RF Devices (15) ISM Equipment (18) Amateur (97)
5.282 5.451 5.453 5.454 5.455					
5725-5830 FIXED-SATELLITE (Earth-to-space) RADIOLOCATION Amateur	5725-5830 RADIOLOCATION Amateur				
5.150 5.451 5.453 5.455 5.456	5.150 5.453 5.455			5.150 5.282	
5830-5850 FIXED-SATELLITE (Earth-to-space) RADIOLOCATION Amateur Amateur-satellite (space-to-Earth)	5830-5850 RADIOLOCATION Amateur Amateur-satellite (space-to-Earth)			5830-5850 Amateur Amateur-satellite (space-to-Earth)	ISM Equipment (18) Amateur (97)
5.150 5.451 5.453 5.455 5.456	5.150 5.453 5.455			5.150	
5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE	5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE Amateur Radiolocation	5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE Radiolocation		5850-5925 FIXED-SATELLITE (Earth-to-space) US245 MOBILE NG160 Amateur	ISM Equipment (18) Private Land Mobile (90) Amateur (97)
5.150	5.150	5.150	5.150 US245	5.150	
5925-6700 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE			5925-6425	5925-6425 FIXED NG41 FIXED-SATELLITE (Earth-to-space)	International Fixed (23) Satellite Commun. (25) Fixed Microwave (101)

	6425-6525 5.440 5.458	6425-6525 FIXED-SATELLITE (Earth-to-space) MOBILE 5.440 5.458	Auxiliary Broadcasting (74) Cable TV Relay (78) Fixed Microwave (101)
	6525-6700 5.458 US342	6525-6700 FIXED FIXED-SATELLITE (Earth-to-space) 5.458 US342	Satellite Communications (25) Fixed Microwave (101)
5.149 5.440 5.458			
6700-7075 FIXED FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.441 MOBILE	6700-7125	6700-6875 FIXED FIXED-SATELLITE (Earth-to-space)(space-to-Earth) 5.441 5.458 5.458A 5.458B	
		6875-7025 FIXED NG118 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.441 MOBILE NG171 5.458 5.458A 5.458B	Satellite Communications (25) Auxiliary Broadcasting (74) Cable TV Relay (78)
		7025-7075 FIXED NG118 FIXED-SATELLITE (Earth-to-space) NG172 MOBILE NG171 5.458 5.458A 5.458B	
5.458 5.458A 5.458B 5.458C			
7075-7250 FIXED MOBILE		7075-7125 FIXED NG118 MOBILE NG171 5.458	Auxiliary Broadcasting (74) Cable TV Relay (78)
	5.458		
	7125-7190 FIXED 5.458 US252 G116	7125-7190 5.458 US252	
	7190-7235 FIXED SPACE RESEARCH (Earth-to-space) 5.458	7190-7250	
	7235-7250 FIXED 5.458	 5.458	
5.458 5.459 5.460			

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International Footnotes

* * * * *

5.446A The use of the bands 5150–5350 MHz and 5470–5725 MHz by the stations in the mobile service shall be in accordance with Resolution 229 (WRC–03).

5.446B In the band 5150–5250 MHz, stations in the mobile service shall not claim protection from earth stations in the fixed-satellite service. No. 5.43A does not apply to the mobile service with respect to fixed-satellite service earth stations.

5.447 *Additional allocation:* In Israel, Lebanon, Pakistan, the Syrian Arab Republic and Tunisia, the band 5150–5250 MHz is also allocated to the mobile service, on a primary basis, subject to agreement obtained under No. 9.21. In this case, the provisions of Resolution 229 (WRC–03) do not apply.

* * * * *

5.447E *Additional allocation:* The band 5250–5350 MHz is also allocated to the fixed service on a primary basis in the following countries in Region 3: Australia, Korea (Rep. of), India, Indonesia, Iran (Islamic Republic of), Japan, Malaysia, Papua New Guinea, Philippines, Sri Lanka, Thailand and Viet Nam. The use of this band by the fixed service is intended for the implementation of fixed wireless access (FWA) systems and shall comply with Recommendation ITU-R F.1613. In addition, the fixed service shall not claim protection from the radiodetermination, Earth exploration-satellite (active) and space research (active) services, but the provisions of No. 5.43A do not apply to the fixed service with respect to the Earth exploration-satellite (active) and space research (active) services. After implementation of FWA systems in the fixed service with protection for the existing radiodetermination systems, no more stringent constraints should be imposed on the FWA systems by future radiodetermination implementations.

5.447F In the band 5250–5350 MHz, stations in the mobile service shall not claim protection from the radiolocation service, the Earth exploration-satellite service (active) and the space research service (active). These services shall not impose on the mobile service more stringent protection criteria, based on system characteristics and interference criteria, than those stated in Recommendations ITU-R M.1638 and ITU-R SA.1632.

5.448 *Additional allocation:* In Azerbaijan, Libyan Arab Jamahiriya, Mongolia, Kyrgyzstan, Slovakia, Romania and Turkmenistan, the band 5250–5350 MHz is also allocated to the radionavigation service on a primary basis.

5.448A The Earth exploration-satellite (active) and space research (active) services in the frequency band 5250–5350 MHz shall not claim protection from the radiolocation service. No. 5.43A does not apply.

5.448B The Earth exploration-satellite service (active) operating in the band 5350–5570 MHz and space research service (active) operating in the band 5460–5570 MHz shall not cause harmful interference to the aeronautical radionavigation service in the band 5350–5460 MHz, the radionavigation service in the band 5460–5470 MHz and the maritime radionavigation service in the band 5470–5570 MHz.

5.448C The space research service (active) operating in the band 5350–5460 MHz shall not cause harmful interference to nor claim protection from other services to which this band is allocated.

5.448D In the frequency band 5350–5470 MHz, stations in the radiolocation service shall not cause harmful interference to, nor claim protection from, radar systems in the aeronautical radionavigation service operating in accordance with No. 5.449.

* * * * *

5.450 *Additional allocation:* In Austria, Azerbaijan, Iran (Islamic Republic of), Mongolia, Kyrgyzstan, Romania, Turkmenistan and Ukraine, the band 5470–5650 MHz is also allocated to the aeronautical radionavigation service on a primary basis.

5.450A In the band 5470–5725 MHz, stations in the mobile service shall not claim protection from radiodetermination services. Radiodetermination services shall not impose on the mobile service more stringent protection criteria, based on system characteristics and interference criteria, than those stated in Recommendation ITU-R M.1638.

5.450B In the frequency band 5470–5650 MHz, stations in the radiolocation service, except ground-based radars used for meteorological purposes in the band 5600–5650 MHz, shall not cause harmful interference to, nor claim protection from, radar systems in the maritime radionavigation service.

* * * * *

5.453 *Additional allocation:* In Saudi Arabia, Bahrain, Bangladesh, Brunei Darussalam, Cameroon, China, Congo, Côte d'Ivoire, Korea (Rep. of), Egypt, the United Arab Emirates, Gabon, Guinea, Equatorial Guinea, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Japan, Jordan, Kenya, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Madagascar, Malaysia, Nigeria, Oman, Pakistan, the Philippines, Qatar, the Syrian Arab Republic, the Dem. People's Rep. of Korea, Singapore, Sri Lanka, Swaziland, Tanzania, Chad, Thailand, Togo, Viet Nam and Yemen, the band 5650–5850 MHz is also allocated to the fixed and mobile services on a primary basis. In this case, the provisions of Resolution 229 (WRC–03) do not apply.

5.454 *Different category of service:* In Azerbaijan, Georgia, Mongolia, Uzbekistan, Kyrgyzstan, the Russian Federation, Tajikistan and Turkmenistan, the allocation of the band 5670–5725 MHz to the space research service is on a primary basis (see No. 5.33).

5.455 *Additional allocation:* In Armenia, Azerbaijan, Belarus, Cuba, Georgia, Hungary, Kazakhstan, Latvia, Moldova, Mongolia, Uzbekistan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkmenistan and Ukraine, the band 5670–5850 MHz is also allocated to the fixed service on a primary basis.

* * * * *

United States (US) Footnotes

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US50 In the band 5470–5650 MHz, the radiolocation service may be authorized for non-Federal Government use on the condition that harmful interference is not caused to the maritime radionavigation service or to the Federal Government radiolocation service.

US51 In the band 9300–9500 MHz, the radiolocation service may be authorized for non-Federal Government use on the condition that harmful interference is not caused to the Federal Government radiolocation service.

US390 Federal Government stations in the space research service (active) operating in the band 5350–5460 MHz shall not cause harmful interference to, nor claim protection from, Federal and non-Federal Government stations in the aeronautical radionavigation service nor Federal Government stations in the radiolocation service.

* * * * *

Government (G) Footnotes

* * * * *

G130 Federal Government stations in the radiolocation service operating in the band 5350–5470 MHz, shall not cause harmful interference to, nor claim protection from, Federal stations in the aeronautical radionavigation service operating in accordance with ITU *Radio Regulation* No. 5.449.

G131 Federal Government stations in the radiolocation service operating in the band 5470–5650 MHz, with the exception of ground-based radars used for meteorological purposes operating in the band 5600–5650 MHz, shall nor cause harmful interference to, nor claim protection from, Federal Government stations in the maritime radionavigation service.

PART 15—RADIO FREQUENCY DEVICES

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

Authority: 47 U.S.C. 154, 302, 303, 304, 307 and 544A.

■ 4. Section 15.37 is amended by adding paragraph (l), to read as follows:

§ 15.37 Transition provisions for compliance with the rules.

* * * * *

(l) U-NII equipment operating in the 5.25–5.35 GHz band for which applications for certification are filed on or after January 20, 2005 shall comply with the DFS and TPC requirements specified in § 15.407. U-NII equipment operating in the 5.25–5.35 GHz band that are imported or marketed January 20, 2006 shall comply with the DFS and TPC requirements in § 15.407.

■ 5. Section 15.401 is revised to read as follows:

§ 15.401 Scope.

This subpart sets out the regulations for unlicensed National Information Infrastructure (U-NII) devices operating

in the 5.15–5.35 GHz, 5.47–5.725 GHz and 5.725–5.825 GHz bands.

■ 6. Section 15.403 is revised to read as follows:

§ 15.403 Definitions.

(a) *Access Point (AP).* A U-NII transceiver that operates either as a bridge in a peer-to-peer connection or as a connector between the wired and wireless segments of the network.

(b) *Available Channel.* A radio channel on which a *Channel Availability Check* has not identified the presence of a radar.

(c) *Average Symbol Envelope Power.* The average symbol envelope power is the average, taken over all symbols in the signaling alphabet, of the envelope power for each symbol.

(d) *Channel Availability Check.* A check during which the U-NII device listens on a particular radio channel to identify whether there is a radar operating on that radio channel.

(e) *Channel Move Time.* The time needed by a U-NII device to cease all transmissions on the current channel upon detection of a radar signal above the DFS detection threshold.

(f) *Digital modulation.* The process by which the characteristics of a carrier wave are varied among a set of predetermined discrete values in accordance with a digital modulating function as specified in document ANSI C63.17–1998.

(g) *Dynamic Frequency Selection (DFS)* is a mechanism that dynamically detects signals from other systems and avoids co-channel operation with these systems, notably radar systems.

(h) *DFS Detection Threshold.* The required detection level defined by detecting a received signal strength (RSS) that is greater than a threshold specified, within the U-NII device channel bandwidth.

(i) *Emission bandwidth.* For purposes of this subpart the emission bandwidth shall be determined by measuring the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, that are 26 dB down relative to the maximum level of the modulated carrier. Determination of the emissions bandwidth is based on the use of measurement instrumentation employing a peak detector function with an instrument resolution bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

(j) *In-Service Monitoring.* A mechanism to check a channel in use by the U-NII device for the presence of a radar.

(k) *Non-Occupancy Period.* The required period in which, once a channel has been recognized as containing a radar signal by a U-NII device, the channel will not be selected as an available channel.

(l) *Operating Channel.* Once a U-NII device starts to operate on an Available Channel then that channel becomes the Operating Channel.

(m) *Peak Power Spectral Density.* The peak power spectral density is the maximum power spectral density, within the specified measurement bandwidth, within the U-NII device operating band.

(n) *Peak Transmit Power.* The maximum transmit power as measured over an interval of time of at most 30/B (where B is the 26 dB emission bandwidth of the signal in hertz) or the transmission pulse duration of the device, whichever is less, under all conditions of modulation. The peak transmit power may be averaged across symbols over an interval of time equal to the transmission pulse duration of the device or over successive pulses. The averaging must include only time intervals during which the transmitter is operating at its maximum power and must not include any time intervals during which the transmitter is off or is transmitting at a reduced power level.

(o) *Power Spectral Density.* The power spectral density is the total energy output per unit bandwidth from a pulse or sequence of pulses for which the transmit power is at its peak or maximum level, divided by the total duration of the pulses. This total time does not include the time between pulses during which the transmit power is off or below its maximum level.

(p) *Pulse.* A pulse is a continuous transmission of a sequence of modulation symbols, during which the average symbol envelope power is constant.

(q) *RLAN.* Radio Local Area Network.

(r) *Transmit Power.* The total energy transmitted over a time interval of at most 30/B (where B is the 26 dB emission bandwidth of the signal in hertz) or the duration of the transmission pulse, whichever is less, divided by the interval duration.

(s) *Transmit Power Control (TPC).* A feature that enables a U-NII device to dynamically switch between several transmission power levels in the data transmission process.

(t) *U-NII devices.* Intentional radiators operating in the frequency bands 5.15–5.35 GHz and 5.470–5.825 GHz that use wideband digital modulation techniques and provide a wide array of high data rate mobile and fixed communications for individuals, businesses, and institutions.

■ 7. Section 15.407 is amended by revising paragraphs (a)(2), by redesignating paragraphs (b)(3) through (7) as paragraphs (b)(4) through (8), by adding a new paragraph (b)(3), and by adding paragraph (h) to read as follows:

§ 15.407 General technical requirements.

(a) * * *

(2) For the 5.25–5.35 GHz and 5.47–5.725 GHz bands, the peak transmit power over the frequency bands of operation shall not exceed the lesser of 250 mW or 11 dBm + 10log B, where B is the 26 dB emission bandwidth in megahertz. In addition, the peak power spectral density shall not exceed 11 dBm in any 1 megahertz band. If transmitting antennas of directional gain greater than 6 dBi are used, both the peak transmit power and the peak power spectral density shall be reduced by the amount in dB that the directional gain of the antenna exceeds 6 dBi.

* * * * *

(b) * * *

(3) For transmitters operating in the 5.47–5.725 GHz band: all emissions outside of the 5.47–5.725 GHz band shall not exceed an EIRP of −27 dBm/MHz.

* * * * *

(h) Transmit Power Control (TPC) and Dynamic Frequency Selection (DFS).

(1) Transmit power control (TPC). U-NII devices operating in the 5.25–5.35 GHz band and the 5.47–5.725 GHz band shall employ a TPC mechanism. The U-NII device is required to have the capability to operate at least 6 dB below the mean EIRP value of 30 dBm. A TPC mechanism is not required for systems with an e.i.r.p. of less than 500 mW.

(2) Radar Detection Function of Dynamic Frequency Selection (DFS). U-NII devices operating in the 5.25–5.35 GHz and 5.47–5.725 GHz bands shall employ a DFS radar detection mechanism to detect the presence of radar systems and to avoid co-channel operation with radar systems. The minimum DFS detection threshold for devices with a maximum e.i.r.p. of 200 mW to 1 W is −64 dBm. For devices that operate with less than 200 mW e.i.r.p. the minimum detection threshold is −62 dBm. The detection threshold is the received power averaged over 1 microsecond referenced to a 0 dBi antenna. The DFS process shall be required to provide a uniform spreading of the loading over all the available channels.

(i) Operational Modes. The DFS requirement applies to the following operational modes:

(A) The requirement for channel availability check time applies in the master operational mode.

(B) The requirement for channel move time applies in both the master and slave operational modes.

(ii) Channel Availability Check Time. A U-NII device shall check if there is a radar system already operating on the channel before it can initiate a transmission on a channel and when it has to move to a new channel. The U-NII device may start using the channel if no radar signal with a power level greater than the interference threshold values listed in paragraph (h)(2) of this part, is detected within 60 seconds.

(iii) Channel Move Time. After a radar's presence is detected, all transmissions shall cease on the operating channel within 10 seconds. Transmissions during this period shall consist of normal traffic for a maximum of 200 ms after detection of the radar signal. In addition, intermittent management and control signals can be sent during the remaining time to facilitate vacating the operating channel.

(iv) Non-occupancy Period. A channel that has been flagged as containing a radar system, either by a channel availability check or in-service monitoring, is subject to a non-occupancy period of at least 30 minutes. The non-occupancy period starts at the time when the radar system is detected.

[FR Doc. 04–1126 Filed 1–16–04; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 02–230; FCC 03–273]

Digital Broadcast Content Protection

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the new public information collection, Digital Broadcast Content Protection, MB Docket 02–230, OMB Control Number 3060–1049. Therefore, the Commission announces that OMB Control No. 3060–1049 and associated rules 47 CFR 73.9002 and 73.9008 are effective January 20, 2004.

DATES: The rules in 47 CFR 73.9002 and 73.9008 published at 68 FR 67599 (December 3, 2003) are effective January 20, 2004.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission has received OMB approval for a new information collection in Digital Broadcast Content Protection, MB Docket No. 02–230, 68 FR 67599, December 3, 2003, which includes interim approval procedures for digital content protection and recording technologies, as well as written commitment regimes for manufacturers and importers of both demodulators and products where the demodulator and transport stream processor are physically separate. Through this document, the Commission announces that it received this approval on January 8, 2004; OMB Control No. 3060–1049. The effective date for this collection and associated rules 47 CFR 73.9002 and 73.9008 is January 20, 2004.

Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning the OMB control numbers and expiration dates should be directed to Leslie F. Smith, Federal Communications Commission, (202) 418–0217 or via the Internet at *leslie.smith@fcc.gov*.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–1190 Filed 1–16–04; 8:45 am]

BILLING CODE 6712–01–U

Proposed Rules

Federal Register
Vol. 69, No. 12
Tuesday, January 20, 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 THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

[OH–248–FOR]

Ohio Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is announcing receipt of a proposed amendment to the Ohio regulatory program (the "Ohio program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Ohio proposes to revise their regulatory program to reflect changes promulgated by the U.S. Environmental Protection Agency related to coal remining operations. Ohio intends to revise its program to be consistent with the corresponding Federal regulations.

This document gives the times and locations that the Ohio program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., (local time), February 19, 2004. If requested, we will hold a public hearing on the amendment on February 17, 2004. We will accept requests to speak until 4 p.m., local time, on February 4, 2004.

ADDRESSES: You should mail or hand deliver written comments and requests to speak at the hearing to Mr. George Rieger, at the address listed below.

You may review copies of the Ohio program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting Appalachian Regional Coordinating Center.

Mr. George Rieger, Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, Appalachian Regional Coordinating Center, 3 Parkway Center, Pittsburgh, Pennsylvania 15220, Telephone: (412) 937–2153. E-mail: *grieger@osmre.gov*.

Mr. Robert Baker, Division of Mineral Resources Management, Ohio Department of Natural Resources, 1855 Fountain Square Court-Bldg. H–2, Columbus, Ohio 43224, Telephone: (614) 265–1092.

FOR FURTHER INFORMATION CONTACT: George Rieger, Telephone: (412) 937–2153. Internet: *grieger@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act... and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Ohio program on August 16, 1982. You can find background information on the Ohio program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Ohio program in the August 16, 1982, **Federal Register** (47 FR 34687). You can also find later actions concerning Ohio's program and program amendments at 30 CFR 935.11, 935.15, and 935.16.

II. Description of the Proposed Amendment

By letter dated November 7, 2003, Ohio sent us a proposed amendment to its program (Administrative Record No. OH–2184–00) under SMCRA (30 U.S.C. 1201 *et seq.*). Ohio has proposed to revise the Ohio Administrative Code (OAC), Sections 1501:13–4–15 and 1501:13–1–02 relating to coal remining operations and water quality standards so that the Ohio program is consistent with the U.S. Environmental Protections Agency's (EPA) water quality standards relating to coal remining operations. Specific revisions are presented below:

OAC Section 1501:13–4–15, Authorization to conduct coal mining on pollution abatement areas, is amended by adding the following under Section 1501:13–4–15(C)(2)(a), (b) and (c):

(1) If the Chief determines that it is infeasible to collect samples for establishing the baseline pollution load and that remining will result in significant improvement that would not otherwise occur, then the numeric effluent limitations do not apply to the pollution abatement area. Pre-existing discharges for which it is infeasible to collect samples for determination of baseline pollutant levels include, but are not limited to, discharges that exist as a diffuse groundwater flow that cannot be assessed via sample collection; a base flow to a receiving stream that cannot be monitored separate from the receiving stream; a discharge on a steep or hazardous slope that is inaccessible for sample collection; a pre-existing discharge that is too large to adequately assess via sample collection; or a number of pre-existing discharges so extensive that monitoring of individual discharges is infeasible.

(2) If the Chief approves a non-numeric NPDES remining permit the operator shall implement a pollution abatement plan incorporating BMP's designed to reduce the pollutant levels of acidity, iron, manganese, and solids in pre-existing discharges. The monitoring plan will be determined by the Chief. An operator who obtains a non-numeric NPDES remining permit will not be subject to paragraphs (F)(2), (3), (4), (5), (6) and (H)(3)(c) of this section.

(3) TSS [Total Suspended Solids] and SS [Settleable Solids] are exempt during

mining and reclamation, if the Chief determines it is infeasible or impractical based on the site specific conditions of the soil, climate, topography, steep slopes, or other baseline conditions provided that the operator demonstrates that significant reductions of TSS and SS will be achieved through the incorporation of sediment control BMP's into the pollutional abatement plan as required under paragraph (C)(4).

OAC Section 1501:13–4–15(E)(3) which reads "notify the Chief immediately prior to the start and upon completion of each step of the abatement plan; and" has been deleted.

OAC Section 1501:13–4–15(F)(1) is revised as follows:

For any pre-existing discharges from or on the pollutional abatement area, that are commingled with active mining wastewater, the operator shall comply with rule 1501:13–9–04(B) of the Administrative Code, until the pollution abatement plan is implemented and the commingling is ceased.

OAC Section 1501:13–4–5(H)(3)(c) has been revised by the addition of the phrase "the total suspended solids meets the standard NPDES limits" at the end of the provision.

OAC Section 1501:13–1–02. Definitions, include the following revisions:

1. The definition of "acid water" is revised to establish that the standard is "6.5, or a total iron concentration equal to or better than 10 mg/l".

2. The definition of "Best available technology economically achievable" is revised as "for remining operations means implementation of pollution abatement plan that incorporates Best Management Practices (BMP's) designed to improve pH (as acidity) and reduce pollutant loadings of iron, manganese and sediment to the maximum extent possible from or on the pollution abatement area. (1) BMP's are practices implemented during the mining and reclamation of remining sites that area designed to reduce, if not completely eliminate, the pre-existing water pollution problems. BMP's are tailored to specific mining operations based largely on pre-existing site conditions, hydrology, and geology. BMP's are designed to function in a physical and/or geochemical manner to reduce pollution loadings. These BMP measures include engineering, geochemical, daylighting, regrading, revegetation, diversion ditches or other applicable practices."

3. The definition of "Pollution abatement area" is revised to include "areas adjacent to and nearby the remining operation that also must be affected to reduce the pollution load of the pre-existing discharges and may include the immediate location of pre-existing discharges".

4. The definition of "Pre-existing discharge" is revised to add "This term shall include a pre-existing discharge that is relocated as a result of the implementation of best management practices contained in the abatement plan".

5. The definition of "abatement plan" has been revised by adding a reference to "best management practices" and an example of "daylighting old underground works".

6. The definition of "base line pollution load" has been revised by deleting the reference to "pH" and adding "* * * net acidity, total iron and total manganese, and total suspended solids * * *"

7. The definition of "Chief" has been revised to be the "Chief of the Division of Mineral Resources Management".

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the program.

Written Comments

Send your written comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (*see* **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Appalachian Regional Coordinating Center may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "Attn: SATS No. OH–248–FOR," your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Appalachian Regional Coordinating Center at (412) 937–2153.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., local time, on February 4, 2004. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard. If you are disabled and need a special accommodation to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowable by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian lands.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed State regulatory program provision does not constitute a major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C.804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State or local governmental agencies; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 935

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 18, 2003.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 04–1059 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 147

[CGD08–03–040]

RIN 1625–AA79

Safety Zone; Outer Continental Shelf Facility in the Gulf of Mexico for Garden Banks 783

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes the establishment of a safety zone around a

petroleum and gas production facility in Garden Banks 783 "A" of the Outer Continental Shelf in the Gulf of Mexico while the facility is being constructed and after the construction is completed. The construction site and facility need to be protected from vessels operating outside the normal shipping channels and fairways, and placing a safety zone around this area would significantly reduce the threat of allisions, oil spills and releases of natural gas. The proposed rule would prohibit all vessels from entering or remaining in the specified area around the facility's location except for the following: An attending vessel; a vessel under 100 feet in length overall not engaged in towing; or a vessel authorized by the Eighth Coast Guard District Commander.

DATES: Comments and related material must reach the Coast Guard on or before March 22, 2004.

ADDRESSES: You may mail comments and related material to Commander, Eighth Coast Guard District (m), Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, or comments and related material may be delivered to Room 1341 at the same address between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–6271. Commander, Eighth Coast Guard District (m) 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 at the location listed above during the noted time periods.

FOR FURTHER INFORMATION CONTACT: Lieutenant (LT) Kevin Lynn, Project Manager for Eighth Coast Guard District Commander, Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, telephone (504) 589–6271.

SUPPLEMENTARY INFORMATION:

Requests for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD08–03–040], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not plan to hold a public meeting. However, you may submit a request for a meeting by writing to Commander, Eighth Coast Guard District (m) at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Coast Guard proposes the establishment of a safety zone around a petroleum and gas production facility in the Gulf of Mexico: Magnolia Tension Leg Platform (TLP), Garden Banks 783 "A" (GB 783 "A"), located at position 27°12′13.86″ N, 92°12′09.36″ W. The proposed safety zone would be in effect while the facility is being constructed and after the construction is completed.

This proposed safety zone is in the deepwater area of the Gulf of Mexico. For the purposes of this regulation it is considered to be in waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles from the baseline from which the breadth of the sea is measured. Navigation in the area of the proposed safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area of the Gulf of Mexico also includes an extensive system of fairways. The fairway nearest the proposed safety zone is the Gulf Safety Fairway—Aransas Pass Safety Fairway to Southwest Pass Safety Fairway. Significant amounts of vessel traffic occur in or near the various fairways in the deepwater area.

ConocoPhillips has requested that the Coast Guard establish a safety zone in the Gulf of Mexico around the Magnolia TLP construction site and for the zone to remain in effect after construction is completed.

The request for the safety zone was made due to the high level of shipping activity around the site of the facility, safety concerns for the integrity of the structure, and the environment. ConocoPhillips indicated that the location, production level, and personnel levels on board the facility make it highly likely that any allision with the facility during and after construction would result in a catastrophic event.

The Coast Guard has evaluated ConocoPhillips' information and concerns against Eighth Coast Guard District criteria developed to determine if an Outer Continental Shelf facility qualifies for a safety zone. We conclude that the risk of allision to the facility and the potential for loss of life and damage to the environment resulting from such an accident during and following the construction of Magnolia TLP warrants the establishment of this proposed safety zone. The proposed rule would significantly reduce the threat of allisions, oil spills and natural gas releases and increase the safety of life, property, and the environment in the Gulf of Mexico. This proposed regulation is issued pursuant to 14 U.S.C. 85 and 43 U.S.C. 1333 as set out in the authority citation for 33 CFR part 147.

Discussion of Proposed Rule

Several factors were considered to determine the necessity of a safety zone for the Magnolia TLP construction site and for a safety zone to remain in effect after the facility is completed: (1) The construction site is located approximately 39 nautical miles south of the Gulf Safety Fairway—Aransas Pass Safety Fairway to Southwest Pass Safety Fairway, (2) the facility will have a high daily production capacity of petroleum oil and gas per day; (3) the facility will be manned; and (4) the facility will be a tension leg platform.

Regulatory Evaluation

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

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

The impacts on routine navigation are expected to be minimal because the proposed safety zone will not overlap any of the safety fairways within the Gulf of Mexico.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a

substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. Since the construction site for the Magnolia TLP is located far offshore, few privately owned fishing vessels and recreational boats/yachts operate in the area and alternate routes are available for those vessels. This proposed rule will not impact an attending vessel or vessels less than 100 feet in length overall not engaged in towing. Use of an alternate route may cause a vessel to incur a delay of 4 to 10 minutes in arriving at their destinations depending on how fast the vessel is traveling. Therefore, the Coast Guard expects the impact of this proposed rule on small entities to be minimal.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Kevin Lynn, Project Manager for Eighth Coast Guard District Commander, Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, telephone (504) 589–6271.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D, 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 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 this rule is not expected to result in any significant environmental impact as described in NEPA. A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 147

Continental shelf, Marine safety, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 147 as follows:

PART 147—SAFETY ZONES

1. The authority citation for part 147 continues to read as follows:

Authority: 14 U.S.C. 85; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

2. Add § 147.835 to read as follows:

§ 147.835 Magnolia TLP Safety Zone.

(a) *Description.* Magnolia TLP, Garden Banks 783 "A" (GB 783 "A"), located at position 27°12′13.86″ N, 92°12′09.36″ W. The area within 500 meters (1640.4 feet) from each point on the structure's outer edge is a safety zone. These coordinates are based upon [NAD 83].

(b) *Regulation.* No vessel may enter or remain in this safety zone except the following—

(1) An attending vessel;

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District.

Dated: October 6, 2003.

J.W. Stark,

Captain, U.S. Coast Guard, Acting Commander, 8th Coast Guard Dist.

[FR Doc. 04–1137 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 147

[CGD08–03–039]

RIN 1625–AA78

Safety Zone; Outer Continental Shelf Facility in the Gulf of Mexico for Mississippi Canyon 474

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes the establishment of a safety zone around a petroleum and gas production facility in Mississippi Canyon 474 "A" of the Outer Continental Shelf in the Gulf of Mexico while the facility is being constructed and after the construction is completed. The construction site and facility need to be protected from vessels operating outside the normal shipping channels and fairways, and placing a safety zone around this area would significantly reduce the threat of allisions, oil spills and releases of natural gas. The proposed rule would prohibit all vessels from entering or remaining in the specified area around the facility's location except for the following: An attending vessel; a vessel under 100 feet in length overall not engaged in towing; or a vessel authorized by the Eighth Coast Guard District Commander.

DATES: Comments and related material must reach the Coast Guard on or before March 22, 2004.

ADDRESSES: You may mail comments and related material to Commander, Eighth Coast Guard District (m), Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, or comments and related material may be delivered to Room 1341 at the same address between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–6271. Commander, Eighth Coast Guard District (m) 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 at the location listed above during the noted time periods.

FOR FURTHER INFORMATION CONTACT: Lieutenant (LT) Kevin Lynn, Project Manager for Eighth Coast Guard District Commander, Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, telephone (504) 589–6271.

SUPPLEMENTARY INFORMATION:

Requests for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD08–03–039], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not plan to hold a public meeting. However, you may submit a request for a meeting by writing to Commander, Eighth Coast Guard District (m) at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Coast Guard proposes the establishment of a safety zone around a petroleum and gas production facility in the Gulf of Mexico: Na Kika Floating Oil and Gas Development System (FDS), Mississippi Canyon 474 "A" (MC 474 "A"), located at position 28°31′14.86″ N, 88°17′19.69″ W. The proposed safety zone would be in effect while the facility is being constructed and after the construction is completed.

This proposed safety zone is in the deepwater area of the Gulf of Mexico. For the purposes of this regulation it is considered to be in waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles from the baseline from which the breadth of the sea is measured. Navigation in the area of the proposed safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area of the Gulf of Mexico also includes an extensive system of fairways. The fairways nearest the proposed safety zone include the South Pass (Mississippi River) to Mississippi River-Gulf Outlet Channel Fairway and Southwest Pass (Mississippi River) to South Pass (Mississippi River) Safety Fairway. Significant amounts of vessel traffic occur in or near the various fairways in the deepwater area.

Shell Exploration and Production Company, hereafter referred to as "Shell" has requested that the Coast Guard establish a safety zone in the Gulf of Mexico around the Na Kika FDS construction site and for the zone to remain in effect after construction is completed.

The request for the safety zone was made due to the high level of shipping activity around the site of the facility and the safety concerns for construction personnel, the personnel on board the facility after it is completed, and the environment. Shell indicated that the location, production level, and personnel levels on board the facility make it highly likely that any allision with the facility during and after construction would result in a catastrophic event.

The Coast Guard has evaluated Shell's information and concerns against Eighth Coast Guard District criteria developed to determine if an Outer Continental Shelf facility qualifies for a safety zone. We conclude that the risk of allision to the facility and the potential for loss of life and damage to the environment resulting from such an accident during and following the construction of Na Kika FDS warrants the establishment of this proposed safety zone. The proposed rule would significantly reduce the threat of allisions, oil spills, and natural gas releases and increase the safety of life, property, and the environment in the Gulf of Mexico. This proposed regulation is issued pursuant to 14 U.S.C. 85 and 43 U.S.C. 1333 as set out in the authority citation for 33 CFR part 147.

Discussion of Proposed Rule

Several factors were considered to determine the necessity of a safety zone for the Na Kika FDS construction site and for a safety zone to remain in effect after the facility is completed: (1) The construction site is located approximately 46 nautical miles east-southeast of the South Pass (Mississippi

River) to Mississippi River-Gulf Outlet Channel Fairway and Southwest Pass (Mississippi River) to South Pass (Mississippi River) Safety Fairway, (2) the facility will have a high daily production capacity of petroleum oil and gas per day; (3) the facility will be manned; (4) the facility will be a semi-submersible; and (5) the semi-submersible will be moored by a 16-line permanent mooring system.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full regulatory evaluation under the regulatory policies and procedures of DHS is unnecessary. The impacts on routine navigation are expected to be minimal because the proposed safety zone will not overlap any of the safety fairways within the Gulf of Mexico.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. Since the construction site for the Na Kika FDS is located far offshore, few privately owned fishing vessels and recreational boats/yachts operate in the area and alternate routes are available for those vessels. This proposed rule will not impact an attending vessel or vessels less than 100 feet in length overall not engaged in towing. Use of an alternate route may cause a vessel to incur a delay of 4 to 10 minutes in arriving at their destinations depending on how fast the vessel is traveling. Therefore, the Coast Guard expects the impact of this proposed rule on small entities to be minimal.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Kevin Lynn, Project Manager for Eighth Coast Guard District Commander, Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, telephone (504) 589–6271.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D, 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 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 this rule is not expected to result in any significant environmental impact as described in NEPA. A draft "Environmental Analysis

Check List" and a draft "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 147

Continental shelf, Marine safety, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 147 as follows:

PART 147—SAFETY ZONES

1. The authority citation for part 147 continues to read as follows:

Authority: 14 U.S.C. 85; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

2. Add § 147.833 to read as follows:

§ 147.833 Na Kika FDS Safety Zone.

(a) *Description.* Na Kika FDS, Mississippi Canyon 474 "A" (MC 474 "A"), located at position 28°31′14.86″ N, 88°17′19.69″ W. The area within 500 meters (1640.4 feet) from each point on the structure's outer edge is a safety zone. These coordinates are based upon [NAD 83].

(b) *Regulation.* No vessel may enter or remain in this safety zone except the following—

(1) An attending vessel;

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District.

Dated: October 6, 2003.

J.W. Stark,

Captain, U.S. Coast Guard, Commander, 8th Coast Guard Dist., Acting.

[FR Doc. 04–1141 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–15–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[SIP NO. SD–001–0016b; FRL–7606–7]

Approval and Promulgation of Air Quality Implementation Plans; State of South Dakota; Regulations for State Facilities in Rapid City

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of South Dakota on June 27, 2002. The June 27, 2002, submittal consists a revision to the administrative rules of South Dakota. These revisions add a new chapter to regulate fugitive emissions of particulate matter from State facilities and State contractors that conduct a construction activity or continuous operation activity in the Rapid City air quality control zone. The intended effect of this action is to make the revisions to the administrative rules of South Dakota federally enforceable. In the "rules and regulations" section of this **Federal Register**, EPA is approving the State's SIP revisions as a direct final rule without prior proposal because the Agency views these as noncontroversial SIP revisions and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Written comments must be received on or before February 19, 2004.

ADDRESSES: Written comments may be mailed to Richard R. Long, Director, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Comments may also be submitted electronically, or through hand delivery/courier. Please follow the detailed instructions (part (I)(B)(1)(i) through (iii) of the **SUPPLEMENTARY INFORMATION** section) described in the direct final rule which is located in the rules section of this **Federal Register**. Copies of the documents relevant to this action are available for public inspection Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays, at the Air and Radiation Program, Environmental Protection Agency, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Copies of the State documents relevant to this action are available for public inspection at the South Dakota Department of Environmental and Natural Resources, Air Quality Program, Joe Foss Building, 523 East Capitol, Pierre, South Dakota 57501.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, EPA, Region 8, 999 18th Street, Suite 300, Mailcode 8P–AR, Denver, Colorado 80202, (303) 312–6144, e-mail *dygowski.laurel@epa.gov.*

SUPPLEMENTARY INFORMATION: *See* the information provided in the direct final action of the same title which is located in the rules and regulations section of this **Federal Register**.

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

Dated: December 19, 2003.

Kerrigan G. Clough,

Acting Regional Administrator, Region 8.

[FR Doc. 04–1036 Filed 1–16–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7609–7]

Pennsylvania: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pennsylvania has applied to EPA for final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant final authorization to Pennsylvania. In the "Rules and Regulations" section of this **Federal Register**, EPA is authorizing the changes by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and we do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we receive written comments which oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. However, if we receive comments that oppose this action, or portions thereof, we will withdraw the relevant portions of the immediate final rule, and they will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment.

If you want to comment on this action, you must do so at this time.

DATES: Send your written comments by February 19, 2004.

ADDRESSES: Send written comments to Charles Bentley, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, Phone number: (215) 814–3379. Comments may also be submitted electronically to: *bentley.pete@epa.gov*, or by facsimile at (215) 814–3163. Comments in electronic format should identify this specific notice. You can view and copy Pennsylvania's application from 8 a.m. to 4:30 p.m., Monday through Friday at the following locations: Pennsylvania Department of Environmental Protection, Bureau of Land Recycling and Waste Management, P.O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105–8471, Phone number (717) 787–6239; Pennsylvania Department of Environmental Protection, Southwest Regional Office, 400 Waterfront Drive, Pittsburgh, PA 15222–4745, Phone number: (412) 442–4120; and EPA Region III, Library, 2nd Floor, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone number: (215) 814–5254. Persons with a disability may use the AT&T Relay Service to contact Pennsylvania Department of Environmental Protection by calling (800) 654–5984 (TDD users), or (800) 654–5988 (voice users).

FOR FURTHER INFORMATION CONTACT: Charles Bentley, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone number: (215) 814–3379.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the "Rules and Regulations" section of this **Federal Register**.

Dated: December 4, 2003.

James W. Newsom,

Acting Regional Administrator, EPA Region III.

[FR Doc. 04–1043 Filed 1–16–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 61, and 69

[CC Docket No. 96–128; DA 03–4027]

Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking; Comments requested.

SUMMARY: The Commission seeks comments on a Petition For Rulemaking or, in the Alternative, Petition To Address Referral Issues In A Pending Rulemaking (*Wright Petition*) filed in CC Docket 96–128. In the *Wright Petition*, "Petitioners request that the Commission prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems."

DATES: Comments are due on or before February 9, 2004, and reply comments are due on or before February 19, 2004.

ADDRESSES: Federal Communications Commission, Marlene H. Dortch, Office of the Secretary, 445 12th Street SW., TW–A325, Washington, DC 20554. *See* Supplementary Information for information on additional instructions for filing paper copies.

FOR FURTHER INFORMATION CONTACT: Joi Roberson Nolen, Wireline Competition Bureau, 202–418–1520.

SUPPLEMENTARY INFORMATION: On November 3, 2003, Martha Wright and other prison inmate and non-inmate petitioners (collectively, Petitioners) filed a Petition For Rulemaking or, in the Alternative, Petition To Address Referral Issues In A Pending Rulemaking (*Wright Petition*) with the Federal Communications Commission (Commission). In the *Wright Petition*, "Petitioners request that the Commission prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems." Petitioners support the *Wright Petition* with evidence that it is technically feasible to provide such interconnection and provide for all necessary security and other penological needs. Petitioners originally sought relief regarding this issue in *Wright, et al.* v. *Corrections Corporation of America, et al.*, which was referred to the Commission under the doctrine of primary jurisdiction. *See Wright* v. *Corrections Corp. of America*, C.A. No. 00–293 (GK) (D.D.C. Aug. 22, 2001). The Commission is currently examining long distance telephone service rates imposed on inmates and their families in an ongoing proceeding regarding the provision of inmate payphone service. *See* Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96–128, Order on Remand and Notice of Proposed Rulemaking, 67 FR 17039 (2002) (Inmate Payphone Rulemaking).

The *Wright Petition* contains assertions that are responsive to issues raised in the *Inmate Payphone Rulemaking*. Thus, the Commission will consider the *Wright Petition* as an *ex parte* presentation in the *Inmate Payphone Rulemaking*. The Commission seeks comment on the *Wright Petition* because it raises important issues to be considered in the *Inmate Payphone Rulemaking*. Interested parties may file comments regarding the *Wright Petition* February 9, 2004 of this public notice. Reply comments may be filed February 19, 2004 of this public notice. In filing their pleadings, parties should reference the following docket number: CC Docket 96–128.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 CFR 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

Filing Procedures. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998). Comments filed through ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/*. Commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing

the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street SW., Washington, DC 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th St. SW., Suite TW-A325, Washington, DC 20554.

Two (2) copies of the comments and reply comments should also be sent to Deena Shetler, Deputy Division Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–A221, Washington, DC 20554. Parties are also requested to send a courtesy copy via e-mail to Joi Nolen, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, at *joi.nolen@fcc.gov*.

Parties shall also serve one copy with Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 863–2893, or via email to *qualexint@aol.com*.

All documents in CC Docket No. 96–128, including the *Wright Petition* are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW., Room CY–A257, Washington, DC 20554. The documents may also be purchased from Qualex International, telephone (202) 863–2893, facsimile (202) 863–2898.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–1125 Filed 1–16–04; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 69, No. 12
Tuesday, January 20, 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

Forest Service

Bitterroot, Flathead and Lolo National Forests Land and Resource Management Plan Revision. Bitterroot, Flathead and Lolo National Forests Here Referred to as the Western Montana Planning Zone In Ravalli, Missoula, Mineral, Sanders, Lake, Flathead, Lincoln, Lewis and Clark, Granite, and Powell Counties, MT, and Idaho County, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Bitterroot, Flathead, and Lolo National Forests will prepare an Environmental Impact Statement (EIS) to document the analysis and disclose the potential environmental impacts of implementing the actions proposed in revision of the Land and Resource Management Plans for the Bitterroot, Flathead and Lolo National Forests. The proposal seeks to update forest plans and respond to six major needs for change. A Notice of Intent was published May 10, 2002, in the **Federal Register**, Vol. 67, No. 91, p. 31761. This is a revision of that notice in order to provide a detailed proposed action for public review and comment. The proposed action can be viewed at *http://www.fs.fed.us/rl/wmpz/.*

Public Involvement: The public is invited to comment on the Proposed Action at any point during the 90-day comment period beginning on January 23, 2004 and ending on April 22, 2004. To get on the mailing list contact Amy Lehtola at phone number (406) 363–7191, or e-mail: *alehtola@fs.fed.us.*

DATES: Initial comments concerning the proposed action should be received in writing, no later than 90 days from the publication of this notice of intent.

ADDRESSES: Please send comments to: Western Montana Planning Zone Revision Team, Lolo National Forest, Building 24, Fort Missoula, Missoula, MT 59804. Written comments may also be electronically submitted to *wmpz@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Lee Kramer, Interdisciplinary Team Leader, Lolo National Forest, Fort Missoula, Bldg. 24, Missoula, MT 59804, phone number (406) 329–3848 or e-mail *lkramer@fs.fed.us.*

Responsible Official: Bradley E. Powell, Regional Forester, Northern Region, 200 E. Broadway, Missoula, MT 59807.

SUPPLEMENTARY INFORMATION: We are revising the original Notice of Intent, [**Federal Register**, Vol. 67, No. 91, page 31761, May 10, 2002] in order to provide a proposed action for public review and comment. The proposed action focuses on six major revision topics identified in the Analysis of the Management Situation (AMS): (1) Access Management, (2) Ecosystem Management, (3) Forest and Private Land Interface, (4) Forest Products, (5) Recreation and Outfitter Guide Management, and (6) Recommended Wilderness and Roadless Areas. The proposed action will also address management of dams in the Selway Bitterroot Wilderness. Proposed actions relating to the Bob Marshall Wilderness Complex, jointly managed by the Flathead, Lolo, Lewis and Clark, and Helena National Forests, may also be included under this analysis. The Analysis of the Management Situation and other supporting documents can be viewed at *http://www.fs.fed.us/rl/wmpz/.* We are coordinating efforts with Tribal and other governments, Bureau of Land Management, U.S. Fish and Wildlife Service, Montana Fish, Wildlife, and Parks as well as with County Commissioners. The following public meetings have been scheduled to aid people in understanding the proposal:

Date	Time	Place
February 17, 2004	6 to 8 p.m.	Holiday Inn Parkside, Missoula, Montana.
February 18, 2004	7 to 9 p.m.	Community Center, Seeley Lake, Montana.
February 19, 2004	6:30 to 8:30 p.m.	Superior High School, Superior, Montana.
February 23, 2004	6:30 to 8:30 p.m.	Frenchtown High School, Ninemile, Montana.
February 25, 2004	6:30 to 8:30 p.m.	Fairgrounds, Sanders County, Plains, Montana.
February 26, 2004	1 to 8 p.m.	West Coast Hotel, Kalispell, Montana.
March 1, 2004	TBA*	Stevensville, Montana.
March 2, 2004	TBA*	Hamilton, Montana.
March 3, 2004	TBA*	Darby, Montana.
March 4, 2004	TBA*	Sula/West Fork, Montana.

TBA*: Meeting time and location to be announced.

To assist the Forest Service with identification and consideration of issues and concerns regarding the proposed action, comments should be in writing and as specific as possible. It is also helpful if comments refer to specific pages or sections of the proposed action. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementation of procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3.

Additional public comment will be accepted after publication of the DEIS anticipated by March 2005. The Final EIS and Records of Decision for the Revised Forest Plans are expected in 2006.

Dated: January 13, 2004.

Bradley E. Powell,

Regional Forester.

[FR Doc. 04–1088 Filed 1–16–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers Used for Publication of Legal Notice of Appealable Decisions for the Northern Region; Idaho, Montana, North Dakota, and Portions of South Dakota and Eastern Washington

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that will be used by all Ranger Districts, Forests, Grasslands, and the Regional Office of the Northern Region to publish legal notices for public comment and decisions subject to appeal and predecisional administrative review under 36 CFR parts 215, 217, and 218. The intended effect of this action is to inform interested members of the public which newspapers will be used to publish legal notices for public comment or decisions; thereby allowing them to receive constructive notice of a decision, to provide clear evidence of timely notice, and to achieve consistency in administering the appeals process.

DATES: Publication of legal notices in the listed newspapers will begin with decisions subject to appeal that are made on or after January 15, 2004. The list of newspapers will remain in effect until another notice is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Appeals and Litigation Group Leader; Northern Region; P.O. Box 7669; Missoula, Montana 59807. Phone: (406) 329–3696.

The newspapers to be used are as follows:

Northern Regional Office

Regional Forester decisions in Montana: The Missoulian, Great Falls Tribune, and The Billings Gazette.
Regional Forester decisions in Northern Idaho and Eastern Washington: The Spokesman Review and Lewiston Morning Tribune.
Regional Forester decisions in North Dakota: Bismarck Tribune.
Regional Forester decisions in South Dakota: Rapid City Journal.
Beaverhead/Deerlodge—Montana Standard
Bitterroot—Ravalli Republic
Clearwater—Lewiston Morning Tribune
Custer—Billings Gazette (Montana) Rapid City Journal (South Dakota)
Dakota Prairie National Grasslands—Bismarck Tribune (North and South Dakota)
Flathead—Daily Inter Lake
Gallatin—Bozeman Chronicle
Helena—Independent Record
Idaho Panhandle—Spokesman Review
Kootenai—Daily Inter Lake
Lewis & Clark—Great Falls Tribune
Lolo—Missoulian
Nez Perce—Lewiston Morning Tribune

Supplemental notices may be placed in any newspaper, but time frames/deadlines will be calculated based upon notices in newspapers of record listed above.

Dated: January 7, 2004.

Kathleen A. McAllister,

Deputy Regional Forester.

[FR Doc. 04–1090 Filed 1–16–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tuolumne County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tuolumne County Resource Advisory Committee will meet on January 26, 2004, at the City of Sonora Fire Department, in Sonora, California. The purpose of the meeting is to review project status and define work for 2004.

DATES: The meeting will be held January 26, 2004, from 12 p.m. to 3 p.m.

ADDRESSES: The meeting will be held at the City of Sonora Fire Department located at 201 South Shepherd Street, in Sonora, California (CA 95370).

FOR FURTHER INFORMATION CONTACT: Pat Kaunert, Committee Coordinator, USDA, Stanislaus National Forest, 19777 Greenley Road, Sonora, CA 95370 (209) 532–3671; e-mail *pkauner@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Review, propose, and vote on changes to the Highway 108 Corridor Cooperative Fire Defense Coordinator position, formerly approved on August 19, 2002; (2) Consider possible spring 2004 field trips; (3) Discuss ways and means of monitoring the status of funded projects; (4) Coordinate public information to solicit new projects for consideration in funding year 2004; (5) Report out on November 13, 2003 statewide RAC meeting; (6) Public Comments. This meeting is open to the public.

Dated: January 12, 2004.

Tom Quinn,

Forest Supervisor.

[FR Doc. 04–1087 Filed 1–16–04; 8:45 am]

BILLING CODE 3410–ED–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Texas Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a conference call of the Texas State Advisory Committee in the Western Region will convene at 1 p.m. (PST) and adjourn at 2:30 p.m., Friday, February 13, 2004. The purpose of the conference call is to discuss Committee activities and priorities.

This conference call is available to the public through the following call-in number: 1–800–659–8292, access code number 21317219. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls not initiated using the provided call-in number or over wireless lines and the Commission will not refund any incurred charges. Callers will incur no charge for calls using the call-in number over land-line connections. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and access code.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Thomas Pilla of the Western Regional Office, (213) 894–3437, by 3:00 p.m. on Thursday, February 12, 2004.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, January 12, 2004.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 04–1113 Filed 1–16–04; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of all State Advisory Committee Chairpersons in the Western Region

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Chairpersons of each advisory committee in the Western Region

(Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Texas and Washington) to the Commission will convene at 1 p.m. (Pacific standard time) and adjourn at 2 p.m., on January 23, 2004. The purpose of the conference call is to discuss state advisory committee activities and priorities with the nine chairpersons of the Western Region.

The conference call is available to the public through the following call-in number 1–800–659–8294, access code number 21288915. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls not initiated using the provided call-in number or over wireless lines and the Commission will not refund any incurred charges. Callers will incur no charge for calls using the call-in number over land-line connections. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and access code.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Thomas Pilla of the Western Regional Office, (213) 894–3437, by 3 p.m. on Thursday, January 22, 2004.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, January 12, 2004.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 04–1108 Filed 1–16–04; 8:45 am]

BILLING CODE 6335–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting Office

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, February 6, 2004.

PLACE: 1155 21st St., NW., Washington, DC, Room 1012.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–1186 Filed 1–15–04; 11:22 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting Office

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, February 13, 2004.

PLACE: 1155 21st St., NW., Washington, DC, Room 1012.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–1187 Filed 1–15–04; 11:22 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, February 20, 2004.

PLACE: 1155 21st St., Washington, DC, Room 1012.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, (202) 418-5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–1188 Filed 1–15–04; 11:22 am]

BILLING CODE 6351 01 M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, February 27, 2004.

PLACE: 1155 21st St., Washington, DC, Room 1012.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–1189 Filed 1–15–04; 11:22 am]

BILLING CODE 6351–01–M

UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Uniformed Services University of the Health Sciences.

TIME AND DATE: 8 a.m. to 4 p.m., February 3, 2004.

PLACE: Uniformed Services University of the Health Sciences, Board of Regents Conference Room (D3001), 4301 Jones Bridge Road, Bethesda, MD 20814–4799

STATUS: Open—under "Government in the Sunshine Act" (5 U.S.C. 552b(e)(3)).

MATTERS TO BE CONSIDERED:

8 a.m. Meeting—Board of Regents

(1) Approval of Minutes—November 4, 2003
(2) Faculty Matters
(3) Departmental Reports
(4) Financial Report
(5) Report—President, USUHS
(6) Report—Dean, School of Medicine
(7) Report—Dean, Graduate School of Nursing
(8) Comments—Chairman, Board of Regents
(9) New Business

FOR FURTHER INFORMATION CONTACT: Mr. Charles R. Mannix, Executive Secretary, Board of Regents, (301) 295–3981.

Dated: January 14, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–1260 Filed 1–15–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 19, 2004.

ADDRESSES: Written comments should be addressed to the Office of

Information and Regulatory Affairs, Attention: Melanie Kadlic, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the Internet address *Melanie_Kadlic@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: January 14, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Vocational and Adult Education

Type of Review: Revision.
Title: America's Career Resource Network State Grant Annual Performance Report.
Frequency: Semi-Annually.
Affected Public:
State, Local, or Tribal Gov't, SEAs or LEAs; individuals or household, not-for-profit institutions.
Reporting and Recordkeeping Hour Burden:
Responses: 59.
Burden Hours: 708.
Abstract: Section 118(e) of the Carl D. Perkins Vocational and Technical Education Act requires the Department of Education to report annually to Congress concerning activities carried out by States with grant funds awarded under section 118. This collection solicits information from grantees necessary to fulfill this requirement, as well as to support the Department's monitoring and technical assistance activities.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2371. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivan.reese@ed.gov*. Requests may also be electronically mailed to the internet address OCIO_RIMG@ed.gov or faxed to (202) 708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Shelia Carey at her e-mail address *Shelia Carey@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–1119 Filed 1–16–04; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Strengthening Institutions, American Indian Tribally Controlled Colleges and Universities, and Alaska Native and Native Hawaiian-Serving Institutions; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.031A, 84.031T, 84.031N and 84.031W.

DATES: *Applications Available:* January 16, 2004.
Deadline for Transmittal of Applications: February 27, 2004.
Deadline for Intergovernmental Review: April 27, 2004.
Eligible Applicants: Institutions of higher education that qualify as eligible institutions under the Strengthening Institutions (SIP), American Indian Tribally Controlled Colleges and Universities (TCCU), and Alaska Native and Native Hawaiian-Serving Institutions (ANNH) Programs may apply for grants under this notice. These programs are known collectively as the Title III, Part A Programs. To qualify as an eligible institution under any Title III, Part A Program, an institution must, among other requirements, be accredited or preaccredited, have a high enrollment of needy students, and have Educational and General (E&G) expenditures per full-time equivalent (FTE) undergraduate student that are low in comparison with the average E&G expenditures per FTE undergraduate student of institutions that offer similar instruction. The eligibility requirements are set forth in a Notice Inviting Applications for Designation as Eligible Institutions for Fiscal Year 2004 that was published in the **Federal Register** on December 9, 2003 (68 FR 68614) and in program regulations contained in 34 CFR 607.2 through 607.5. The regulations may be accessed by visiting the following Department of Education Web site: *http://www.ed.gov/news/fedregister*.

Relationship Between Title III, Part A and Hispanic Serving Institution Programs

Notes: 1. A grantee under the Developing Hispanic-Serving Institutions (HSI) Program, authorized under Title V of the Higher Education Act of 1965, as amended (HEA), may not receive a grant under any Title III, Part A Program. Further, a current Developing HSI Program grantee may not give up its grant under the Developing HSI Program in order to receive a grant under any Title III, Part A Program.

2. An institution that does not fall within the limitation described in Note 1 may apply for a FY 2004 grant under all Title III, Part A Programs for which it is eligible, as well as under the Developing HSI Program. However, a successful applicant may receive only one grant.

Estimated Available Funds: Although Congress has not enacted a final appropriation for FY 2004, the Department is inviting applications for this competition now so that it may be prepared to make awards following final action on the Department's appropriations bill. Based on the Congressional action to date, we estimate $5.0 million for new awards under the ANNH Program, $15.541 million for new awards under the TCCU Program and $20.023 million for new awards under the SIP.

For specific funding information, see the chart in the Award Information section of this notice.

Estimated Range of Awards: See chart.

Estimated Average Size of Awards: See chart.

Estimated Number of Awards: See chart.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the Title III, Part A Web

site for further information on these programs. The address is: *http://www.ed.gov/programs/iduestitle3a/index.html.*

Project Period: 60 months for individual development grants, 60 months for cooperative arrangement grants, 12 months for planning grants and 12 months for construction grants.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The SIP, TCCU, and ANNH Programs are all authorized under Title III, Part A of the HEA. Each provides grants to eligible institutions of higher education to enable them to improve their academic quality, institutional management, and fiscal stability, and increase their self-sufficiency.

Program Authority: 20 U.S.C. 1057–1059d.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 607.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: Although Congress has not enacted a final appropriation for FY 2004, the Department is inviting applications for this competition now so that it may be prepared to make awards following final action on the Department's appropriations bill. Based on the Congressional action to date we estimate $5.0 million for new awards under the ANNH Program, $15.541 million for new awards under the TCCU Program and $20.023 million for new awards under the SIP.

Estimated Range of Awards: See chart.

Estimated Average Size of Awards: See chart.

Estimated Number of Awards: See chart.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the TitleIII, Part A Web site for further information on these programs. The address is: *http://www.ed.gov/programs/iduestitle3a/index.html.*

Project Period: 60 months for individual development grants, 60 months for cooperative arrangement grants, 12 months for planning grants and 12 months for construction grants.

Program Name	Estimated Range of Awards	Estimated Average Size of Awards	Estimated Number of Awards
Alaska Native and Native Hawaiian Program			
--5-year Individual Development Grants (84.031N and 84.031W)	$350,000-$500,000 per year	$500,000 per year	10
Tribally Controlled Colleges and Universities Program (84.031T)			
--5-year Individual Development Grants	$350,000-$500,000 per year	$395,000 per year	10
--Construction and Renovation Grants	$1,000,000-$2,500,000	$1,287,880	9
Strengthening Institutions Program (83.031A)			
--5-year Individual Development Grant	$330,000-$365,000 per year	$351,332 per year	52
Planning Grants Under any Title III, Part A Program	$30,000-$35,000 for 1 year	$35,000 for 1 year	20
Cooperative Arrangement Grants Under any Title III, Part A Program	$395,000-$500,000	$351,332 per year	3

III. Eligibility Information

Eligible Applicants: Institutions of higher education that qualify as eligible institutions under the SIP, TCCU, and ANNH programs may apply for grants under this notice. These programs are known collectively as the Title III, Part A Programs. To qualify as an eligible institution under any Title III, Part A Program, an institution must, among other requirements, be accredited or preaccredited, have a high enrollment of needy students, and have E&G expenditures per FTE undergraduate student that are low in comparison with the average E&G expenditures per FTE undergraduate student of institutions that offer similar instruction. The eligibility requirements are set forth in a Notice Inviting Applications for Designation as Eligible Institutions for

Fiscal Year 2004 that was published in the **Federal Register** on December 9, 2003 (68 FR 68614), and in program regulations contained in 34 CFR 607.2 through 607.5. The regulations may be accessed by visiting the following Department of Education Web site: *http://www.ed.gov/news/fedregister.*

Notes: 1. A grantee under the Developing HSI Program, authorized under Title V of the HEA, may not receive a grant under any Title III, Part A Program. Further, a current Developing HSI Program grantee may not give up its grant under the Developing HSI Program in order to receive a grant under any Title III, Part A Program.

2. An institution that does not fall within the limitation described in Note 1 may apply for a FY 2004 grant under all Title III, Part A Programs for which it is eligible, as well as under the Developing HSI Program. However, a successful applicant may receive only one grant.

1. *Cost Sharing or Matching:* There are no cost sharing or matching requirements in any Title III, Part A Programs unless a grantee under the SIP or TCCU Program uses a portion of its grant for establishing or improving an endowment fund. If it does, it must match with non-Federal funds the amount of grant funds used for this purpose. 20 U.S.C. 1057(d)(2) and 1059c (c)(3)(B).

IV. Application and Submission Information

1. *Address to Request Application Package:* Louis J. Venuto, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8513. Telephone: (202) 502–7777 or via Internet: *Louis.Venuto@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the contact person listed in this section. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: We have established mandatory page limits for the applications to be submitted under this notice. You must limit your entire application to the equivalent of no more than 80 pages for an individual development grant under the SIP; 80 pages for an individual development grant under ANNH; 80 pages for an individual development grant and a construction and renovation grant under the TCCU Program; 100 pages for the cooperative arrangement development grant under the Title III, Part A Programs and 30 pages for the planning grant under the Title III, Part A Programs, using the following standards:

- A "page" is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles and headings. You may single space abstracts, footnotes, quotations, references, captions, tables and forms (including the ED Forms), however, you must still use font size 12.
- Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch). The page limit applies to all parts of the application.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: January 16, 2004.

Deadline for Transmittal of Applications: February 27, 2004.

Deadline for Intergovernmental Review: April 27, 2004.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR 607.10. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Instructions and requirements for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this program.

Application Procedures: The Government Paperwork Elimination Act (GPEA) of 1998 (Pub. L. 105–277) and the Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106–107) encourage us to undertake initiatives to improve our grant processes. Enhancing the ability of individuals and entities to conduct business with us electronically is a major part of our response to these Acts. Therefore, we are taking steps to adopt the Internet as our chief means of conducting transactions in order to improve services to our customers and to simplify and expedite our business processes.

Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

We are requiring that applications for grants for FY 2004 under Title III, Part A Programs—CFDA Numbers 84.031A, 84.031N, 84.031T and 84.031W be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system. The e-GRANTS system is accessible through its portal page at: *http://e-grants.ed.gov.*

If you are unable to submit an application through the e-GRANTS system, you may submit a written request for a waiver of the electronic submission requirement. In your request, you should explain the reason or reasons that prevent you from using the Internet to submit the application. Address your request to: Louis J. Venuto, U.S. Department of Education, 1990 K. Street, NW., 6th Floor, room 6071, Washington, DC 20006–8513. Please submit your request no later than two weeks before the application deadline date.

If, within two weeks of the application deadline date, you are unable to submit an application electronically, you must submit a paper application by the application deadline date in accordance with the transmittal instructions in the application package. The paper application must include a written request for a waiver documenting the reasons that prevented you from using the Internet to submit your application.

Pilot Project for Electronic Submission of Applications

We are continuing to expand our pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The Title III, Part A Programs—CFDA

Numbers 84.031A, 84.031N, 84.031T, and 84.031W are included in the pilot project. If you are an applicant under Title III, Part A Programs, you must submit your application to us in electronic format or receive a waiver.

The pilot project involves the use of e-Application. If you use e-Application, you will be entering data online while completing your application. You may not e-mail a soft copy of a grant application to us. The data you enter online will be saved into a database. We shall continue to evaluate the success of e-Application and solicit suggestions for its improvement.

If you participate in e-Application, please note the following:

- When you enter the e-Application system, you will find information about its hours of operation. We strongly recommend that you do not wait until the application deadline date to initiate an e-Application package.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524, and all necessary assurances and certifications.
- Your e-Application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Education Assistance (ED 424) to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.
2. The institution's Authorizing Representative must sign this form.
3. Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.
4. Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you are prevented from submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an e-Application for this competition; and
2. (a) The e-Application system must be unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system must be unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 and 4:30 p.m., Washington, DC time) on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for Title III, Part A Programs at: *http://e-grants.ed.gov.*

V. Application Review Information

1. *Selection Criteria:* The selection criteria for these programs are in 34 CFR 607.21 and 607.22.

2. *Review and Selection Process:* Additional factors we consider in selecting an application for an award are the tie-breaking situations described in 34 CFR 607.23. The Title III, Part A Program regulations require that we award one additional point to an application from an institution of higher education (IHE) that has an endowment fund for which the 2000–2001 market value per FTE student was less than the comparable average per FTE student at a similar type IHE. We also award one additional point to an application from an IHE that had expenditures for library materials in 2000–2001 per FTE student that were less than the comparable average per FTE student at a similar type IHE.

For the purpose of these funding considerations, an applicant must demonstrate that the market value of its endowment fund per FTE student and library expenditures per FTE student, were less than the average expenditure per FTE student when calculated using the data submitted by applicants for the year 2000–2001.

If a tie remains, after applying the additional point(s) we will determine the ranking of applicants based on the lowest combined library expenditures per FTE student and endowment values per FTE student.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118 and 607.31.

4. Performance Measures: The Secretary has established the following key performance measures for assessing the effectiveness of the Title III, Part A Programs: (1) The percentage of Title III, Part A project goals relating to the improvement of academic quality that are met or exceeded will increase or be maintained over time. (2) The percentage of Title III, Part A goals relating to the improvement of student services and student outcomes that are met or exceeded will increase or be maintained over time. (3) The percentage of Title III, Part A project goals relating to the improvement of institutional management and fiscal stability that are met or exceeded will increase or be maintained over time.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Louis J. Venuto, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8513. Telephone: (202) 502–7777 or by email: *Louis.Venuto@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call

the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: January 14, 2004.

Sally L. Stroup,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 04–1139 Filed 1–14–04; 3:00 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Developing Hispanic-Serving Institutions Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Catalog of Federal Domestic Assistance (CFDA) Number: 84.031S.

DATES: *Applications Available:* January 16, 2004.

Deadline for Transmittal of Applications: March 3, 2004.

Deadline for Intergovernmental Review: May 3, 2004.

Eligible Applicants: Except as noted below, institutions of higher education that qualify as eligible Hispanic-Serving Institutions are eligible to apply for new Individual Development Grants and Cooperative Arrangement Development Grants under the Developing Hispanic-Serving Institutions Program. The requirements for satisfying the definition of an eligible "Hispanic-Serving Institution" (HSI) are set forth in the Notice Inviting Applications for Designation as Eligible Institutions for Fiscal Year 2004 that was published in the **Federal Register** on December 9, 2003 (68 FR 68614). The complete HSI eligibility requirements are contained in 34 CFR 606.2 through 606.5 and can be accessed from the following Web site: *http://www.ed.gov/news/fedregister.*

Relationship Between HSI and Title III, Part A Programs

Notes: 1. A grantee under the Developing HSI Program, authorized under Title V of the Higher Education Act of 1965, as amended (HEA), may not receive a grant under any Title III, Part A Program. The Title III, Part A Programs include the Strengthening Institutions, American Indian Tribally Controlled Colleges and Universities, and Alaska Native and Native Hawaiian-Serving Institutions Programs. Further, a current Developing HSI Program grantee may not give up its grant in order to receive a grant under any Title III, Part A Program.

2. An HSI that does not fall within the limitation described in Note 1 may apply for a FY 2004 grant under all Title III, Part A Programs for which it is eligible, as well as under the Developing HSI Program. However, a successful applicant may receive only one grant.

Estimated Available Funds: Although Congress has not enacted a final appropriation for FY 2004, the Department is inviting applications for this competition now so that it may be prepared to make awards following final action on the Department's appropriations bill. Based on the Congressional action to date, we estimate $17.776 million will be available for new awards under this program for FY 2004. The actual level of funding, if any, depends on final congressional action.

Estimated Range of Awards: $475,000–$700,000.

Estimated Average Size of Awards: Individual Development Grant: $475,000 per year. Cooperative Arrangement Development Grant: $650,000 per year.

Estimated Number of Awards: Individual Development Awards: 26. Cooperative Arrangement Development Awards: 8.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the HSI Program Web site for further information. The address is: *http://www.ed.gov/programs/idueshsi/index.html.*

Project Period: Up to 60 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Developing HSI Program assists HSIs in expanding their capacity to serve Hispanic and low-income students by enabling them to improve their academic quality, institutional management, and fiscal stability and to increase their self-sufficiency.

Priorities: This competition includes two competitive preference priorities taken from the statute for this program and four invitational priorities. These priorities are as follows:

In accordance with 34 CFR 75.105(b)(2)(iv), the following priorities are from sections 511(d) and 514(b) of the HEA.

Competitive Preference Priorities: For FY 2004, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(ii) we give preference to an application that meets these priorities over an application of comparable merit that does not meet the priorities.

These priorities are:

Competitive Preference Priority 1: Section 511(d) of the HEA provides that we must give priority to applications for development grants that contain satisfactory evidence that the HSI has entered into, or will enter into, a collaborative arrangement with at least one local educational agency or community-based organization to provide that agency or organization with assistance (from funds other than funds provided under Title V of the HEA) in reducing dropout rates for Hispanic students, improving rates of academic achievement for Hispanic students, and increasing the rates at which Hispanic secondary school graduates enroll in higher education.

Competitive Preference Priority 2: Section 514(b) of the HEA provides that we must give priority to applications for cooperative arrangement grants that are geographically and economically sound or will benefit the applicant HSI.

We are particularly interested in applications that address the following invitational priorities with respect to cooperative arrangement grant applications only.

Invitational Priorities: Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1

Cooperative arrangements between two-year and four-year institutions that aim to increase the transfer of Hispanic students from two-year to four-year institutions and the retention of Hispanic students at the four-year institutions.

Invitational Priority 2

Cooperative arrangements between institutions that develop and share

technological resources in order to enhance each institution's ability to serve the needs of low-income communities or Hispanic populations.

Invitational Priority 3

Cooperative arrangements between institutions where one of the institutions in the arrangement is not a current grantee under the Developing HSI Program.

Invitational Priority 4

Cooperative arrangements that include institutions from more than one university or college system.

Program Authority: 20 U.S.C. 1101–1101d, 1103–1103g.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 606.

II. Award Information

Type of Award: Discretionary grant. Five-year Individual Development Grants and Cooperative Arrangement Development Grants will be awarded in FY 2004. Planning grants will not be awarded in FY 2004.

Estimated Available Funds: Although Congress has not enacted a final appropriation for FY 2004, the Department is inviting applications for this competition now so that it may be prepared to make awards following final action on the Department's appropriations bill. Based on the Congressional action to date, we estimate $17.776 million will be available for new awards under this program for FY 2004. The actual level of funding, if any, depends on final congressional action.

Estimated Range of Awards: $475,000–$700,000.

Estimated Average Size of Awards: Individual Development Grant: $475,000 per year. Cooperative Arrangement Development Grant: $650,000 per year.

Estimated Number of Awards: Individual Development Awards: 26. Cooperative Arrangement Development Awards: 8.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the HSI Program Web site for further information. The address is: *http://www.ed.gov/programs/idueshsi/index.html.*

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Except as noted below, institutions of higher education that qualify as eligible HSI are eligible to apply for new Individual Development Grants and Cooperative Arrangement Development Grants under the Developing HSI Program. The requirements for satisfying the definition of an eligible HSI are set forth in the Notice Inviting Applications for Designation as Eligible Institutions for Fiscal Year 2004 that was published in the **Federal Register** on December 9, 2003 68 FR 68614. The complete HSI eligibility requirements are contained in 34 CFR 606.2 through 606.5 and can be accessed from the following Web site: *http://www.ed.gov/news/fedregister.*

Relationship between HSI and Title III, Part A Programs

Notes: 1. A grantee under the Developing HSI Program, authorized under the HEA, may not receive a grant under any Title III, Part A Program. The Title III, Part A Programs include the Strengthening Institutions, American Indian Tribally Controlled Colleges and Universities, and Alaska Native and Native Hawaiian-Serving Institutions Programs. Further, a current Developing HSI Program grantee may not give up its grant in order to receive a grant under any Title III, Part A Program.

2. An HSI that does not fall within the limitation described in Note 1 may apply for a FY 2004 grant under all Title III, Part A Programs for which it is eligible, as well as under the Developing HSI Program. However, a successful applicant may receive only one grant.

Cost Sharing or Matching: There are no cost sharing or matching requirements unless the grantee uses a portion of its grant for establishing or improving an endowment fund. If it does, it must match with non-Federal funds the amount of grant funds used for this purpose. (20 U.S.C. 1101c).

IV. Application and Submission Information

1. *Address to Request Application Package:* Darlene Collins, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8513. Telephone: (202) 502–7576 or by e-mail: *Darlene.Collins@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: We have established mandatory page limits for both the Individual Development Grant and the Cooperative Arrangement Development Grant applications. You must limit your entire application to the equivalent of no more than 85 pages for the Individual Development Grant and 120 pages for the Cooperative Arrangement Development Grant, using the following standards:

- A "page" is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles and headings. You may single space the abstract, footnotes, quotations, references, captions, tables, and forms (including the ED Forms), however, you must still use font size 12.
- Use a font that is size 12.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: January 16, 2004.

Deadline for Transmittal of Applications: March 3, 2004.

The dates and times for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this program. The application package also specifies the hours of operation of the e-Application Web site.

We do not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: May 3, 2004.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable activities in 34 CFR 606.10. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Instructions and requirements for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the

application package for this program. Application Procedures: The Government Paperwork Elimination Act (GPEA) of 1998 (Pub. L. 105–277) and the Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106–107) encourage us to undertake initiatives to improve our grant processes. Enhancing the ability of individuals and entities to conduct business with us electronically is a major part of our response to these Acts. Therefore, we are taking steps to adopt the Internet as our chief means of conducting transactions in order to improve services to our customers and to simplify and expedite our business processes.

Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

We are requiring that applications for grants under the Developing HSI Program—CFDA Number 84.031S be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system. The e-GRANTS system is accessible through its portal page at: *http://e-grants.ed.gov.*

If you are unable to submit an application through the e-GRANTS system, you may submit a written request for a waiver of the electronic submission requirement. In your request, you should explain the reason or reasons that prevent you from using the Internet to submit your application. Address your request to: Darlene Collins, U.S. Department of Education, 1990 K Street, NW., room 6032, Washington, DC 20006–8513. Please submit your request no later than two weeks before the application deadline date.

If, within two weeks of the application deadline date, you are unable to submit an application electronically, you must submit a paper application by the application deadline date in accordance with the transmittal instructions in the application package. The paper application must include a written request for a waiver documenting the reasons that prevented you from using the Internet to submit your application.

Pilot Project for Electronic Submission of Applications: We are continuing to expand our pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The Developing HSI Program—CFDA Number 84.031S is one of the programs included in the pilot project. If you are an applicant under the Developing HSI Program, you must submit your application to us in electronic format or receive a waiver.

The pilot project involves the use of e-Application. If you use e-Application, you will be entering data online while completing your application. You may not e-mail an electronic copy of a grant application to us. The data you enter online will be saved into a database. We shall continue to evaluate the success of e-Application and solicit suggestions for its improvement.

If you participate in e-Application, please note the following:

- When you enter the e-Application system, you will find information about its hours of operation. We strongly recommend that you do not wait until the application deadline date to initiate an e-Application package.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Your e-Application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Education Assistance (ED 424) to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.
2. The institution's Authorizing Representative must sign this form.
3. Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.
4. Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you are prevented from submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an e-Application for this competition; and

2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time) on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for the Developing HSI Program at: *http://e-grants.ed.gov.*

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are in 34 CFR 606.21 and 606.22.

2. *Review and Selection Process:* Additional factors we consider in selecting an application for an award are as follows: In tie-breaking situations described in 34 CFR 606.23, the HSI Program regulations require that we award one additional point to an application from an IHE that has an endowment fund for which the 2000–2001 market value per full-time equivalent (FTE) student was less than the comparable average per FTE student at a similar type IHE. We also award one additional point to an application from an IHE that had expenditures for library materials in 2000–2001 per FTE student that were less than the comparable average per FTE student at a similar type IHE.

For the purpose of these funding considerations, an applicant must be able to demonstrate that the market

value of its endowment fund per FTE student and library expenditures per FTE student were less than the average expenditure per FTE student when calculated using the data submitted by applicants for the year 2000–2001.

If a tie still remains after applying the additional point(s), we will determine the ranking of applicants based on the lowest combined library expenditures per FTE student and endowment values per FTE student.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118, 34 CFR 75.720 and in 34 CFR 606.31.

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the Developing HSI Program: (1) The percentage of Title V project goals relating to the improvement of academic quality that are met or exceeded will increase or be maintained over time. (2) The percentage of Title V project goals relating to the improvement of student services and student outcomes that are met or exceeded will increase or be maintained over time. (3) The percentage of Title V project goals relating to the improvement of institutional management and fiscal stability that are met or exceeded will increase or be maintained over time.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Darlene Collins, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8513. Telephone: (202) 502–7576 or by e-mail: *Darlene.Collins@ed.gov.*

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Dated: January 14, 2004.

Sally L. Stroup,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 04–1140 Filed 1–14–04; 3:00 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF04–5182–000, et al.]

United States Department of Energy, et al.; Electric Rate and Corporate Filings

January 12, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. United States Department of Energy—Western Area Power Administration

[Docket No. EF04–5182–000]

Take notice that on January 2, 2004, as amended on January 8, 2004, the Deputy Secretary of the Department of Energy, by Rate Order No. WAPA–106, did confirm and approve on an interim basis, to be effective on March 1, 2004, ending February 28, 2009, the Western Area Power Administration's Rate Schedules L–NT1, L–FPT1, L–NFPT1, L–AS1, L–AS2, L–AS3, L–AS4, L–AS5, L–AS6, and L–AS7 for Loveland Area Projects Transmission and Ancillary Services.

The Deputy Secretary of the Department of Energy states that these rates will be in effect pending the Federal Energy Regulatory Commission's (Commission) approval of these or of substitute rates on a final basis through February 28, 2009.

Comment Date: January 23, 2004.

2. PJM Interconnection, L.L.C.

[Docket No. EL02–111–010]

Take notice that on January 2, 2004, PJM Interconnection, L.L.C. (PJM), in compliance with the Commission's November 17 Order in Docket No. EL01–111–004, *et al.*, 105 FERC 61,212 (2003), on behalf of itself and the Transmission Owners Agreement Administrative Committee, filed revisions to the PJM Open Access Transmission Tariff, to eliminate through-and-out rates for transactions sinking within the Combined Region, as defined in the November 17 Order, other than transactions pursuant to long-term firm transmission reservations effective before April 1, 2004. PJM states that the compliance tariff sheets have an effective date of April 1, 2004, as established by the November 17 Order.

PJM states that copies of this filing have been served on all PJM members and utility regulatory commissions in the PJM Region and on all parties listed on the official service list compiled by the Secretary in this proceeding.

Comment Date: January 23, 2004.

3. Midwest Independent Transmission System Operator, Inc.

[Docket Nos. EL02–111–011]

Take notice that on January 2, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), pursuant to the Commission's November 17, 2003, Order in Docket No. EL02–111–004, *et al.*, submitted for filing revisions to its Open Access Transmission Tariff (OATT) to eliminate certain Regional Through and Out Rates (RTORs) for new transactions sinking in the areas served by the tariffs of the

Midwest ISO, PJM Interconnection L.L.C. (PJM), American Electric Power System (AEP) (but only for transactions in the "AEP East Zone" as that term is defined in AEP's tariff), Commonwealth Edison Company and Commonwealth Edison Company of Indiana (ComEd), Illinois Power Company (Illinois Power), Dayton Power and Light Company (DP&L), and Ameren Operating Companies (Ameren) (collectively, as the Combined Region), to become effective as of April 1, 2004.

The Midwest ISO has also requested waiver of the service requirements set forth in 18 CFR 385.2010. The Midwest ISO states it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region and in addition, the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading "Filings to FERC" for other interested parties in this matter. The Midwest ISO further states it will provide hard copies to any interested parties upon request.

Comment Date: January 23, 2004.

4. American Electric Power Service Corporation, Commonwealth Edison Company, Dayton Power and Light Company

[Docket Nos. EL03–212–005]

Take notice that on January 2, 2004, American Electric Power Service Corporation on behalf of Appalachian Power Service Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company (AEP), Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. (ComEd) and Dayton Power and Light Company (DP&L) tendered for filing revisions to their respective Open Access Transmission Tariffs in compliance with the Commission's Order issued on November 17, 2003, in Docket Nos. EL03–212–000 and 001, 105 FERC § 61,216 (2003).

AEP, ComEd and DP&L state that they have served copies of this filing on all parties on the service list for this proceeding, as well as on state public utility commissions having jurisdiction over the companies.

Comment Date: January 23, 2004.

5. Ameren Services Company

[Docket No. EL03–212–006]

Take notice that on January 2, 2004, Ameren Services Company (Ameren) filed revisions to its open access transmission tariff (OATT) to comply with the Commission's Order, issued November 17, 2003, Docket Nos. EL03–212–000 and 001. Ameren proposes, effective April 1, 2004, to eliminate through and out rates for transactions exiting the Ameren system and sinking in the areas served by the open access transmission tariffs of the Midwest Independent System Operator Inc., PJM Interconnection, L.L.C.,

American Electric Power Company (East Zone), Commonwealth Edison Company and Commonwealth Edison Company Indiana, Dayton Power and Light Company and Illinois Power Company. The exceptions are long term firm transactions already in effect on April 1, 2004 which will continue to pay the current rates under the Ameren OATT. Ameren states that it has served copies of this filing on all of the parties listed in the official service list maintained in Docket No. EL03–212–000, the Missouri Public Service Commission and the Illinois Commerce Commission.

Comment Date: January 23, 2004.

6. InterGen Services, Inc., on Behalf of Cottonwood Energy Company, L.P., Complaint v. Entergy Services, Inc. and Entergy Gulf States, Inc., Respondent

[Docket No. EL04–51–000]

Take notice that on January 9, 2004, InterGen Services, Inc., (InterGen) filed a Complaint, pursuant to section 206 of the Federal Power Act, against Entergy Services, Inc., and Entergy Gulf States, Inc. (collectively, Entergy). The Complaint asserts that Entergy is violating the Commission's Interconnection Policy by refusing to allow InterGen to use its transmission credits in a flexible manner as required by Entergy Services, Inc.,

101 FERC § 61,289 (2002). InterGen states that copies of the Complaint were served on Entergy.

Comment Date: February 2, 2004.

7. PPL Wallingford Energy LLC and Devon Power LLC

[Docket Nos. ER03–421–007 and ER03–563–026]

Take notice that on January 2, 2004, PPL Wallingford Energy LLC, in compliance with the Commission(s December 22, 2003, Order,105 FERC & 61,324 a filing providing an explanation of costs allocated to PPL Wallingford Energy LLC.

Comment Date: January 23, 2004.

8. PPL Wallingford Energy LLC and Devon Power LLC, et al.

[Docket Nos. ER03–421–008 and ER03–563–028]

Take notice that on January 7, 2004, ISO New England Inc. (ISO) submitted a Compliance Filing in the above-captioned proceeding as directed by the Commission in its December 22, 2003, Order on Rehearing and Compliance, 105 FERC 61,324. The ISO states that copies of the filing have been served on all parties to the above-captioned proceeding.

Comment Date: January 28, 2004.

9. Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and NRG, and Power Marketing Inc.

[Docket No. ER03–563–027]

Take notice that on January 2, 2004, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC (collectively Applicants) and NRG Power Marketing Inc., tendered for filing in compliance with the Commission's Order, issued December 22, 2003, 105 FERC 61,324 Fourth Revised Cost of Service Agreements among each of the Applicants, NRG Power Marketing Inc, as agent for each Applicant, and ISO New England Inc. (ISO–NE).

Applicants state that they have served a copy of the filing on ISO–NE and to each person designated on the official service list compiled by the Secretary in the above-captioned proceedings.

Comment Date: January 23, 2004.

10. Agway Energy Services-PA, Inc.

[Docket No. ER04–284–001]

Take notice that on January 2, 2004, Agway Energy Services-PA, Inc. (Agway) tendered for filing an Amendment to its Notice of Cancellation for its market-based rate authority filed on December 12, 2003. Agway is requesting an effective date of December 23, 2003.

Comment Date: January 23, 2004.

11. Pacific Gas and Electric Company

[Docket Nos. ER04–337–001]

Take notice that on January 5, 2004, Pacific Gas and Electric Company (PG&E) filed an errata to replace an exhibit and correct a tariff sheet to its December 24, 2003, filing of Transmission Owner Tariff (TO Tariff) rate for the Transmission Revenue Balancing Account Adjustment (TRBAA), the Reliability Services (RS) rate, and the Transmission Access Charge Balancing Account Adjustment (TACBAA) also set forth in its TO Tariff. PG&E states that the errata corrects

administrative errors in Exhibit 6A and minor typographical errors in Appendix II.

PG&E states that copies of this filing have been served upon the California Independent System Operator (ISO), Scheduling Coordinators registered with the ISO, Southern California Edison Company, San Diego Gas &Electric Company, the California Public Utilities Commission and other parties to the official service lists in this docket and recent TO Tariff rate cases, FERC Docket Nos. ER01–1639–000, ER03–409–000 and ER04–109–000.

Comment Date: January 26, 2004.

12. PJM Interconnection, L.L.C.

[Docket No. ER04–368–000]

Take notice that on January 2, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed Construction Service Agreement (CSA) among PJM and Borough of Chambersburg, and Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all doing business as Allegheny Power. PJM requests a waiver of the Commission's 60-day notice requirement to permit a December 17, 2003, effective date for the CSA. PJM states that copies of this filing were served upon the parties to the agreements and the state regulatory commissions within the PJM region.

Comment Date: January 23, 2004.

13. Illinois Power Company

[Docket No. ER04–369–000]

Take notice that on January 2, 2004, Illinois Power Company (IP) filed revisions to its open access transmission tariff (OATT) to comply with the directives in the Commission's Order issued in Docket Nos. EL03–212–000 and 001 on November 17, 2003, 105 FERC 61,216 (2003).

IP states that it has served copies of this filing on all of the parties listed in the official service list maintained in Docket No. EL03–212–000, which includes the Illinois Commerce Commission, and all of IP's OATT customers.

Comment Date: January 23, 2004.

14. Western Systems Power Pool, Inc.

[Docket No. ER04–376–000]

Take notice that on January 6, 2004, the Western Systems Power Pool, Inc. (WSPP) submitted a request to amend the WSPP Agreement to include Duke Energy Marketing America, LLC (DEMA) as a participant. The WSPP seeks an effective date of November 27, 2003.

WSPP states that copies of this filing will be served upon DEMA. WSPP further states that in addition, copies will be emailed to WSPP members who have supplied email addresses for the Contract Committee and Contacts lists. WSPP states that this filing also has been posted on the their home page (*www.wspp.org*) thereby providing notice to all WSPP members.

Comment Date: January 27, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the commission's-rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ≥FERRIS≥ link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–78 Filed 01–16–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[CT–057–7216f; A–1–FRL–7611–8]

Adequacy Status of Motor Vehicle Budgets in Submitted State Implementation Plan for Transportation Conformity Purposes; Connecticut; Revised Attainment Plan for the Connecticut Portion of the New York-Northern New Jersey-Long Island and the Greater Connecticut Ozone Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this notice, EPA is notifying the public that EPA has found that the 2007 motor vehicle emissions budgets in the June 17, 2003 Connecticut State Implementation Plan (SIP) revision are adequate for conformity purposes. The submittal included MOBILE6.2 motor vehicle emissions budgets for 2007 for the Connecticut portion of the New York-Northern New Jersey-Long Island ozone nonattainment area and the Greater Connecticut ozone nonattainment area. On March 2, 1999, the DC Circuit Court ruled that budgets in submitted state implementation plans cannot be used for conformity determinations until EPA has affirmatively found them adequate. As a result of our finding, the Connecticut portion of the New York-Northern New Jersey-Long Island ozone nonattainment area and the Greater Connecticut ozone nonattainment area can use the MOBILE6.2 motor vehicle emissions budgets from the submitted plan for future conformity determinations.

DATES: These budgets are effective February 4, 2004.

FOR FURTHER INFORMATION CONTACT: Donald O. Cooke, Environmental Scientist, Air Quality Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023, (617) 918–1668, *cooke.donald@epa.gov*.

SUPPLEMENTARY INFORMATION: Today's notice is simply an announcement of a finding that we have already made. EPA New England sent a letter to Connecticut Department of Environmental Protection on January 6, 2004 stating that the 2007 MOBILE6.2 motor vehicle emissions budgets in the June 17, 2003 SIP are adequate. This finding will also be announced on EPA's conformity Web site: *http://www.epa.gov/otaq/transp/conform/adequacy.htm* (once there, click on "What SIP submissions has EPA already found adequate or inadequate?").

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule requires that transportation plans, programs, and projects conform to state air quality implementation plans 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 EPA's completeness review, and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

We've described our process for determining the adequacy of submitted SIP budgets in a May 14, 1999 memorandum entitled "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision." Additional guidance on EPA's adequacy process was published in a June 30, 2003 **Federal Register** notice of proposed rulemaking, "Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes" (68 FR 38973). We followed this guidance in making our adequacy determination.

The MOBILE6.2 motor vehicle emission budgets for 2007 are as follows: 16.4 tons per summer day (tpsd) for volatile organic compounds (VOC) and 29.7 tpsd for nitrogen oxides (NO_X) in the Connecticut portion of the New York-Northern New Jersey-Long Island severe ozone nonattainment area, and 51.9 tpsd for VOC and 98.4 tpsd for NO_X in the Greater Connecticut serious ozone nonattainment area.

Authority: 42 U.S.C. 7401–7671 q.

Dated: January 8, 2004.

Robert W. Varney,

Regional Administrator, EPA New England.

[FR Doc. 04–1109 Filed 1–16–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–OW–7611–7]

Notice of Availability of Draft Revised Ambient Water Quality Criteria Document for Chloroform 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 and requests scientific views on a revised draft human health criteria document for chloroform. The Agency derived the revised criteria according to the procedures and methods in *EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000) (2000 Human Health Methodology).*

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 will provide EPA's recommendations to States and authorized Tribes as they establish their water quality standards as State or Tribal law or regulation. At this time the Agency is not making final recommendations. Rather the Agency is requesting scientific views on the draft revised criteria because the criteria reflect changes in several of the values used to derive them, including the Reference Dose (RfD), the Relative Source Contribution (RSC) and Bioaccumulation Factors.

DATES: All scientific information must be submitted to the Agency on or before March 22, 2004.

ADDRESSES: Scientific views may be submitted electronically, by mail, or through hand-delivery/courier. Follow detailed instructions as provided in section I.C. of the **SUPPLEMENTARY INFORMATION** section. Copies of the criteria document entitled, *Ambient Water Quality Criteria for the Protection of Human Health: Chloroform—Revised Draft (EPA–822–R–04–002)* 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/humanhealth/docs/.*

FOR FURTHER INFORMATION CONTACT: Dr. Tala Henry, Health and Ecological Criteria Division (4304T), U.S. EPA, 1200 Pennsylvania Avenue NW., Washington, DC 20460; (202) 566–1323; *henry.tala@epa.gov*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Interested Entities

Entities potentially interested in today's notice are those that produce, use, or regulate chloroform. Categories and entities interested in today's notice include:

Category	Examples of interested entities
State/Local/Tribal Government	States and Tribes
Industries discharging pollutants to surface waters	Paper and pulp mills, steam electric generators, organic chemicals/petroleum refining.
Publically-owned treatment works discharging pollutants to surface waters.	Drinking water treatment plants, wastewater treatment plants.

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–2003–0082. 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 the 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 Office of Water Docket is (202) 566–2426. To view these 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 read the 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 is not included in the official 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.1.

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 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 My 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 time period. Scientific views received after the close of the stated time 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–2003–0082. 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 input.

ii. *E-mail.* Scientific views may be sent by electronic mail (e-mail) to: *OW-Docket@epa.gov,* Attention Docket ID No. OW–2003–0082. 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 9, or higher, 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–2003–0082.

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–2003–0082. 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 these 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 time period 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 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 human health is protected from 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 Chloroform and Why Are We Concerned About it?

Chloroform (trichloromethane) is nonflammable and slightly soluble in water. Chloroform is a volatile organic liquid that has a number of industrial and chemical uses. It is manufactured and used as a solvent and as an intermediate in the production of refrigerants, plastics, and other solvents. Because of its volatility, chloroform has the potential to evaporate from water and escape from contaminated environmental media (*e.g.*, water or soil) into air, and may also be released in vapor from some types of industrial or chemical operations. The chief reason for chloroform-related health concerns is that it is generated as a by-product during the chlorination of drinking water. Chloroform has also been detected in a wide variety of foods and beverages. Because chloroform is thought to be ubiquitous in the environment and exposure may occur from several routes of exposure, concerns have been raised over the potential risks posed by exposure of humans to it. For these reasons, EPA has developed ambient water quality criteria for chloroform.

C. Why Did EPA Revise the Chloroform Criteria?

EPA originally published Human Health AWQC for chloroform in 1980 (45 FR 79318, October 1980). These criteria were updated by incorporating newer toxicity values from EPA's Integrated Risk Information System (IRIS) data base and published in the 1992 National Toxics Rule (57 FR 60848). The criteria values promulgated in the National Toxics Rule are the same values included in EPA's most recent compilation of national recommended water quality criteria, published in 2002 (67 FR 79091). The chloroform criteria currently recommended by EPA are: 5.7 µg/L for consumption of water + organisms and 470 µg/L for consumption of organisms only. The 2002 compilation did not include updates to the chloroform criteria based on the 2000 Human Health Methodology. Rather, EPA indicated in the 2002 compilation that updates for chemicals undergoing major reassessments, including chloroform, would be published in the future. The draft revised criteria document announced in this notice is the result of that reassessment.

D. What's New in the Revised Criteria?

The draft revised criteria reflect the Agency's consideration of the recent advances in scientific information available since the 2002 criteria were recommend. We have revised the criteria by implementing EPA's *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2002)* (EPA–822–B–00–004; 2000 Human Health Methodology). Specifically, we used new:

- Fish Consumption Rate
- Dose Response Parameter
- Relative Source Contribution (RSC)
- Bioaccumulation Factors

1. *Fish Consumption Rate.* The fish consumption rate used in revising the chloroform criteria is 17.5 grams per day. The value represents the 95th percentile rate for the general U.S. population. The data from which this value was derived and the scientific basis for applying this value in deriving national recommended ambient water quality criteria is described in EPA's 2000 Human Health Methodology. EPA has previously received peer review and scientific views on this value as part of developing the 2000 Human Health Methodology, and therefore, is not requesting scientific views on the fish consumption rate.

2. *Dose Response Parameter.* The dose response parameter used in revising the chloroform criteria is the Reference Dose (RfD) that was revised by EPA's Integrated Risk Information System (IRIS) program in October 2001 (*http://www.epa.gov/iris/*). The IRIS program performed a detailed review of toxicological information on chloroform during the process of revising the RfD (EPA–635–R–01–001). The RfD published in IRIS is $1 \times 10^{\text{minus;2}}$ mg/kg-day. EPA has previously received peer review and scientific views on this value as part of developing the IRIS profile and RfD, and therefore, is not requesting scientific views on the RfD.

3. *Relative Source Contribution (RSC).* The RSC is taken into account in deriving AWQC for non-carcinogens, and for carcinogens for which a nonlinear approach is used for low-dose extrapolation. In light of the data supporting a nonlinear low-dose extrapolation for chloroform, a RSC is needed for this chemical. EPA recently published a report, *Relative Source Contribution for Chloroform* (EPA–822–R–01–006, March 2001), in support of the Stage 2 Disinfectants and Disinfection Byproducts—Proposed Rule (68 FR49548). This document examines the RSC to dose through all routes of exposure. The RSC value used in revising the chloroform criteria was derived using exposure data and analysis from that document. From our exposure analysis, it was found that data were insufficient to adequately quantify the exposures from ambient water and freshwater/estuarine fish consumption. Therefore, therefore the default RSC value of 20% was used for the calculation of the AWQC. EPA is particularly interested in receiving scientific views on the data used to derive the RSC and on the value used to calculate the AWQC for chloroform.

4. *Bioaccumulation Factors (BAFs).* In the 2000 Human Health Methodology EPA recognized that to prevent harmful exposures to chemicals in water by eating contaminated fish and shellfish, national 304(a) water quality criteria for the protection of human health must address the process of chemical bioaccumulation in aquatic organisms. EPA also developed detailed procedures and methods for developing BAFs to derive or revise ambient water quality criteria in the 2000 Human Health Methodology. In deriving the revised chloroform criteria, we have implemented these procedures and methods to develop national trophic-level specific bioaccumulation factors for trophic level 2, 3 and 4 aquatic organisms. The bioaccumulation factors we derived are: 2.8 L/kg for trophic level 2, 3.4 L/kg for trophic level 3, and 3.8 L/kg for trophic level 4. The trophic level 3 and 4 BAF values were derived from laboratory-measured BCFs (Method 3) and the trophic level 2 BAF was derived from the *n*-octanol-water partition coefficient (K_{ow}) (Method 4), as described in the 2000 Human Health Methodology. EPA is particularly interested in receiving scientific views on the data used to derive the BAFs and

on the value used to calculate the AWQC for chloroform.

E. What Are the Draft Revised National Recommended Water Quality Criteria for Chloroform?

The draft revised criteria for chloroform are: 68 µg/L for consumption of water + organisms and 2,400 µg/L for consumption of organisms only.

F. What Specific Scientific Issues Does EPA Want Views On?

Though the public is welcome to submit scientific views on any component of the chloroform ambient water quality criteria document, EPA is specifically interested in scientific views on the following scientific issues:

- The determination of Relative Source Contribution and the value as estimated.
- The data from which the bioaccumulation factors (BAFs) were derived and the values as estimated.

G. What Is the Status of Existing Recommended Criteria While They Are Being Revised?

Water quality criteria published by EPA are the Agency's recommended water quality criteria until EPA revises or withdraws the criteria. EPA supports using the current section 304(a) criteria for those chemicals for which criteria are being updated and considers them to be scientifically sound until the Agency publishes final revised 304(a) criteria.

Dated: December 23, 2003.

Geoffrey H. Grubbs,

Director, Office of Science and Technology.

[FR Doc. 04–1107 Filed 1–16–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket Numbers 96–45 and 97–21; FCC 03–314]

Request for Review of the Decision of the Universal Service Administrator by Winston-Salem/Forsyth County School District and IBM

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission grants the Requests for Review by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina and International Business Machines, Inc., and remands the Requests for Review to SLD for consideration.

DATES: The Commission's decisions on the Requests for Review addressed in this order were effective December 8, 2003.

FOR FURTHER INFORMATION CONTACT: Andy Firth, Attorney. Telecommunications Access Policy Division, Wireline Competition Bureau, (202) 418–7400, TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in CC Docket Nos. 96–45 and 97–21 released on December 8, 2003. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC 20554.

I. Introduction

1. In this Order, before the Commission are Requests for Review by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina (Winston-Salem), and International Business Machines, Inc. (IBM). This school and IBM seek review of decisions of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) that denied Winston-Salem $16.7 million in discounts for internal connections from the universal service support mechanisms for schools and libraries for Funding Year 2002. For the reasons set forth below, we grant these Requests for Review, and remand to SLD for consideration in accordance with this Order.

2. The Commission also releases the *Ysleta Order*, December 8, 2003, which addresses request for review by other applicants that also selected IBM as their service provider. In the *Ysleta Order*, the Commission finds that a number of schools in Funding Year 2002 engaged in various practices that violated one or more of our rules regarding competitive bidding, the weighting of price in selecting among bidders, and the submission of bona fide requests for services under this support mechanism. The Commission also concluded, however, that the circumstances of those applicants justified a waiver of our rules governing the Funding Year 2002 filing window, and allowed those applicants to re-bid for their requested services. As set forth below, we conclude that the facts presented in this case, unlike the cases that the Commission addresses in the *Ysleta Order*, do not support a denial of Winston-Salem's request for discounts under the program.

II. Discussion

3. We conclude, based on the record before us that SLD erred in denying the discounts requested by Winston-Salem. The grounds upon which we found rule violations in the Ysleta case are not present here.

4. First, we cannot conclude that Winston-Salem violated our competitive bidding rules. Unlike the *Ysleta Order*, Winston-Salem did not issue any sort of RFP for a systems integrator prior to filing its FCC Form 471. It merely posted a request for bids for eligible services on FCC Form 470. While we are troubled that it utilized an overly broad FCC Form 470, that is not, in itself, a basis for denying its requests for discounts. In the *Ysleta Order*, we clarified that the requirement for a bona fide request for services means that applicants must submit a list of specified services for which they anticipate they are likely to seek discounts, consistent with their technology plans; they may not list every service and product eligible for discounts under the schools and libraries support mechanism. At the same time, we recognized that past practices arguably could be construed as permitting broad FCC Form 470, and therefore clarified this requirement prospectively.

5. Second, we cannot conclude that Winston-Salem failed to properly consider price when selecting its service provider because only one party responded to its posted FCC Form 470. Its decision to enter into a contract with the one bidder is no different than the thousands of other applicants who receive either no bids, or only one bid, in response to a FCC Form 470 posting. Our rules require applicants to seek competitive bids; they do not require an applicant to have competing bidders where none appear. While we find it unusual, given the size of Winston-Salem's proposed project, that no other entity submitted a bid, this alone, without more, cannot be the basis for denying Winston-Salem's request for review. We note, however, that this case demonstrates how an overly broad FCC Form 470 posting may well stifle competition among service providers. In the *Ysleta Order*, we clarify that prospectively such a broad FCC Form 470 is not consistent with our rules.

6. Finally, we note that in its Request for Review, Winston-Salem describes in detail the process it employed to select a Systems Integrator, to demonstrate that Winston-Salem is committed to utilizing a fully competitive selection process for the award of its contracts. We find that Winston-Salem's

procedures for selecting Eperitus as a Systems Integrator are not relevant to our decision here, because it did not seek discounts on any services provided by Eperitus, and the services provided by Eperitus were outside the scope of the E-rate program.

7. Therefore, we grant the above-captioned Requests for Review and remand the Winston-Salem application to SLD. In doing so, we emphasize that we make no determination as to whether the applicant is ultimately entitled to any funding, as SLD must scrutinize all applications for ineligible services and compliance with all program rules, including all prospective clarifications enunciated in the *Ysleta Order*.

III. Ordering Clause

8. Pursuant to § 54.722(a) of the Commission's rules, that the above-captioned Requests for Review are granted to the extent provided herein and remanded to SLD for further processing in accordance with this Order.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–1124 Filed 1–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 3, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Old Post Road, L.P., Madison, Georgia; to acquire voting shares of Madison Bank Corporation, Madison, Georgia, and thereby indirectly acquire voting shares of Bank of Madison, Madison, Georgia.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. Samuel Jackson Young, Elizabethtown, Kentucky, individually, and as part of the Young Family control group, which includes Mr. Young and Ginger Young, Spring, Texas; to retain voting shares of Fredonia Valley Bancorp, Inc., Fredonia, Kentucky, and thereby indirectly retain voting shares of Fredonia Valley Bank, Fredonia, Kentucky.

C. Federal Reserve Bank of Kansas City (James Hunter, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Scott Smiley, Avondale, Colorado, as trustee of the Carl W. Smiley Trust Number 1, Carl W. Smiley Trust Number 2, Julia Smiley Trust, Ward B. Smiley Trust A, and Ward B. Smiley Trust B; to acquire voting shares of First Norton Corporation, Norton, Kansas, and thereby indirectly acquire voting shares of First Security Bank & Trust Company, Norton, Kansas.

Board of Governors of the Federal Reserve System, January 13, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–1085 Filed 1–16–04; 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 February 13, 2004.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. BB&T Corporation, Winston–Salem, North Carolina; to merge with Republic Bancshares, Inc., Saint Petersburg, Florida, and thereby indirectly acquire Republic Bank, Saint Petersburg, Florida.

2. Shore Bancshares, Inc., Easton, Maryland; to merge with Midstate Bancorp, Inc., Felton, Delaware, and thereby indirectly acquire The Felton Bank, Felton, Delaware.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. NBC Capital Corporation, Starkville, Mississippi; to merge with Enterprise Bancshares, Inc., Memphis, Tennessee, and thereby acquire Enterprise National Bank, Memphis, Tennessee.

Board of Governors of the Federal Reserve System, January 13, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–1084 Filed 1–16–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS).

Time and Date: January 29, 2004, 9 a.m.–3:30 p.m.

Place: Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 705A, Washington, DC 20201.

Status: Open.

Purpose: At this meeting the Committee will hear presentations and hold discussions on several health data policy topics. On the morning of the first day the full Committee will hear updates and status reports from the Department on several topics including HHS Data Council activities, the adoption of data standards including clinical data standards, privacy rule compliance and activities of the Board of Scientific Advisors at the National Center for Health Statistics. A presentation on the Consolidated Health Informatics Initiative is also planned with subsequent discussion. In the afternoon there will be an update from the Privacy Subcommittee and discussion of recommendations, reports and letters that the Committee is working on in selected areas including claims attachment standards, and the Committee's 6th Report to Congress on the implementation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA.) The Committee also plans to hear a briefing from the Executive Subcommittee from their latest retreat. Finally there will be a discussion of agendas for future NCVHS meetings.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: January 5, 2004.

James Scanlon,

Acting Deputy Assistant Secretary for Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 04–1142 Filed 1–16–04; 8:45 am]

BILLING CODE 4151–05–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 02060]

National Cancer Prevention and Control Program; Notice of Availability of Funds; Amendment 3

A notice announcing the availability of fiscal year (FY) 2002 funds for cooperative agreements for the National Cancer Prevention and Control Program (NCPCP) was published in the **Federal Register** April 23, 2002, Volume 67, Number 78, pages 19932–19950. The notice is amended as follows:

Page 19937, section G.4.a.(5)(f), second column, last paragraph, replace "Attachment B—Workplan Template" with "Attachment A—Workplan Template & Definitions".

Page 19940, section H.3.a.(3), third column, replace "Attachment C" with "Attachment B".

Page 19941, section H.4.a., third column, first full paragraph, replace "Attachment D" with "Attachment C".

Page 19941, section H.4.a., third column, second full paragraph, replace "Attachment E" with "Attachment D".

Page 19941, section H.4.a.(5)(a)[1], third column, delete "two business meetings" and place with "one business meeting".

Page 19941, section H.4.a.(5)(a)[3], third column, delete "up to two regional training opportunities." And replace with "two CDC-sponsored workshops/trainings/meetings (2–3 days)."

Page 19942, section H.4., first column, third paragraph after section H.4.a.(5)(a)[4], delete the following: 'The applicant should submit a completed Screening and Diagnostic Worksheet (Attachment F—"Screening and Diagnostic Worksheet" in the appendices) which is used to estimate the amount of funding needed to reimburse providers for allowable clinical services provided to eligible women served in your program. Further information about the Screening and Diagnostic Worksheet is provided in the NBCCEDP Policies and Procedures Manual, Section IV, pages 21–25. An electronic version of the Screening and Diagnostic Worksheet, an EXCEL spreadsheet, may be obtained through the program technical assistance contact listed in Section L. "Where to Obtain Additional Information.'" Replace with "The applicant should submit a completed Clinical Costs Worksheet (Attachment E—"Clinical Costs Worksheet" in the appendices) which is used as a standardized tool to estimate clinical and other direct service costs for your program. An electronic version of the Clinical Costs Worksheet, an EXCEL spreadsheet, and a related MSWord document with definitions may be obtained through the program technical assistance contact listed in Section L. "Where to Obtain Additional Information."

Page 19942, section H.4.a.(6)(a), first column, replace "Attachment G" with "Attachment F".

Page 19942, second column, after section H.4.a.(6)(b), add section H.4.a.(6)(c) to read "Provide an itemized list of other non-Federal sources of funds, (appropriated, donated, and/or in-kind) by source, that are used to support NBCCEDP staffing and/or allowable direct services (*i.e.*, screening, diagnostic services, case management) to women for the past two budget periods (9/30/2002–6/29/2003 and 6/30/2003–6/29/2004). Indicate the amount anticipated from these or other sources for the upcoming budget period (6/30/2004–6/29/2005). If any part of the non-Federal sources of funds are used to meet the matching requirement for the NBCCEDP, please indicate the source and the amount that is included in the match for each budget period (See Attachment G—"Additional Non-Federal Funds Chart" in the appendices).

Page 19943, section H.5.d., third column, first partial sentence, delete the "." And add "(See Attachment H—Workplan Templates A&B)."

Page 19949, section J.1.a.(4)(b), second column, amended in Amendment 2 to read, "An example that demonstrates the impact of the NBCCEDP, and updated list of the screening and diagnostic procedures paid for by the program, the amount paid and the maximum amount allowed by Medicare within the State. Also include an updated letter of assurance regarding Medicaid coverage for CBE, screening mammograms, Pap smears and pelvic exams.", add the following, "NBCCEDP recipients are required to submit the NBCCEDP Minimum Data Elements (MDEs) to CDC semiannually on October 15 and April 15 and the System for Technical Assistance Reporting (STAR) data once annually on October 30 to CDC—OMB Control No. 0920–0571."

Dated: January 12, 2004.

Edward J. Schultz,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1094 Filed 1–16–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Clinical Laboratory Improvement Advisory Committee

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: Clinical Laboratory Improvement Advisory Committee (CLIAC).

Times and Dates: 8:30 a.m.–5 p.m., February 11, 2004; 8:30 a.m.–3:30 p.m., February 12, 2004.

Place: Embassy Suites Hotel (Buckhead), 3285 Peachtree Rd. NE., Atlanta, Georgia 30305, Telephone: (404) 261–7733.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 100 people.

Purpose: This committee is charged with providing scientific and technical advice and guidance to the Secretary of Health and Human Services, the Assistant Secretary for Health, and the Director, CDC, regarding the need for, and the nature of, revisions to the standards under which clinical laboratories are regulated; the impact on medical and laboratory practice of proposed revisions to the standards; and the modification of the standards to accommodate technological advances.

Matters To Be Discussed: The agenda will include updates from CDC, the Centers for Medicare & Medicaid Services, and the Food and Drug Administration; a report from the CLIAC Waiver Workgroup; and discussion on the CLIA waiver criteria and process, previous CLIAC recommendations related to such, and AdvaMed's CLIA waiver criteria proposal.

Agenda items are subject to change as priorities dictate.

Providing Oral or Written Comments: It is the policy of CLIAC to accept written public comments and provide a brief period for oral public comments whenever possible.

Oral Comments: In general, each individual or group requesting to make an oral presentation will be limited to a total time of five minutes (unless otherwise indicated). Speakers must also submit their comments in writing for inclusion in the meeting's Summary Report. To assure adequate time is scheduled for public comments, individuals or groups planning to make an oral presentation should, when possible, notify the contact person below at least one week prior to the meeting date.

Written Comments: For individuals or groups unable to attend the meeting, CLIAC accepts written comments until the date of the meeting (unless otherwise stated). However, the comments should be received at least one week prior to the meeting date so that the comments may be made available to the Committee for their consideration and public distribution. Written comments, one hard copy with original signature, should be provided to the contact person below. Written comments will be included in the meeting's Summary Report.

FOR FURTHER INFORMATION CONTACT: Rhonda Whalen, Chief, Laboratory Practice Standards Branch, Division of Laboratory Systems, Public Health Practice Program Office; CDC, 4770 Buford Highway, NE, Mailstop F–11, Atlanta, Georgia 30341–3717; telephone (770) 488–8042; fax (770) 488–8279; or via e-mail at *RWhalen@cdc.gov.*

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 CDC and the Agency for Toxic Substances and Disease Registry.

Dated: January 13, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1086 Filed 1–16–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Protection and Advocacy for Individuals With Mental Illness (PAIMI) Annual Program Performance Report (OMB No. 0930–0169, Revision)

The Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act (42 U.S.C. 10801 *et seq.*) authorized funds to support protection and advocacy services on behalf of individuals with severe mental illness and severe emotional impairment who are at risk for abuse and neglect and other civil rights violations while under treatment in a residential facility. This program is managed by SAMHSA's Center for Mental Health Services (CMHS).

Under the PAIMI Act, formula grant awards are made to protection and advocacy (P&A) systems designated by the governors of the 50 states and 6 territories, and the District of Columbia to ensure that the rights of individuals with severe mental illness and severe emotional disturbance are not violated. In October 2000, the PAIMI Act was amended to create a 57th P&A system—the American Indian Consortium in Shiprock, New Mexico. Whenever the annual PAIMI appropriation reaches $30 million or more, State P&A systems may serve eligible individuals with serious mental illness or severe emotional impairments, as defined under the Act, residing in the community, including their own homes. However, PAIMI eligible persons residing in public and private residential care or treatment facilities have priority for all P&A system services.

The PAIMI Act requires P & A systems to file an annual report on their activities and accomplishments and to provide information on such topics as: numbers of individuals served, types of complaints addressed, and the number of intervention strategies used to resolve the presenting issues. Under the Act, there is an Advisory Council which is also required to submit an annual report that assesses the effectiveness of the services provided to, and the activities conducted by, the P&A systems on behalf of PAIMI eligible individuals and their family members.

The PAIMI Annual Program Performance Report (PPR) will undergo minor changes consistent with current statutory and regulatory data requirements, specifically information on grievance procedures, issues and investigations related to incidents of seclusion, restraint, including serious injuries and deaths, and the Advisory Council assessment of State P&A system PAIMI Program activities. The revised report formats will be effective for the report due on January 1, 2005.

The annual burden estimate is as follows:

	Number of respondents	Number of responses per respondent	Hours per response	Total hour burden
Annual Program Performance Report	57	1	28	1,596
Activities & Accomplishments			(20)	(1,140)
Performance outcomes			(3)	(171)
Expenses			(2)	(114)
Budget			(2)	(114)
Priority statements & objectives			(1)	(57)

	Number of respondents	Number of responses per respondent	Hours per response	Total hour burden
Advisory Council Report	57	1	10	570
Total	114			2,166

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: January 13, 2004.

Anna Marsh,

Acting Executive Officer, SAMHSA.

[FR Doc. 04–1089 Filed 1–16–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4908–N–01]

Notice of Proposed Information Collection: American Healthy Homes Survey

AGENCY: Office of Healthy Homes and Lead Hazard Control, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement concerning an American Healthy Homes Survey in homes across the country will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* March 22, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Gail N. Ward, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room P3206, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: John H. Miller, (202) 755–1758 ext. 106 (this is not a toll-free number), or *John__H.__Miller@HUD.gov*, for copies of the proposed information collection instruments and other available documents electronically or on paper.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995, (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Title of Proposal: American Healthy Homes Survey.

OMB Control Number: To be assigned.

Need for the Information and Proposed Use: Lead is a highly toxic heavy metal that adversely affects virtually every organ system in the body. Young children are particularly susceptible to its effects. Lead poisoning remains one of the top childhood environmental health problems today. The most current national survey (1998–2000), conducted by the Centers for Disease Control and Prevention, shows that about 434,000 young children are lead poisoned. The most common source of lead exposure for children today is lead paint in older housing and the contaminated dust and soil it generates. The National Survey of Lead and Allergens in Housing, conducted by HUD and the National Institute of Environmental Health Sciences (NIEHS) in 1998–2000, estimated that 24 million homes had lead-based paint hazards at that time. New information is needed to identify the extent of progress toward achieving the goal of the President's Task Force on Environmental Health Risks and Safety Risks to Children of eliminating lead paint hazards in housing where children under six live.

Asthma is a chronic respiratory disease characterized by episodes of airway inflammation and narrowing. It is generally accepted that asthma results from the interaction between genetic susceptibility and environmental exposures. Exposure to indoor allergy-producing substances (allergens) is believed to play an important role in the development and exacerbation of asthma. The HUD–NIEHS survey, above, found that most U.S. homes had, near the end of the last decade, detectable levels of dust mite allergen associated with allergic sensitization and asthma. New information is needed to characterize changes in the residential prevalence of allergens since the survey.

Similarly, such airborne chemicals as carbon monoxide, airborne particulate matter, and such chemicals on surfaces as arsenic and pesticides, and such unintentional injury factors as conditions associated with falls, fires and poisons, are known to have adverse health or safety effects, but national residential prevalence estimates are unavailable, limiting the ability of HUD and other agencies to develop data-driven control strategies.

This information will be used in revising policy and guidance to target the housing with the greatest needs for lead hazard evaluation and control.

Results from this survey will provide current information needed for regulatory and policy decisions and enables an assessment of progress in making the U.S. housing stock safe.

Agency Form Number: None.

Members of Affected Public: Homeowners and rental housing tenants.

Total Burden Estimate (First Year):

Number of task	Frequency of respondents	Hours per responses	Burden response
Respondents	2000	1	3.5
Total Estimated Burden Hours			7000

Status of the Proposed Information Collection: New request.

Dated: January 9, 2004.

David E. Jacobs,

Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 04–1099 Filed 1–16–04; 8:45 am]

BILLING CODE 4210–70–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4910–N–01]

Notice of Proposed Information Collection for Public Comment—Exigent Health and Safety Deficiency Correction and Remedy Certification

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* March 22, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4238, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–0614, extension 4128. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

The Exigent Health and Safety Deficiency Correction and Remedy Certification templates are the set of documents on which the Department will collect information from Public Housing Agencies (PHAs) and multifamily property owners/agents about the correction and mitigation of exigent health and safety (EH&S) deficiencies that are identified in the property inspection.

The Department's Uniform Physical Condition Standards (UPCS) regulation (24 CFR part 5, subpart G) provides that HUD assisted and insured housing must be decent, safe, sanitary, and in good repair. Owners/agents and PHAs must maintain the housing in a manner that meets the prescribed physical condition standards in order to be considered decent, safe, sanitary, and in good repair. In addition, the UPCS regulation provides that all areas and components of the housing must be free of health and safety hazards.

This Notice also lists the following information:

Title of Proposal: Exigent Health and Safety Deficiency Correction and Remedy Certification.

OMB Control Number: 2507–00X.

Description of the need for the information and proposed use: Pursuant to the UPCS inspection protocol, at the end of the property inspection (or at the end of each day of a multi-day inspection) (or at the end of each day of a multi-day inspection) the inspector provides the property representative with a copy of the "Notification of Exigent and Fire Safety Hazards Observed" form. Listed on this document that is given to the property representative for signature is each EH&S deficiency that the inspector observed during the inspection or on that day of the inspection.

The PHAs are to correct or mitigate EH&S deficiencies (*i.e.*, emergency work orders) within 24 hours (24 CFR part 902). Property owners/agents are to correct or remedy EH&S deficiencies immediately and notify the Department in writing within three business days of the date of inspection which the date the owner was provided notice of these deficiencies (24 CFR 200.857(c)).

In accordance with these requirements, PHAs and multifamily property owners/agents enter the required data on the templates, certify to the data entered, and electronically submit the information to HUD. Requiring PHAs and multifamily property owners/agents to report correction and mitigation activities enables HUD to monitor regulatory requirements and conduct follow-up activities to assist in ensuring the residents are living in HUD housing that is decent, safe, sanitary and in good repair and is free of health and safety hazards.

Agency form numbers, if applicable: Not applicable.

Members of affected public: Local, State, or Tribal governments, not-for-profit institutions, businesses or other for-profit.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

2,061 PHAs; annual submission per PHA; average burden hours for PHA response is .32 hours; the total reporting burden is 648.65 hours.

6,771 multifamily property owners; annual submission per owner; average burden hours for owner response is .3 hours; the total reporting burden is 2,044.15 hours.

Status of the proposed information collection: Approval of a new collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 31, 2003.

William Russell III,

Deputy Assistant Secretary for Public Housing and Voucher Programs.

[FR Doc. 04–1100 Filed 1–16–04; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4910–N–02]

Notice of Proposed Information Collection for Public Comment—Housing Choice Voucher Program Forms for Funding Application, Utility Allowances, Inspection, Financial, Tenancy Approval, Voucher, Family Portability, Housing Assistance Payments (HAP) Contracts

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* March 22, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4255, Washington, DC. 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–0614, extension 4128. (This is not a toll-free number). *http://www.hudclips.org/sub_nonhud/html/forms.htm.*

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

The housing choice voucher program forms are used by the Department to collect information from Public Housing Agencies (PHAs), and program participants as part of the Housing Choice Voucher Program process.

There are several forms used by the Department, each serve a different information collection purpose. The title, and purpose of each form is described in the section below.

This Notice also lists the following information:

Title of Proposal: Information Collection for the Housing Choice Voucher Program.

OMB Control Number: 2577–0169.

Description of the need for the information and proposed use: The requested information requirements (how, by whom, and for what purpose the information is to be used) for the voucher program consist of the following:

Funding Application, Form HUD–52515, is prepared by the PHA and specifies the number of units requested, as well as the PHA's objectives and plans for administering the voucher program. The application is reviewed by HUD and ranked according to the PHA's administrative capability, the need for housing assistance, and other factors specified in the Notice of Funding Availability. PHAs are required to prepare an Administrative Plan that states local PHA policy on matters for which the PHA has discretion to establish local policies. The PHA must discuss in these plan how it will operate the voucher program, *e.g.*, organization of the waiting list, opening and closing of the waiting list, selection of families from the waiting list, terms of the voucher and occupancy policies.

Allowance for Tenant Furnished Utilities and Other Services, Form HUD–52667, the PHA must establish a utility allowance schedule for all utilities and other services. The utility allowance is used in determining the family's monthly housing assistance payment and rental payment or monthly homeownership assistance payment. The allowance is provided for those utilities paid by the family. The utility allowance schedule is determined based on the typical cost of utilities and services paid by energy-conservative households, which occupy housing of a similar size and type in the same locality. The PHA must submit its initial utility allowance schedule and supporting documentation to HUD in order for HUD to ensure that the costs are reasonable. Thereafter, the updated form is not sent to HUD.

Inspection Form, HUD–52580 and 52580–A, these inspection forms are used by the PHA to determine if a unit meets the housing quality standards (HQS) of the housing choice voucher program. The goal of the voucher program is to provide decent, safe, and sanitary housing to very low-income families. In keeping with that goal, the primary objective of the HQS is to protect the family receiving assistance under the program by guaranteeing a basic level of assisted housing. The units must pass inspection before housing assistance payments may be paid to owners and must be re-inspected at least once a year when an assisted family continues occupancy. Annual re-inspections are not required under the homeownership option. These forms are not sent to HUD.

Financial Forms, HUD 525663, 52671, 52673, 52681 and 52681–B, PHAs that administer the housing choice voucher program are required to maintain financial reports in accordance with accepted accounting standards in order to permit timely and effective audits. The financial records identify the amount of annual contributions that are received and disbursed by the PHA. The required financial statements are similar to those prepared by any responsible business or organization at the end of the fiscal year. The financial forms are used by PHAs to estimate their annual contributions requirements to: (a) Assure that project costs (*e.g.*, housing assistance payments and PHA administrative expenses) do not exceed the amount of authorized contract authority; (b) requisition the advance of annual contributions; and (c) report actual receipts and expenditures. Below is an explanation of each financial form:

Supporting Data for Annual Contribution Estimates, Form HUD–52672, is used to estimate preliminary or initial costs, housing assistance payments, and PHA fees for ongoing administration of the program, and is submitted after HUD approval of the PHA's application for the voucher program.

Estimate of Total Required Annual Contributions, Form HUD–562673 is used to summarize the financial estimates contained on Form HUD–52672, and upon approval by HUD, Form HUD–52673 is the PHA operating budget for the PHA fiscal year.

Requisition for Partial Payment of Annual Contributions, Form HUD–52663, is used by the PHA to request payment of required annual contributions for the program. The form identifies the PHA's estimate of annual

contributions to cover homeownership assistance payments, housing assistance payments to owners and the fee for preliminary and ongoing PHA administrative costs for the fiscal year and the amount of the advance to be paid by HUD for each month during the quarter.

Voucher for Payment of Annual Contribution and Operating Statement, Form HUD 52681, is used by HUD to approve actual PHA program expenses for the PHA fiscal year, and is the basis for reviewing PHA financial estimates for the subsequent fiscal year. This form is also used to make a year-end settlement of monthly advances provided by HUD during the PHA's fiscal year and actual PHA expenditures for the voucher program, and to monitor the financial status of PHAs.

Request for Tenancy Approval, Form HUD–52517, is completed and submitted by the family to the PHA when the family finds a unit that is suitable for its needs. The PHA reviews the request to determine if the owner is eligible to participate in the program, if the unit is eligible, and if the lease complies with the program and statutory requirements governing prohibited and required lease provisions. This form is not sent to HUD.

Voucher, Form HUD–52646, is the document that authorizes the family to look for an eligible unit. It specifies the appropriate unit size necessary to meet the family's needs. The voucher also sets forth the family's obligations under the housing choice voucher program. This form is not sent to HUD.

PHA Preparation of Information about the Tenant for the Owner, when the PHA is approving a new unit selected by the family, the PHA must advise the owner that the PHA has not screened the family and provide the name and address of previous landlords if such information is readily available. This information is not provided to HUD.

Family Portability Information, HUD–52665, this form standardizes the portability information submitted to the receiving PHA by the initial PHA. In addition, this form is used for monthly portability billing by the receiving PHA. After the payment amount is established, the form does not need to be resubmitted until the payment amount changes. This information is not provided to HUD.

Housing Assistance Payments (HAP) Contracts and Tenancy Addendums, the contract is a written agreement between the PhA and the owner of a unit or manufactured home space occupied by a voucher participant. The HAP contract must be executed before the PHA can make payment on behalf of an eligible family. The HAP contract consists of the three parts: Part A (Contract Information); Part B (Body of the Contract) and Part C (Tenancy Addendum). Separate tenancy addenda forms are provided to the landlord for attachment to the tenant's lease. The PHA must be provided a copy of any revisions to the lease agreed by the owner and the tenant. These forms are not sent to HUD. Below is an explanation of each contract form:

HAP Contract for Section 8 Tenant-Based Assistance Housing Choice Voucher Program, Form 52641, is used for all program participants except manufactured homeowners leasing the manufactured home space. This form is not sent to HUD.

HAP Contract for Manufactured Home Space Rental, Form 52642, is used for manufactured homeowners who lease the manufactured home space. This form is not sent to HUD.

Tenancy Addendum, form 52641A, this form must be attached to a copy the lease that is provided to the tenant by the landlord. If there is any conflict between the tenancy addendum and any other provisions of the lease, the language of the tenancy addendum shall control. This form is not sent to HUD.

Tenancy Addendum, Form 52642–A, is to be attached to a copy of the lease provided to the tenant by the landlord, for manufactured home space rental. If there is any conflict between the tenancy addendum and any other provisions of the lease, the language of the tenancy addendum shall control. This form is not sent to HUD.

Agency form numbers: HUD–52515, HUD–52667, HUD–52580 and HUD–52580–A, HUD–52663, HUD–52672, HUD–52673, HUD–52681, HUD–52681–B, HUD–52517, HUD–52646, HUD–52665, HUD–52641, HUD–52642, HUD–52641–A, HUD–52642–A

Estimation of the total number of hours needed to prepare the information collection including the number of respondents, frequency of response, and hours of response: 250,000 families + 100,000 tenant-based owners = 352,500 respondents, total annual responses 2,563,500, hours per response varies for each form, frequency, annually and on-occasion, total burden hours 775,750.

Status of the Proposed Information Collection: Revision.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 31, 2003.

William Russell III,

Deputy Assistant Secretary for Public Housing and Voucher Programs.

[FR Doc. 04–1101 Filed 1–16–04; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4910–N–03]

Notice of Proposed Information Collection for Public Comment—Public and Indian Housing—Line of Credit Control System/Voice Response System: LOCCS/VRS Payment Vouchers

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* March 22, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4255, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–0614, extension 4128. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

The Line of Credit Control System (LOCCS) is HUD computerized cash management and disbursement system developed to assist the Chief Financial Officer (CFO) in planning, accounting, and evaluating HUD disbursements within specific Public and Indian Housing (PIH) housing program areas. The Voice Response System (VRS) allows the grant recipient to requisition grant funds via a touch-tone telephone. The applicable payment voucher will be prepared by the grantee before calling

LOCCS/VRS with the drawdown request, and will be used as a prompt for entering the information through the touch-tone pat and for confirming information that is spoken back by the VRS simulated voice.

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Public and Indian Housing—Line of Credit Control System/Voice Response System: LOCCS/VRS Payment Voucher.

OMB Control Number: 2577–0166.

Description of the need for the information and proposed use: Grant recipients will use the applicable payment voucher to request funds from HUD through the LOCCS/VRS voice activated system. The information collected on the payment voucher will also be used as an internal control measure to ensure the lawful and appropriate disbursement of Federal funds as well as provide a service to program recipients.

Agency form numbers, if applicable: HUD–50080 Series.

Members of affected public: Local, State, or Tribal Governments; Resident Organizations.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 5,312 respondents, 22 responses per respondent; 116,864 total responses, .15 minutes per responses (116,864 × .15) 17,540 total reporting burden hours.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended.

Dated: December 31, 2003.

William Russell III,

Deputy Assistant Secretary for Public Housing and Voucher Programs.

[FR Doc. 04–1103 Filed 1–16–04; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4800–FA–03]

Announcement of Funding Awards for the Rural Housing and Economic Development Program; Fiscal Year 2003

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability (SuperNOFA) for the Rural Housing and Economic Development Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

FOR FURTHER INFORMATION CONTACT: Jackie L. Williams, Ph.D., Director, Office of Rural Housing and Economic Development, Office of Community Planning and Development, 451 7th Street, SW., Room 7137, Washington, DC 20410; telephone (202) 708–2290 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number via TTY by calling the Federal Relay Service toll-free at 1–800–877–8339. For general information on this and other HUD programs, call Community Connections at 1–800–998–9999 or visit the HUD Web site at *http://www.hud.gov.*

SUPPLEMENTARY INFORMATION: The Rural Housing and Economic Development program was authorized by the Department of Veterans Affairs, Housing and Urban Development and Independent Agencies Appropriations Act of 1999. The competition was announced in the SuperNOFA published April 25, 2003. Applications were rated and selected for funding on the basis of selection criteria contained in that notice.

The Catalog of Federal Domestic Assistance number for this program is 14.250.

The Rural Housing and Economic Development Program is designed to build capacity at the State and local level for rural housing and economic development and to support innovative housing and economic development activities in rural areas. Eligible applicants are local rural non-profit organizations, community development corporations, federally recognized Indian tribes, and State housing finance agencies. The funds made available under this program were awarded competitively, through a selection process conducted by HUD.

Prior to the rating and ranking of this year's applications, Eastern Eight Community Development in Johnson City, Tennessee was awarded $134,000, Fort Belknap Indian Community in Harlem, Montana was awarded $66,782, and Haliwa Saponi Indian Tribe in Hollister, North Carolina was awarded $89,421 as a result of funding errors during the previous year's funding. For the Fiscal Year 2003 competition, a total of $24,590,272 was awarded to 87 projects nationwide.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the grantees and amounts of the awards in Appendix A to this document.

Dated: December 17, 2003.

Roy A. Bernardi,

Assistant Secretary for Community, Planning and Development.

APPENDIX A.—FISCAL YEAR 2003 FUNDING AWARDS FOR RURAL HOUSING AND ECONOMIC DEVELOPMENT PROGRAM

Applicant	City	State	Award dollars
Innovative Grants			
Arkansas Human Development Corporation	Little Rock	AR	400,000
Navajo Partnership for Housing, Inc.	Saint Michaels	AZ	400,000
PPEP Microbusiness and Housing Development	Tucson	AZ	400,000

APPENDIX A.—FISCAL YEAR 2003 FUNDING AWARDS FOR RURAL HOUSING AND ECONOMIC DEVELOPMENT PROGRAM—Continued

Applicant	City	State	Award dollars
International Sonoran Desert Alliance	Ajo	AZ	400,000
Nogales Main Street Association	Tucson	AZ	389,927
Arizona Department of Housing	Phoenix	AZ	400,000
Tule River CDC	Porterville	CA	400,000
North Fork CD Council	North Fork	CA	400,000
Westside Housing and Economic Network, Inc	Fresno County	CA	400,000
I–5 Social Services Corporation	Fresno	CA	400,000
Walking Shield American Indian Society	Tustin	CA	400,000
SW Georgia United Empowerment Zone	Vienna	GA	400,000
Homeward, Inc.	Clarion	IA	400,000
Homestead Affordable Housing, Inc.	Nortonville	KS	400,000
HPCHDA, Inc.	Hazard	KY	400,000
Kentucky Highlands Investment Corporation	London	KY	400,000
Frontier Housing, Inc.	Morehead	KY	400,000
Macon Ridge CDC	Ferriday	LA	202,400
Four Directions Development Corporation	Orono	ME	400,000
Midwest MN CDC	Detroit Lakes	MN	400,000
Chippewa Cree Housing Authority	Box Elder	MT	400,000
The Heritage Capital Fund	Wolf Point	MT	399,848
Lumbee Regional Development Association	Pembroke	NC	379,328
Hollister R.E.A.C.H	Hollister	NC	190,750
Community Developers of Beaufort-Hyde	Belhaven	NC	397,796
Ho-Chunk CDC	Walthill	NE	400,000
Tierra Del Sol Housing Corporation	Anthony	NM	399,625
Rural Opportunities, Inc.	Rochester	NY	400,000
Portage Area Development Corporation	Ravenna	OH	400,000
Appalachian Center for Economic Networks	Athens	OH	306,964
Little Dixie Community Action Agency	Hugo	OK	386,207
Community First Fund	Lancaster	PA	400,000
Ceiba Housing and Economic Development Corporation	Ceiba	PR	397,900
Oglala Sioux Tribe Partnership, Inc.	Pine Ridge	SD	400,000
Oglala Sioux Lakota Housing	Pine Ridge	SD	400,000
Oti Kaga, Inc.	Eagle Butte	SD	400,000
Carey Counseling Center, Inc.	Paris	TN	400,000
Buffalo Valley, Inc.	Hobenwald	TN	400,000
Douglas-Cherokee Economic Authority, Inc	Morristown	TN	400,000
Organizacion Progresiva de San Elizario	San Elizario	TX	400,000
El Paso Empowerment Zone Corporation	El Paso	TX	400,000
Alianza Para El Desarrollo Community, Inc.	El Paso	TX	374,321
ACCION Texas	San Antonio	TX	400,000
Habitat for Humanity of Laredo, Inc.	Laredo	TX	400,000
Community Development Corporation of Brownsville	Brownsville	TX	400,000
Center for Economic Opportunity, Inc.	San Juan	TX	400,000
Telamon Corporation	Richmond	VA	399,659
Washington State Housing Finance Commission	Seattle	WA	387,872
WISC Wisconsin Department of Commerce	Madison	WI	400,000
Southern Appalachian Labor School	Kincaid	WV	400,000
Capacity Building Grants			
Upper Sand Mountain United Methodist	Sylvania	AL	150,000
Arizona Border Health Foundation	Tucson	AZ	150,000
Fresno West Coalition for Economic Development	Fresno	CA	150,000
Region 9 Economic Development District of SW CO	Durango	CO	148,925
Empowerment Alliance of SW Florida-CDC	Immokalle	FL	147,728
Housing Partners, Inc.	Albany	GA	150,000
Crisp Area Habitat for Humanity	Cordele	GA	150,000
Area Committee to Improve Opportunity	Athens	GA	61,275
Georgia Legal Services Program, Inc.	Atlanta	GA	150,000
Partnership Housing Affordable to Society	Bainbridge	GA	150,000
Area 12 Council on Aging and Community	Dillsboro	IN	150,000
County Community Housing Development Corporation	Whitley City	KY	150,000
People's Self-Help Housing, Inc.	Vanceburg	KY	150,000
Sunrise County Economic Council	Machias	ME	150,000
Genesis Fund	Damariscotta	ME	39,000
Life Renewal Ministry, Inc.	Starkville	MS	149,296
Human Resource Development Council of District	Bozeman	MT	150,000
SER De New Mexico, Inc.	Albuquerque	NM	150,000
South Central Council of Governments, Inc	Elephant Butte	NM	138,000
Mexicano Land Education and Conservation Trust	Espanola	NM	128,640

APPENDIX A.—FISCAL YEAR 2003 FUNDING AWARDS FOR RURAL HOUSING AND ECONOMIC DEVELOPMENT PROGRAM—Continued

Applicant	City	State	Award dollars
Community Unified Today, Inc.	Geneva	NY	150,000
Adams Brown County Economic Opportunities	Georgetown	OH	140,572
Confederated Tribes of the Umatilla	Pendleton	OR	150,000
Confederated Tribes of Coos	Coos Bay	OR	150,000
Options for Southern Oregon, Inc.	Grants Pass	OR	108,625
Community Action Southwest	North Apollo	PA	148,988
Lakota Fund	Kyle	SD	150,000
Four Bands Community Fund, Inc.	Eagle Butte	SD	100,000
West Tennessee Legal Services	Jackson	TN	150,000
Amigos Del Valle, Inc.	Mission	TX	150,000
Texas Rural Legal Aid	Austin	TX	150,000
Rural Housing Development Corporation	Provo	UT	150,000
Snoqualmie Indian Tribe	Carnation	WA	140,000
Makah Housing Authority	Neah Bay	WA	150,000
Menominee Indian Tribe of Wisconsin	Keshena	WI	150,000
Ho-Chunk Nation	Black River Falls	WI	126,626
Preservation Alliance of West Virginia	Charleston	WV	150,000
Total			24,590,272

[FR Doc. 04–1098 Filed 1–16–04; 8:45 am]
BILLING CODE 4210–29–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Draft Recovery Plan for Behren's Silverspot Butterfly (*Speyeria zerene behrensii*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability for review and comment.

SUMMARY: The U.S. Fish and Wildlife Service ("we") announces the availability of the Draft Recovery Plan for Behren's Silverspot Butterfly (*Speyeria zerene behrensii*). This draft recovery plan includes specific criteria and measures to be taken in order to effectively recover the species to the point where delisting is warranted. We solicit review and comment from local, State, and Federal agencies, and the public on this draft recovery plan.

DATES: Comments on the draft recovery plan must be received on or before March 22, 2004 to receive our consideration.

ADDRESSES: Copies of the recovery plan are available for inspection, by appointment, during normal business hours at the following location: U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, California 95521. Requests for copies of the draft recovery plan and written comments and materials regarding the plan should be addressed to the Field Supervisor at the above address. Electronic comments on the draft recovery plan can be sent via e-mail to: *fw1_behrenssilverspot@fws.gov*. An electronic copy of the draft recovery plan is also available at *http://www.pacific.fws.gov/ecoservices/endangered/recovery/default.htm*.

FOR FURTHER INFORMATION CONTACT: Jim Watkins, Fish and Wildlife Biologist, at the above Arcata address (telephone: 707–822–7201).

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants is a primary goal of our endangered species program and the Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*). Recovery means improvement of the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting or delisting listed species, and estimate time and cost for implementing the measures needed for recovery.

The Act requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires that public notice and an opportunity for public review and comment be provided during recovery plan development. We will consider all information presented during the public comment period prior to approval of each new or revised recovery plan. Substantive technical comments may result in changes to the plan. Substantive comments regarding recovery plan implementation may not necessarily result in changes to the recovery plan, but will be forwarded to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions. Individual responses to comments will not be provided.

The Behren's silverspot butterfly occupies early successional coastal terrace prairie habitat that contains *Viola adunca* (early blue violet), the larval host plant, adult nectar sources, and adult courtship areas. Several populations have apparently been extirpated, and the species likely remains at a single location near Point Arena, Mendocino County, California. It was federally listed as an endangered species on December 5, 1997 (62 FR 64306). Threats include invasion by exotic species, natural succession, fire suppression, residential development, and collection.

This draft recovery plan includes conservation measures designed to ensure that a self-sustaining population of Behren's silverspot butterfly will continue to exist, distributed throughout its extant and historic range. Specific recovery actions focus on protection and management of suitable habitat with larval food plants. The draft recovery plan also addresses the need to re-establish multiple populations of Behren's silverspot butterfly within its historic range. The ultimate objective of this recovery plan is to delist Behren's silverspot butterfly through implementation of a variety of recovery

actions including: (1) Protecting existing habitat; (2) locating or establishing new metapopulations; (3) developing and implementing management plans; (4) monitoring metapopulations and habitat; and (5) reducing take and sources of mortality.

Public Comments Solicited

We solicit written comments on the draft recovery plan described. All comments received by the date specified above will be considered in developing a final recovery plan.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: November 5, 2003.

Steve Thompson,

Manager, California/Nevada Operations Office, Region 1, Fish and Wildlife Service.

[FR Doc. 04–1121 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF INTERIOR

Fish and Wildlife Service

Proposed Safe Harbor Agreement for Fender's Blue Butterfly and Kincaid's Lupine in the Dallas Oak Savanna, Polk County, OR

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The Fish and Wildlife Service (we, the Service) has received an application from Clem and Barbara Starck (Applicants) for an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA). The permit application includes a proposed Safe Harbor Agreement (Agreement) between the Applicants and the Service that allows for management and conservation of the endangered Fender's blue butterfly (*Icaricia icarioides fenderi*) and the threatened Kincaid's lupine (*Lupinus sulphureus kincaidii*) on approximately 20 acres (ac) of land owned and managed by the Applicants. The Agreement is intended to facilitate the implementation of conservation measures for the species and to support on-going efforts to reintroduce Kincaid's lupine into areas where it historically occurred and where Fender's blue butterfly will be encouraged to colonize. The Applicants propose to introduce Kincaid's lupine onto their lands and conduct related monitoring activities with the assistance of the Institute for Applied Ecology. Although the Fender's blue butterfly does not currently occur on the property, restoration of its native habitat might encourage colonization over time. If natural colonization appears to be unlikely, introduction of the butterfly to the restored habitat would be considered.

The proposed Agreement and ESA survival enhancement permit may be eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). This is evaluated in an Environmental Action Statement, which is also available for public review.

DATES: Written comments must be received by close of business on February 19, 2004.

ADDRESSES: Comments should be addressed to Kemper McMaster, State Supervisor, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, Oregon 97266, facsimile number (503) 231–6195 (see **SUPPLEMENTARY INFORMATION,** Public Review and Comment).

FOR FURTHER INFORMATION CONTACT: Richard Szlemp, Fish and Wildlife Service Biologist, at the above address or by calling (503) 231–6179.

SUPPLEMENTARY INFORMATION:

Public Review and Comment

Individuals wishing copies of the permit application, the Environmental Action Statement, or copies of the full text of the proposed Agreement should contact the office and personnel listed in the **ADDRESSES** section above. Documents also will be available for public inspection, by appointment, during normal business hours at this office (see **ADDRESSES**).

The Service provides this notice pursuant to section 10(c) of the ESA and pursuant to implementing regulations for NEPA (40 CFR 1506.6). All comments received on the permit application and proposed Agreement, including names and addresses, will become part of the administrative record and may be released to the public. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. All submissions from organizations or companies, or from individuals representing organizations or companies, are available for public inspection in their entirety.

Background

Fender's blue butterfly is one of about a dozen subspecies of Boisduval's blue butterfly (*Icaricia icarioides*). Boisduval's blue butterfly is found in western North America; the subspecies, *fenderi,* is restricted to the Willamette Valley, Oregon. This subspecies was thought to be extinct until its rediscovery in Benton County in 1989. Kincaid's lupine is a subspecies of the sulfur lupine (*Lupinus sulphureus*), which occurs on upland prairie habitats in western North America from British Columbia to California. Kincaid's lupine is the primary larval food plant for Fender's blue butterfly.

Past conversion of land to agriculture, urban development, fire suppression, and other factors have reduced upland prairie to approximately 988 ac, which is approximately 0.01 percent of its former range. Of this remaining prairie habitat, Fender's blue butterfly occupies approximately 408 ac and Kincaid's lupine occupies about 370 ac. The threat of habitat loss in remnant prairies continues through habitat destruction or degradation due to agriculture, urban development, forestry, grazing, roadside maintenance, and commercial Christmas tree farming. Sites not threatened by habitat destruction are threatened by herbivory, competition by nonnative species, and plant succession. Over half of the sites occupied by Fender's blue butterfly and Kincaid's lupine are privately owned, necessitating conservation actions on non-Federal lands to recover the species.

The Applicants, in partnership with the Service through the Partners for Fish and Wildlife Program, propose to enter into an agreement to restore approximately 20 ac of upland prairie oak savanna habitat (Agreement #13420–1–J134). The project area had been a hay field and horse pasture and was covered with a variety of hay grasses and weeds, including Himalayan blackberry and Queen Anne's lace. The project site consists of two fields, both of which have large Oregon white oaks growing along the edges. The site was determined to be suitable for introduction of Kincaid's lupine and may eventually support Fender's blue butterfly.

As described in the proposed Agreement, the Applicants and the Service would agree to carry out management activities that would restore 20 ac of oak savanna habitat for Kincaid's lupine and Fender's blue butterfly. The Applicants will maintain the habitat for a period of 15 years by controlling invasive plant species via bi-annual perimeter mowing, burning, or other means. In return for these voluntary conservation commitments, an ESA 10(a)(1)(A) permit, if approved, would extend assurances to the Applicants, including authorization to return the property to its original baseline condition at the end of the 15-year term of the Agreement.

The Service would be responsible for annual compliance monitoring related to implementation of the proposed Agreement and fulfillment of its provisions. The Institute for Applied Ecology, per the Partners for Fish and Wildlife Program contract, will monitor effectiveness of the introduction and survivorship of Kincaid's lupine seeds and seedlings.

We will evaluate the permit application, the proposed Agreement, and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act and applicable regulations. If the requirements are met, the Service will sign the proposed Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the Act to the applicant for take of Fender's blue butterfly as a result of activities incidental to otherwise lawful activities of the project. Kincaid's lupine would be included on the permit in recognition of the conservation benefits provided to it under the Agreement as a result of restoration and recovery activities. The Service will not make a final decision without full consideration of all comments received during the comment period.

Dated: December 22, 2003.

David Wesley,

Deputy Regional Director, Region 1, Portland, Oregon.

[FR Doc. 04–1095 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Notice of Submission of Information Collection to the Office of Management and Budget

AGENCIES: Bureau of Indian Affairs, Interior and Indian Health Service, Health and Human Services.

SUMMARY: The Bureau of Indian Affairs and the Indian Health Service are submitting the information collection, titled "Indian Self-Determination and Education Assistance Act Contracts" to the Office of Management and Budget for renewal. The information collection, #1076–0136, is used to process contracts, grants or cooperative agreements for award by the Bureau of Indian Affairs and the Indian Health Service as authorized by the Indian Self-Determination and Education Assistance Act. The Act was amended and is set forth in 25 CFR part 900. This proposed information collection project was published in the **Federal Register** (68 FR 37016, June 20, 2003) and allowed 60 days for public comment. No public comment was received in response to the notice. The purpose of this notice is to allow 30 days for public comment to be submitted to OMB. The Department of the Interior and the Department of Health and Human Services invite you to submit comments to the OMB on the information collection described below.

DATES: Interested persons are invited to submit comments on or before February 19, 2004.

ADDRESSES: You may submit comments on the information collection to the Desk Officer for Department of the Interior, by facsimile at (202) 395–6566 or you may send an e-mail to: *OIRA_DOCKET@omb.eop.gov.*

Please send copy of comments to Lena Mills, Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW., MS 320 SIB, Washington, DC 20240. You may telefax comments on this information collection to (202) 208–5113. You may also hand-deliver written comments or view comments at the same address.

FOR FURTHER INFORMATION CONTACT: You may request further information or obtain copies of the information collection request submission from Lena Mills, Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW., MS 320 SIB, Washington, DC 20240, or (202) 513–7612.

SUPPLEMENTARY INFORMATION: Representatives of the Department of the Interior and the Department of Health and Human Services and Tribes developed a joint rule, 25 CFR part 900, to implement section 107 of the Indian Self-Determination and Education Assistance Act, as amended, Title I, Public Law 103–413, the Indian Self-Determination Contract Reform Act of 1994. Section 107(a)(2)(A)(ii) of the Indian Self-Determination Contract Reform Act requires the joint rule to permit contracts and grants be awarded to Indian Tribes without the unnecessary burden or confusion associated with two sets of rules and information collection requirements when legislation treats this as a single program covering two separate agencies. The Bureau of Indian Affairs and the Indian Health Service estimate that the base burden hours established for this Information Collection Request, OMB 1076–0136, will be reduced overall by approximately 20 percent. The reduction in the number of base burden hours established for information collection requirements of 25 CFR part 900 is a result of the three following factors:

(1) More Tribes are contracting under 25 CFR 900.8 which permits Tribes to contract several programs under a single contract;

(2) The number of self-governance Tribes has increased. Self-governance Tribes may combine all programs under a single self-governance compact;

(3) The majority of contracts awarded are for renewal, which take considerably less time to complete than new contracts and therefore substantially reduces the burden under subpart C.

The information requirements for this joint rule represent significant differences from other agencies in several respects. Both the Bureau of Indian Affairs and the Indian Health Service let contracts for multiple programs whereas other agencies usually award single grants to Tribes. Under the Indian Self-Determination and Education Assistance Act, as amended, and the Indian Self-Determination Contract Reform Act of 1994, Tribes are entitled to contract and may renew contracts annually where other agencies provide grants on a discretionary/competitive basis.

The proposal and other supporting documentation identified in this information collection is used by the Department of the Interior and the Department of Health and Human Services to determine applicant eligibility, evaluate applicant capabilities, protect the service population, safeguard Federal funds and other resources, and permit the Federal agencies to administer and evaluate contract programs. Tribal governments or Tribal organizations provide the information by submitting Public Law 93–638 contract or grant proposals to the appropriate Federal agency. No third-party notification or public disclosure burden is associated with this collection.

Request for Comments: The Bureau of Indian Affairs, DOI and Indian Health Service, DHHS requests you to send your comments on this collection to the locations listed in the **ADDRESSES** section.

Your comments should address: (a) The necessity of the information collection for the proper performance of the agencies, including whether the information will have practical utility; (b) the accuracy of the agencies' estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c)

ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor nor request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section, room 320–South Interior Building, during the hours of 9 a.m. to 5 p.m., Eastern Standard Time, Monday through Friday, except for legal holidays. If you wish to have your name and/or address withheld, you must state this prominently at the beginning of your comments. We will honor your request according to the requirements of the law. All comments from organizations or representatives will be available for review. We may withhold comments from review for other reasons.

OMB Control Number: 1076–0136.

Title: Indian Self-Determination and Education Assistance Act Contracts.

Brief Description of Collection: A Tribe or Tribal organization may be required to respond from 1 to 12 times per year, depending upon the number of programs they contract from the Bureau of Indian Affairs and Indian Health Service. Each response may vary in its length. In addition, each Subpart concerns different parts of the contracting process. For example, Subpart C relates to the content provisions of the initial contract proposal. The burden associated with this would not be used when contracts are renewed. Subpart F describes minimum standards for the management systems used by Indian Tribes or Tribal organizations under these contracts. Subpart G addresses the negotiability of all reporting and data requirements in the contract.

Type of review: Renewal.

Respondents: 550.

Total annual burden to respondents: 191,174 hours.

Time per response: Varies from 10 hours to 50 hours.

Total number of responses: 5,507.

Dated: January 6, 2004.

Aurene M. Martin,

Principal Deputy Assistant Secretary—Indian Affairs, Department of the Interior.

Dated: November 20, 2003.

Robert G. McSwain,

Acting Director, Indian Health Service.

[FR Doc. 04–1111 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Environmental Impact Statement for the Proposed Ione Band of Miwok Indians' Trust Acquisition and Casino Project, Amador County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of additional public scoping meeting and extension of comment period for scoping.

SUMMARY: This notice announces that the Bureau of Indian Affairs is holding an additional public scoping meeting and extending the comment period for identifying potential issues and content for inclusion in the Environmental Impact Statement (EIS) for the Proposed Ione Band of Miwok Indians' Trust Acquisition and Casino Project, Amador County, California. The Notice of Intent to prepare the EIS, published in the **Federal Register** on November 7, 2003 (68 FR 63127), announced a public scoping meeting for November 19, 2003, which was held, and a closing date for comments of December 8, 2003.

DATES: The additional public scoping meeting will be held on Wednesday, February 4, 2004, from 6 p.m. to 9 p.m. or until the last comment is received. The date by which written comments must arrive is extended to February 20, 2004.

ADDRESSES: The additional public scoping meeting will be held at the Amador County Fairgrounds, 18621 Sherwood and School Streets, Plymouth, California. You may mail or hand-carry written comments to Mr. Clay Gregory, Acting Regional Director, Pacific Region, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825.

FOR FURTHER INFORMATION CONTACT: William Allan, (916) 978–6043.

SUPPLEMENTARY INFORMATION: The Ione Band of Miwok Indians proposes that the Bureau of Indian Affairs take 208.06± acres of land into trust for the Band and that a casino, parking, hotel and other facilities supporting the casino be constructed on the trust acquisition property. The proposed project is located within the City of Plymouth, California. Additional details may be found in the November 7, 2003, **Federal Register** notice.

Areas of environmental concern identified to date for analysis in the EIS include land use, geology and soils, water resources, agricultural resources, biological resources, mineral resources, paleontological resources, cultural resources, traffic and transportation, air quality, noise, public health/environmental hazards, hazardous materials and waste/worker safety, public services and utilities, socio-economics, visual resources/aesthetics and environmental justice. Additional issues may be addressed based on comments received during the scoping process.

Public Comment Availability

Comments, including names and addresses of respondents, will be available for public review at the mailing address shown in the **ADDRESSES** section, during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish us to withhold your name and/or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. We will not, however, consider anonymous comments. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public inspection in their entirety.

Authority

This notice is published in accordance with section 1503.1 of the Council on Environmental Quality Regulations (40 CFR Parts 1500 through 1508) implementing the procedural requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and the Department of the Interior Manual (516 DM 1–6), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8.

Dated: January 6, 2004.

Aurene M. Martin,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 04–1110 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–030–1020–XX 028H; G 04–0072]

Meeting Notice for the National Historic Oregon Trail Interpretive Center (NHOTIC) Advisory Board

AGENCY: Bureau of Land Management (BLM), Vale District.

ACTION: Notice of meeting.

SUMMARY: The National Historic Oregon Trail Interpretive Center Advisory Board will meet in a conference room at the Best Western Sunridge Inn (541–523–6444), One Sunridge Way in Baker City, OR from 8 a.m. to 12 p.m., (Pacific time P.t.) on Thursday, March 4, 2004.

The meeting topics may include: reports from the Standing Committees (Economic Development, Visitation, Education and Community Liaison), a roundtable to allow members to introduce new issues to the board, and other matters as may reasonably come before the Board. The entire meeting is open to the public. For a copy of the information to be distributed to the Board members, please submit a written request to the Vale District Office 10 days prior to the meeting. Public comment is scheduled for 10 a.m. to 10:15 a.m., Pacific time (P.t.).

FOR FURTHER INFORMATION CONTACT: Additional information concerning the NHOTIC Advisory Board may be obtained from Peggy Diegan, Management Assistant/Webmaster, Vale District Office, 100 Oregon Street, Vale, OR 97918 (541) 473–3144, or e-mail *Peggy_Diegan@or.blm.gov*.

Dated: January 13, 2004.

David R. Henderson,

District Manager.

[FR Doc. 04–1091 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–260–09–1060–00–24 1A]

Wild Horse and Burro Advisory Board; Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Announcement of meeting.

SUMMARY: The Bureau of Land Management (BLM) announces that the Wild Horse and Burro Advisory Board will conduct a meeting on matters pertaining to management and protection of wild, free-roaming horses and burros on the Nation's public lands.

DATES: The Advisory Board will meet Monday, February 9, 2004, from 8 a.m., to 5 p.m., local time, and on Tuesday, February 10, 2004, from 8 a.m., to 12 p.m., local time.

ADDRESSES: The Advisory Board will meet at the Crowne Plaza, 2532 W. Peoria, Phoenix, Arizona 85029, (602) 943–2341.

Written comments pertaining to the Advisory Board meeting should be sent to: Bureau of Land Management, National Wild Horse and Burro Program, WO 260, Attention: Ramona Delorme, 1340 Financial Boulevard, Reno, Nevada 89502–7147. Submit written comments pertaining to the Advisory Board meeting no later than close of business February 4, 2004. See **SUPPLEMENTARY INFORMATION** section for electronic access and filing address.

FOR FURTHER INFORMATION CONTACT: Janet Neal, Wild Horse and Burro Public Outreach Specialist, 775–861–6583. Individuals who use a telecommunications device for the deaf (TDD) may reach *Ms. Neal* at any time by calling the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Public Meeting

Under the authority of 43 CFR part 1784, the Wild Horse and Burro Advisory Board advises the Secretary of the Interior, the Director of the BLM, the Secretary of Agriculture, and the Chief, Forest Service, on matters pertaining to management and protection of wild, free-roaming horses and burros on the Nation's public lands. The tentative agenda for the meeting is:

Monday, February 9, 2004 (8 a.m.–5 p.m.)

8 a.m. Call to Order & Introductions:
8:15 a.m. Old Business: FY 04 Program Update
9:30 a.m. Break
9:45 a.m. Old Business:
2004–2006 Advisory Board Charter
Long-term Holding and Adoptions Costs
12:30 p.m. Lunch
1:30 p.m. Old Business:
Facility Managers/Veterinarians Questionnaire
Facility Weekend Adoptions
2:30 p.m. Break
2:45 p.m. Old Business: National Marketing-Adoption Plan
4 p.m. Public Comments
4:45 p.m. Recap/Summary
5 p.m. Adjourn
5–6 p.m. Roundtable Discussion

Tuesday, February 10, 2004 (8 a.m.–12 p.m.)

8 a.m. New Business
8:45 a.m. Board Recommendations
9:45 a.m. Break
10 a.m. Next Meeting/Date/Site
Proposed Agenda Items
12 p.m. Adjourn

The meeting site is accessible to individuals with disabilities. An individual with a disability needing an auxiliary aid or service to participate in the meeting, such as interpreting service, assistive listening device, or materials in an alternate format, must notify the person listed under **FOR FURTHER INFORMATION CONTACT** two weeks before the scheduled meeting date. Although the BLM will attempt to meet a request received after that date, the requested auxiliary aid or service may not be available because of insufficient time to arrange it.

The Federal advisory committee management regulations [41 CFR 101–6.1015(b),] require BLM to publish in the **Federal Register** notice of a meeting 15 days prior to the meeting date.

II. Public Comment Procedures

Members of the public may make oral statements to the Advisory Board on February 9, 2004, at the appropriate point in the agenda. This opportunity is anticipated to occur at 4 p.m., local time. Persons wishing to make statements should register with the BLM by noon on February 9, 2004, at the meeting location. Depending on the number of speakers, the Advisory Board may limit the length of presentations. At previous meetings, presentations have been limited to three minutes in length. Speakers should address the specific wild horse and burro-related topics listed on the agenda. Speakers must submit a written copy of their statement to the address listed in the **ADDRESSES** section or bring a written copy to the meeting.

Participation in the Advisory Board Meeting is not a prerequisite for submission of written comments. The BLM invites written comments from all interested parties. Your written comments should be specific and explain the reason for any recommendation. The BLM appreciates any and all comments, but those most useful and likely to influence decisions on management and protection of wild horses and burros are those that are either supported by quantitative information or studies or those that include citations to and analysis of applicable laws and regulations. Except for comments provided in electronic format, speakers should submit two copies of their written comments where feasible. The BLM will not necessarily consider comments received after the time indicated under the **DATES** section

or at locations other than that listed in the **ADDRESSES** section.

In the event there is a request under the Freedom of Information Act (FOIA) for a copy of your comments, the BLM will make them available in their entirety, including your name and address. However, if you do not want the BLM to release your name and address in response to a FOIA request, you must state this prominently at the beginning of your comment. The BLM will honor your request to the extent allowed by law. The BLM will release all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, in their entirety, including names and addresses.

Electronic Access and Filing Address

Speakers may transmit comments electronically via the Internet to: *Janet_Neal@blm.gov*. Please include the identifier "WH&B" in the subject of your message and your name and address in the body of your message.

Dated: January 13, 2004.

Thomas H. Dyer,

Assistant Director, Renewable Resources and Planning.

[FR Doc. 04–1147 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

CO–922–5700–BX; COC64903]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

Pursuant to the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), a petition for reinstatement of oil and gas lease COC64903 for lands in Moffat County, Colorado, was timely filed and were accompanied by all the required rentals accruing from the date of termination. The lessee has agreed to the amended lease terms for rentals and royalties at the rate of $10.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively.

The lessee has paid the required $500 administrative fee and $166 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease COC64903 effective June 1, 2002, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Beverly A. Derringer,

Chief, Fluid Minerals Adjudication.

[FR Doc. 04–1071 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Long-Term Miscellaneous Purposes Contract, Carlsbad Irrigation District, New Mexico

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent to prepare a draft environmental impact statement and announcement of a public scoping meeting.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, the Bureau of Reclamation (Reclamation) and the New Mexico Interstate Stream Commission (NMISC) intend to prepare a draft environmental impact statement (EIS) on the execution of a long-term contract, based upon the 1920 Sale of Water for Miscellaneous Purposes Act (long-term miscellaneous purposes contract) with the Carlsbad Irrigation District (CID), New Mexico, and the subsequent conversion and delivery of the full amount of irrigation water addressed in the contract and any related contracts (hereinafter collectively referred to as a single contract). Reclamation is the lead Federal agency and the NMISC will serve as a joint lead agency for NEPA compliance for the proposed Federal action.

DATES AND ADDRESSES: To receive input from interested organizations and individuals, a public scoping meeting will be held on February 12, 2004, in Carlsbad, New Mexico. Scoping is an early and public process for determining the issues to be addressed and identifying any significant issues related to the proposed Federal action. The scoping period will be open from January 20, 2004 to March 15, 2004. The public scoping meeting will be held at the following time and location:

- Thursday, February 12, 2004—7 to 9 p.m., Best Western Stevens Inn, Room No. 4, 1829 South Canal Street, Carlsbad, New Mexico.

Reclamation also invites written comments during the scoping period. Written comments regarding the scope and content of the draft EIS may be sent directly to Marsha Carra, Bureau of Reclamation, Albuquerque Area Office, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102; telephone (505) 462–3602; facsimile (505) 462–3797; e-mail: *mcarra@uc.usbr.gov*. Written comments should be received no later than March 15, 2004, to be considered most effectively.

Those not desiring to submit comments or suggestions at this time, but who would like to receive a copy of the draft EIS, should contact Marsha Carra. When the draft EIS is complete, its availability will be announced in the **Federal Register**, in the local news media, and through direct contact with interested parties. Comments will be solicited on the draft document.

FOR FURTHER INFORMATION CONTACT: Marsha Carra, Bureau of Reclamation, Albuquerque Area Office, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102; e-mail: *mcarra@uc.usbr.gov*; telephone (505) 462–3602; or Sara Rhoton, New Mexico Interstate Stream Commission, Bataan Memorial Building, State Capitol, P.O. Box 25102, Santa Fe, New Mexico 87504; e-mail: *srhoton@ose.state.nm.us*; telephone (505) 827–3996.

SUPPLEMENTARY INFORMATION: The purpose of Reclamation's proposed Federal action is to allow the NMISC to use Carlsbad Project water (Project water) allotted to land located inside the boundaries of the CID that NMISC owns or leases from other members of the CID, or other Project water, for release from facilities serving the Carlsbad Project. The underlying need for Reclamation's action is to help the NMISC comply with the Pecos River Compact and the United States Supreme Court Amended Decree in *Texas* v. *New Mexico*. "Other Project water" consists of water that is allotted to land on the CID assessment rolls that is available for lease under a Contingent Water Contract where: (1) Willing lessors temporarily forego irrigation of their lands in an irrigation season (fallowed land water) or (2) allotted water is not delivered to farms by October 31 of a given year (undelivered allotment water). The long-term miscellaneous purposes contract would replace a 1999 short-term contract that Reclamation currently has with the CID that allows the NMISC to use water allotted to CID lands leased by the NMISC or lease other available Carlsbad Project water.

The State of New Mexico *ex rel.* the State Engineer, NMISC, Reclamation, CID, and the Pecos Valley Artesian Conservancy District entered into a Settlement Agreement on March 25, 2003, that resolves litigation,

implements a plan to ensure delivery of water to the CID and New Mexico-Texas state line, and settles many water management issues on the Pecos River. An *ad hoc* committee comprised of water users in the Pecos River Basin was formed to develop a solution for long-term compliance with the Pecos River Compact and Amended Decree, resulting in the Settlement Agreement. In addition, the Settlement Agreement is contingent on fulfilling certain conditions, including execution of a long-term miscellaneous purposes contract.

For several years Reclamation and the NMISC have worked together to address Pecos River water issues. Recently, the two agencies developed an approach for the environmental review of proposed Pecos River Basin activities that involves two concurrent EIS's: the Miscellaneous Purposes Contract EIS (the subject of this Notice of Intent) and the Carlsbad Project Water Operations and Water Supply Conservation EIS. The latter EIS is being developed to address Reclamation's Carlsbad Project water operations and water acquisition program. The Miscellaneous Purposes Contract EIS will address the effects of entering into a long-term miscellaneous purposes contract and the subsequent conversion and delivery of the full amount of irrigation water addressed in the miscellaneous purposes contract. Reclamation and the NMISC plan to coordinate the environmental analyses for both EIS processes.

The Carlsbad Project is a Federal Reclamation project authorized to irrigate 25,055 acres. Reclamation stores and delivers Carlsbad Project water for the benefit of the CID. Carlsbad Project facilities on the Pecos River include Santa Rosa Dam (owned and operated by the U.S. Army Corps of Engineers), Sumner Dam, Brantley Dam, and Avalon Dam. The NMISC plans to purchase land, and water rights appurtenant thereto, within the boundaries of the CID.

On February 28, 2003, Reclamation published a notice in the **Federal Register** stating plans to execute a contract with the CID that would allow the NMISC to use water allotted for up to 6,000 acres, or other available Project water, for purposes other than irrigation. These 6,000 acres, plus 164 acres that the NMISC currently owns within the boundaries of the CID, would be fallowed under this contract. Execution of this contract would not preclude future use of the water for irrigation purposes on lands owned by the NMISC. The Commissioner of Reclamation has granted approval to negotiate and execute a long-term miscellaneous purposes contract, pursuant to authority provided by the Sale of Water for Miscellaneous Purposes Act of February 25, 1920, whereby the NMISC would be limited to using or leasing a maximum of 50,000 acre-feet of Project water per year.

The draft EIS on the execution of a long-term miscellaneous purposes contract, and the subsequent conversion and delivery of the full amount of irrigation water addressed in the long-term miscellaneous purpose contract, will disclose the effects of the NMISC's use of this water and identify options to mitigate for any adverse impacts. Any proposed mitigation will comply with State, Federal, and other applicable laws and regulations. During the EIS process, opportunities to provide additional environmental, recreational, and social benefits may be identified and incorporated into the EIS.

The alternatives to be analyzed in the draft Miscellaneous Purposes Contract EIS will include the execution of a long-term miscellaneous purposes contract (Proposed Action Alternative), any other alternatives identified that fulfill the purpose and need, and a No Action Alternative. The draft EIS will assess the potential effects that the alternatives may have on Indian trust assets as well as any potential disproportionate effects on minority or low-income communities (environmental justice). The draft EIS will also evaluate the effects of the alternatives on the State of New Mexico's ability to meet annual state line delivery obligations associated with the Pecos River Compact and Amended Decree.

Public Disclosure

It is Reclamation's practice to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: January 7, 2004.

Rick L. Gold,

Regional Director—Upper Colorado Region, Bureau of Reclamation.

[FR Doc. 04–1097 Filed 1–16–04; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–449]

U.S. Market Conditions for Certain Wool Articles in 2002–04

AGENCY: International Trade Commission.

ACTION: In accordance with the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Commission has submitted a request for emergency processing for review and clearance of questionnaires to the Office of Management and Budget (OMB). The Commission has requested OMB approval of this submission by COB February 13, 2004.

EFFECTIVE DATE: December 19, 2003.

Purpose of Information Collection: The forms are for use by the Commission in connection with its second (and final) report on investigation No. 332–449, U.S. Market Conditions for Certain Wool Articles in 2002–04, instituted under the authority of section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)). This investigation was requested by the United States Trade Representative (USTR), which asked that the Commission submit the report by September 15, 2004. As requested by the USTR, the Commission will provide information for 2003 and year-to-date 2003–04 on U.S. market conditions for men's and boys' worsted wool tailored clothing, worsted wool fabrics used in such clothing, and inputs used in such fabrics (*see* the Commission's Notice of Investigation, published in the **Federal Register** on February 4, 2003 (68 FR 5652) for further information on the investigation).

Summary of Proposal

(1) *Number of forms submitted:* 2.

(2) *Title of forms:* Questionnaire for U.S. Producers of Worsted Wool Fabrics and Questionnaire for U.S. Purchasers of Worsted Wool Fabrics.

(3) *Type of request:* reinstatement with change.

(4) *Frequency of use:* one-time use.

(5) *Description of respondents:* U.S. producers and purchasers of worsted wool fabrics.

(6) *Estimated number of respondents:* 40 (4 producers and 36 purchasers).

(7) *Estimated total number of hours to complete the forms:* 1,160 hours.

(8) Information obtained from the forms that qualifies as confidential business information will be so treated by the Commission and not disclosed in a manner that would reveal the individual operations of a firm.

FOR FURTHER INFORMATION CONTACT: Copies of the forms and supporting documents may be obtained from Jackie W. Jones (202–205–3466; *jones@usitc.gov*) of the Office of Industries, U.S. International Trade Commission. Comments about the proposals should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Room 10102 (Docket Library), Washington, DC 20503, ATTENTION: Docket Librarian. All comments should be specific, indicating which part of the questionnaire is objectionable, describing the concern in detail, and including specific suggested revisions or language changes. Copies of any comments should be provided to Robert Rogowsky, Director, Office of Operations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, who is the Commission's designated Senior Official under the Paperwork Reduction Act.

Hearing impaired individuals may obtain information on this matter by contacting the Commission's TTD terminal on 202–205–1810. General information about the Commission may be obtained by accessing its Internet server (*http://www.usitc.gov*).

Issued: January 14, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 04–1128 Filed 1–16–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–494]

In the Matter of Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices; Notice of Commission Decision Not To Review an Initial Determination Granting Complainant's Motion To Amend the Complaint and Notice of Investigation To Add Six Respondents to the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on November 26, 2003, granting complainant Auto Meter Products, Inc.'s motion to amend the complaint and notice of investigation to add six firms as respondents in the above-captioned investigation. These firms are: Modern Work, Inc. of Taipei, Taiwan; Dynamik Exhaust Industry Co., Ltd. of Taipei, Taiwan; LPL Trans Trade Co. of Taipei, Taiwan; Transglobal of Greenville, South Carolina; GSN Automotive, Inc. of Yung Kang City, Taiwan; and Equus, Inc. of Taipei, Taiwan.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3115. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: The Commission issued a notice of investigation dated June 16, 2003, naming Auto Meter Products, Inc. ("Auto Meter") of Sycamore, Illinois, as the complainant and several companies as respondents. On June 20, 2003, the notice of investigation was published in the **Federal Register**. 68 FR 37023 (June 20, 2003). The complaint alleges violations of section 337 of the Tariff Act of 1930 in the importation and sale of certain automotive measuring devices, products containing same, and bezels for such devices, by reason of infringement of U.S. Registered Trademark Nos. 1,732,643 and 1,497,472, and U.S. Supplemental Register No. 1,903,908, and infringement of the complainant's trade dress. Subsequently, one more firm was added as a respondent based on a motion filed by Auto Meter.

On October 2, 2003, Auto Meter filed a motion to amend the complaint and notice of investigation, and protective order to include six additional respondents. On October 14, 2003, American Products Company, Inc. ("APC"), Equus Products, Inc. ("Equus Products") and GR Motorsports, Inc. D/b/a/ Matrix GR Motorsports ("GR"), three of the current respondents, filed their opposition to Auto Meter's motion. On October 23, 2003, Auto Meter filed a motion for leave to reply to the opposition filed by APC, Equus Products, and GR, which was granted by the ALJ. On October 29, 2003, the Commission investigative attorneys filed a response in support of Auto Meter's motion.

On December 15, 2003, the ALJ issued an initial determination (Order No. 12) granting Auto Meter's motion. No party petitioned for review of the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in § 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: January 13, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 04–1130 Filed 1–16–04; 8:45 am]

BILLING CODE 7020–02–P

NATIONAL SCIENCE FOUNDATION

Comment Request: National Science Foundation Proposal/Award Information—Grant Proposal Guide

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request renewed clearance of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

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 on respondents, including through the use of automated collection techniques or other forms of information technology;

and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be received by March 22, 2004, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: "National Sciences Foundation Proposal/Award Information-Grant Proposal Guide"

OMB Approval Number: 3145–0058.

Expiration Date of Approval: August 31, 2004.

Type of Request: Intent to seek approval to extend with revision an information collection for three years.

Proposed Project: The National Science Foundation Act of 1950 (Pub. L. 81–507) set forth NSF's mission and purpose:

"To promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense. * * *"

The Act authorized and directed NSF to initiate and support:

- Basic scientific research and research fundamental to the engineering process;
- Programs to strengthen scientific and engineering research potential;
- Science and engineering education programs at all levels and in all the various fields of science and engineering;
- Programs that provide a source of information for policy formulation; and
- Other activities to promote these ends.

Over the years, NSF's statutory authority has been modified in a number of significant ways. In 1968, authority to support applied research was added to the Organic Act. In 1980, The Science and Engineering Equal Opportunities Act gave NSF standing authority to support activities to improve the participation of women and minorities in science and engineering.

Another major change occurred in 1986, when engineering was accorded equal status with science in the Organic Act. NSF has always dedicated itself to providing the leadership and vision needed to keep the words and ideas embedded in its mission statement fresh and up-to-date. Even in today's rapidly changing environment, NSF's core purpose resonates clearly in everything it does: Promoting achievement and progress in science and engineering and enhancing the potential for research and education to contribute to the Nation. While NSF's vision of the future and the mechanisms it uses to carry out its charges have evolved significantly over the last four decades, its ultimate mission remains the same.

Use of the Information: The regular submission of proposals to the Foundation is part of the collection of information and is used to help NSF fulfill this responsibility by initiating and supporting merit-selected research and education projects in all the scientific and engineering disciplines. NSF receives more than 40,000 proposals annually for new projects, and makes approximately 10,500 new awards. Support is made primarily through grants, contracts, and other agreements awarded to more than 2,000 colleges, universities, academic consortia, nonprofit institutions, and small businesses. The awards are based mainly on evaluations of proposal merit submitted to the Foundation (proposal review is cleared under OMB Control No. 3145–0060).

The Foundation has a continuing commitment to monitor the operations of its information collection to identify and address excessive reporting burdens as well as to identify any real or apparent inequities based on gender, race, ethnicity, or disability of the proposed principal investigator(s)/project director(s) or the co-principal investigator(s)/co-project director(s).

Burden on the Public: The Foundation estimates that an average of 120 hours is expended for each proposal submitted. An estimated 40,000 proposals are expected during the course of one year for a total of 4,800,000 public burden hours annually.

Dated: January 13, 2004.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 04–1065 Filed 1–16–04; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

National Science Board; Meeting

AGENCY HOLDING MEETING: National Science Foundation, National Science Board, Committee on Programs and Plans.

DATE AND TIME: January 23, 2004 3:30 p.m. "4:30 p.m. Open Session Teleconference.

PLACE: The National Science Foundation, Stafford One Building, 4201 Wilson Boulevard, Room 130, Arlington, VA 22230.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Friday, January 23, 2004

Open Session (3:30 to 4:30 p.m.)

Discussion of the report by the National Academies on "Setting Priorities for Large Research Facility Projects supported by the National Science Foundation."

FOR FURTHER INFORMATION CONTACT: Michael P. Crosby, Executive Officer, NSB, (703) 292–7000, *www.nsf.gov/nsb*.

Michael P. Crosby,

Executive Officer.

[FR Doc. 04–1244 Filed 1–15–04; 2:53 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–348 and 50–369]

Southern Nuclear Operating Company, Inc.; Notice of Withdrawal of Application for Amendment to Facility Operating License

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of withdrawal; correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** on December 17, 2003 (68 FR 70320), that corrects the licensee name.

FOR FURTHER INFORMATION CONTACT: Sean Peters, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–1842, e-mail: *sep@nrc.gov*.

SUPPLEMENTARY INFORMATION: On page 70320, in the first column, in the first complete paragraph, first line, it is corrected to read from "Duke Energy Corporation" to "Southern Nuclear Operating Company, Inc."

Dated in Rockville, Maryland, this 13th day of January 2004.

For the Nuclear Regulatory Commission.

Sean E. Peters,

Project Manager, Section 1, Project Directorate II, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–1106 Filed 1–16–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–305]

Wisconsin Public Service Corporation and Wisconsin Power and Light Company, Kewaunee Nuclear Power Plant; Notice of Consideration of Approval of Transfer of Facility Operating License and Conforming Amendment and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the transfer of Facility Operating License No. DPR–43 for the Kewaunee Nuclear Power Plant (KNPP) currently owned by Wisconsin Public Service Corporation (WPSC) and Wisconsin Power and Light Company (WPL), who hold 59 percent and 41 percent ownership respectively, and Nuclear Management Company, LLC (NMC) as the licensed operator of KNPP. The transfer would be to Dominion Energy Kewaunee. The Commission is also considering amending the license for administrative purposes to reflect the proposed transfer.

According to an application for approval filed by WPSC, WPL, and NMC, Dominion Energy Kewaunee would assume title to the facility following approval of the proposed license transfer, and would be responsible for the operation, maintenance, and eventual decommissioning of KNPP. No physical changes to the Kewaunee facility or operational changes are being proposed in the application.

The proposed amendment would replace references to WPSC, WPL, and NMC in the license with references to Dominion Energy Kewaunee to reflect the proposed transfer. The proposed amendment would also change the name of the Kewaunee Nuclear Power Plant to the Kewaunee Power Station.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility which does no more than conform the license to reflect the transfer action involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

By February 9, 2004, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart M, "Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications," of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.1306, and should address the considerations contained in 10 CFR 2.1308(a). Untimely requests and petitions may be denied, as provided in 10 CFR 2.1308(b), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.1308(b)(1)–(2).

Requests for a hearing and petitions for leave to intervene should be served upon Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources, Inc. Rope Ferry Road, Waterford, CT 06385, phone number: 860–444–5316, fax: 860–444–4278, e-mail: *Lillian_Cuoco@dom.com,* Counsel for Dominion Energy Kewaunee; John E. Matthews, Esq., Morgan, Lewis & Brockius LLP, 1111 Pennsylvania Avenue, NW., Washington, DC 20004, phone: 202–739–3000, fax: 202–739–3001, e-mail: *jmatthews@morganlewis.com,* Counsel for Dominion Energy and WPL; Jonathan Rogoff, Esq., General Counsel, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016, phone number: 715–377–3316, fax: 715–377–3464, e-mail: *Jonathan.Rogoff@nmcco.com,* Counsel for NMC; and Allen W. Williams, Jr., Esq., Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202, phone: 414–297–5805, fax: 414–297–4900, e-mail: *awilliams@foley.com,* Counsel for WPSC; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.1313.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, by February 19, 2004, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated December 19, 2003, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents

Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. The application dated December 19, 2003, can be accessed under ADAMS Accession No. ML033570112.

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 13th day of January 2004.

For the Nuclear Regulatory Commission.

John G. Lamb,

Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–1105 Filed 1–16–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97–415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97–415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from December 24, 2003, through January 8, 2004. The last biweekly notice was published on January 6, 2003 (69 FR 691).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By February 19, 2004, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the

Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff, or may be delivered to the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that petitions for leave to intervene and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and because of continuing disruptions in delivery of mail to United States Government offices, it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

AmerGen Energy Company, LLC, Docket No. 50–461, Clinton Power Station, Unit 1, DeWitt County, Illinois

Date of amendment request: May 1, 2003.

Description of amendment request: The proposed amendment would revise the Clinton Power Station (CPS) Technical Specifications to (1) support an expansion of the core flow operating range, (2) implement an Oscillation Power Range Monitor (OPRM) Instrumentation system, and (3) implement the Detect and Suppress Solution—Confirmation Density approach to automatically detect and suppress neutronic/thermal-hydraulic instabilities. These changes will support operation at 3,473 megawatts thermal with core flow as low as 85 percent of rated core flow. The expanded operating range is identified as Maximum Extended Load Line Limit Analysis Plus (MELLLA+). The scope of evaluations required to support the expansion of the core flow operating range to MELLLA+ boundary is contained in the General Electric Licensing Topical Report (LTR) NEDC–33006P, "Maximum Extended Load Line Limit Analysis Plus Licensing Topical Report."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The probability (frequency of occurrence) of a design basis accident (DBA) occurring is not affected by the operating range expansion, because the plant continues to comply with the regulatory and design basis criteria established for plant equipment. The MELLLA+ core operating range expansion does not require significant plant hardware modifications. The core operating range expansion involves changes to the operating power-to-flow map and a small number of setpoints and alarms. Because there is no change in the operating pressure, power, steam flow rate, or feedwater flow rate, there are no significant effects on the plant hardware outside of the Nuclear Steam Supply System (NSSS). The MELLLA+ operating range expansion does not cause additional requirements to be imposed on any of the safety, balance-of-plant, electrical, or auxiliary systems. No changes to the power generation and electrical distribution systems are required due to the introduction of MELLLA+. An evaluation of the probabilistic safety assessment concludes that the calculated increase in core damage frequencies due to the MELLLA+ operating range expansion are very small. Scram setpoints (equipment settings that initiate automatic plant shutdowns) are established such that there is no significant increase in scram frequency due to the MELLLA+ operating range expansion. No new challenges to safety-related equipment result from the MELLLA+ operating range

expansion. As a result, there is no significant increase in the probability of an accident previously evaluated.

The proposed changes specify limiting conditions for operation, required actions and surveillance requirements for the OPRM system, and allows operation in regions of the power-to-flow map currently restricted by the requirements of the Interim Corrective Actions (ICAs) and certain limiting conditions of operation of TS Section 3.4.1. The restrictions of the ICAs and TS Section 3.4.1 were imposed to ensure adequate capability to detect and suppress conditions consistent with the onset of thermal-hydraulic oscillations that may develop into a thermal-hydraulic instability event. A thermal-hydraulic instability event has the potential to challenge the Minimum Critical Power Ratio (MCPR) safety limit. The OPRM system can automatically detect and suppress conditions necessary for thermal-hydraulic instability. The Backup Stability Protection (BSP), in lieu of the ICAs, will provide adequate protection should the OPRM equipment become temporarily inoperable. With the activation of the OPRM system, the restrictions of the ICAs and TS Section 3.4.1 will no longer be required.

The probability of a thermal-hydraulic instability event is impacted by power to flow conditions such that only during operation inside specific regions of the power-to-flow map, in combination with power shape and inlet enthalpy conditions, can the occurrence of an instability event be postulated to occur. Operation in these regions may increase the probability that operation with conditions necessary for a thermal-hydraulic instability can occur.

When the OPRM is operable, the OPRM can automatically detect the imminent onset of power oscillations and generate a trip signal. Actuation of a Reactor Protection System (RPS) trip will suppress conditions necessary for thermal-hydraulic instability and decrease the probability of a thermal-hydraulic instability event. In the event the trip capability of the OPRM is not maintained, the proposed changes limit the period of time before an alternate method to detect and suppress thermal-hydraulic oscillations is required. Since the duration of this period of time is limited, the increase in the probability of a thermal-hydraulic instability event is not significant. Therefore, the proposed changes do not result in a significant increase in the probability of an accident previously evaluated.

The DSS–CD solution is designed to identify power oscillations upon inception and initiate control rod insertion (*i.e.*, scram) to terminate the oscillations prior to any significant amplitude growth. The DSS–CD provides protection against violation of the Safety Limit Minimum Critical Power Ratio (SLMCPR) for anticipated oscillations. Compliance with Criterion 10, "Reactor design.", and Criterion 12, "Suppression of reactor power oscillations.", of 10CFR50, Appendix A, "General Design Criteria For Nuclear Power Plants," is accomplished via an automatic action. A developing instability event is suppressed by the DSS–CD system with substantial margin to the SLMCPR and no clad damage, with the event terminating in a scram and never developing into an accident. The DSS–CD system does not interact with equipment whose failure could cause an accident. Scram setpoints in the DSS–CD will be established so that analytical limits are met. The reliability of the DSS–CD will meet or exceed that of the existing system. No new challenges to safety-related equipment will result from the DSS–CD solution. Because an instability event would reliably terminate in an early scram without impact on other safety systems, there is no significant increase in the probability of an accident.

The spectrum of hypothetical accidents and transients has been investigated, and are shown to meet the plant's currently licensed regulatory criteria. In the area of core design, for example, the fuel operating limits such as Maximum Average Planar Linear Heat Generation Rate (MAPLHGR) and SLMCPR continue to be met. The fuel reload analyses will show plant transients meet the criteria accepted by the NRC as specified in NEDO–24011. "GESTAR II," (Reference 12). Challenges to fuel are evaluated, and shown to still meet the criteria of 10 CFR 50.46, "Acceptance Criteria for Emergency Core Cooling Systems for Light-Water Nuclear Power Reactors.", 10 CFR 50 Appendix K, "ECCS Evaluation Models," and Regulatory Guide 1.70, "Standard Format and Content of Safety Analysis Reports for Nuclear Power Plants," Section 6.3. Challenges to the containment have been evaluated, and the containment and its associated cooling systems meet Criterion 38, "Containment heat removal.", and Criterion 50, "Containment design basis.", of the general design criteria. Radiological release events have been evaluated, and are shown to be below the regulatory limits of 10 CFR 100, "Reactor Site Criteria". Operation in the MELLLA+ region does not result in an increase in the consequences of an accident previously evaluated. Operation within the MELLLA+ region has been evaluated to ensure that the CPS response to accidents and transients remains within acceptable criteria. Thus, the proposed changes do not involve a significant increase in the consequences of an accident previously evaluated.

An unmitigated thermal-hydraulic instability event is postulated to cause a violation of the MCPR safety limit. The proposed changes ensure mitigation of thermal-hydraulic instability events prior to challenging the MCPR safety limit if initiated from anticipated conditions by detection of the onset of oscillations and actuation of an RPS trip signal when the OPRM system is operable. The OPRM also provides the capability of an RPS trip being generated for thermal-hydraulic instability events initiated from unanticipated but postulated conditions. These mitigative capabilities of the OPRM system would become available as a result of the proposed changes and have the potential to reduce the consequences of unanticipated and postulated thermal-hydraulic instability events.

As stated above, the DSS–CD solution meets the requirements of Criterion 10 and Criterion 12 of the GDC by automatically detecting and suppressing design basis thermal-hydraulic oscillations prior to exceeding the fuel SLMCPR. Proper operation of the DSS–CD system does not affect any fission product barrier or Engineered Safety Feature. Thus, the proposed change cannot change the consequences of any accident previously evaluated.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

Equipment that could be affected by MELLLA+ has been evaluated and no new operating mode, safety related equipment lineup, accident scenario, or equipment failure mode was identified. The full spectrum of accident considerations, defined in the CPS Updated Safety Analysis Report (USAR), has been evaluated, and no new or different kind of accident has been identified. The MELLLA+ operating range expansion uses existing technology and NRC approved safety analysis methodology, and applies them within the capabilities of already existing plant equipment in accordance with presently existing regulatory and industry criteria. The MELLLA+ operating range expansion will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes specify limiting conditions for operations, required actions and surveillance requirements of the OPRM system and allows operation in regions of the power-to-flow map currently restricted by the requirements of the ICAs and TS Section 3.4.1. The OPRM system uses input signals shared with the Average Range Power Monitor (APRM) system and rod block functions to monitor core conditions and generate an RPS trip when required. Quality requirements for software design, testing, implementation and module self-testing of the OPRM system provide assurance that no new equipment malfunctions due to software errors are created. The design of the OPRM system also ensures that neither operation nor malfunction of the OPRM system will adversely impact the operation of the other systems and no accident or equipment malfunction of these other systems could cause the OPRM system to malfunction or cause a different kind of accident. No new failure modes of either the new OPRM equipment or of the existing APRM equipment have been introduced. Therefore, operation with the OPRM system does not create the possibility of a new or different kind of accident from any previously evaluated.

The DSS–CD solution operates within the existing Option III OPRM hardware. Implementation of the DSS–CD will require a software/hardware change to the existing Option III system. No new operating mode, safety-related equipment lineup, accident scenario, system interaction, or equipment failure mode was identified. Therefore, the DSS–CD solution will not adversely affect plant equipment. Because there are no significant hardware changes, there is no

change in the possibility or consequences of a failure. The worst-case failure of the equipment is a failure to initiate mitigating action (*i.e.*, scram), but no failure can cause an accident of a new or different kind than any previously evaluated.

As such the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The calculated loads on all affected structures, systems and components have been shown to remain within design allowables for all design basis event categories. No NRC acceptance criteria are exceeded. The margins of safety currently included in the design of the plant are not affected by the MELLLA+ operating range expansion. Because the plant configuration and response to transients and hypothetical accidents do not result in exceeding the presently approved NRC acceptance limits, operation in the MELLLA+ region does not involve a significant reduction in a margin of safety.

The OPRM system monitors small groups of LPRM signals for indication of local variations of core power consistent with thermal-hydraulic oscillations and generates an RPS trip when conditions consistent with the onset of oscillations are detected. An unmitigated thermal-hydraulic instability event has the potential to result in a challenge to the MCPR safety limit. The OPRM system provides the capability to automatically detect and suppress conditions which might result in a thermal-hydraulic instability event and thereby maintains the margin of safety by providing automatic protection for the MCPR safety limit while reducing the burden on the control room operators significantly. The BSP, in lieu of the ICAs, will provide adequate protection should the OPRM equipment become temporarily inoperable. Operation with the OPRM system does not involve a significant reduction in a margin of safety.

The DSS–CD solution is designed to identify the power oscillations upon inception and initiate control rod insertion to terminate (*i.e.*, scram) the oscillations prior to any significant amplitude growth. The DSS–CD solution algorithm will maintain or increase the margin to the SLMCPR for anticipated instability events. The safety analyses in NEDC–33075P demonstrate the margin to the SLMCPR for postulated bounding stability events. In addition, the current Option III algorithms are retained to provide defense-in-depth protection for unanticipated reactor instability events. As a result, there is no impact on the MCPR Safety Limit identified for an instability event.

Therefore, operation of CPS in accordance with the proposed changes will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Edward J. Cullen, Deputy General Counsel Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

AmerGen Energy Company, LLC, et al., Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey

Date of amendment request: December 23, 2003.

Description of amendment request: The licensee proposed to revise Section 3.4.A and 3.5.A.2 of the Technical Specifications to clarify requirements for inoperable components and allow meeting the water availability requirements during periods of core spray system inoperability (*e.g.*, when the plant is shutdown) in an alternate manner. Specifically, this would allow the required water volume for core spray system operability be located in the torus, condensate storage tank, or a combination of both, in order to provide operational flexibility in water management and outage work scheduling. Additionally, the licensee proposed to improve consistency of verification requirements within the specifications and provide more definitive bases for the specifications. No physical changes to the plant are involved, and the requirements in the current specifications will be maintained.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the three standards of 10 CFR 50.92(c). The NRC staff's analysis is presented below:

The first standard requires that operation of the unit in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed changes will be made in a manner such that the current requirements are maintained for the core spray system. The source of core spray water was not considered as a precursor of any previously analyzed and evaluated accident. No hardware design change is involved with the proposed amendment. Thus, the proposed amendment would create no adverse effect on the functional performance of any plant structure, system, or component (SSC). All SSCs will continue to perform their design functions with no decrease in their capabilities to mitigate the previously analyzed consequences of postulated accidents. Accordingly, the revised specifications will lead to no increase in the consequences of an accident previously evaluated, and no increase of the probability of an accident previously evaluated.

The second standard requires that operation of the unit in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed amendment is not the result of a hardware design change, nor does it lead to the need for a hardware design change. There is no change in the methods the unit is operated. As a result, all SSCs will continue to perform as previously analyzed by the licensee, and previously evaluated and accepted by the NRC staff. Therefore, the proposed amendment will not create the possibility of a new or different kind of accident from any previously evaluated.

The third standard requires that operation of the unit in accordance with the proposed amendment will not involve a significant reduction in a margin of safety. Since the licensee did not propose to exceed or alter a design basis or safety limit, and did not propose to operate any component in a less conservative manner, the proposed amendment will not affect in any way the performance characteristics and intended functions of any SSC. Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

Based on the NRC staff's analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Kevin P. Gallen, Morgan, Lewis & Bockius, LLP, 1800 M Street, NW., Washington, DC 20036–5869.

NRC Section Chief: Richard J. Laufer.

AmerGen Energy Company, LLC, et al., Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey

Date of amendment request: December 23, 2003.

Brief description of amendments: The licensee proposed to revise various parts of the Technical Specifications (TSs) to allow entry into a mode or other specified condition in the applicability of a specification while in a condition statement and the associated required actions of the TSs, provided the licensee

performs a risk assessment and manages risk consistent with the program in place for complying with the requirements of 10 CFR 50.65(a)(4). Specifically, TS 3.0, "Limiting Conditions for Operation (General)," as well as other portions of the TSs (*i.e.*, Sections 3.4, 3.7, and 3.8) referencing TS 3.0, will be revised.

This change was proposed by the industry's Technical Specification Task Force (TSTF) and is designated TSTF–359. The NRC staff issued a notice of opportunity for comment in the **Federal Register** on August 2, 2002 (67 FR 50475), on possible amendments concerning TSTF–359, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on April 4, 2003 (68 FR 16579). In its application for amendment, the licensee affirmed the applicability of the following NSHC determination.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee presented an analysis of NSHC by endorsing the model NSHC published in 68 FR 16579 (reproduced below):

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change allows entry into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS. Being in a TS condition and the associated required actions is not an initiator of any accident previously evaluated. Therefore, the probability of an accident previously evaluated is not significantly increased. The consequences of an accident while relying on required actions as allowed by proposed LCO 3.0.4, are no different than the consequences of an accident while entering and relying on the required actions while starting in a condition of applicability of the TS. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). Entering into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Thus, this change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in [a] Margin of Safety

The proposed change allows entry into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS. The TS allow operation of the plant without the full complement of equipment through the conditions for not meeting the TS LCO. The risk associated with this allowance is managed by the imposition of required actions that must be performed within the prescribed completion times. The net effect of being in a TS condition on the margin of safety is not considered significant. The proposed change does not alter the required actions or completion times of the TS. The proposed change allows TS conditions to be entered, and the associated required actions and completion times to be used in new circumstances. This use is predicated upon the licensee's performance of a risk assessment and the management of plant risk. The change also eliminates current allowances for utilizing required actions and completion times in similar circumstances, without assessing and managing risk. The net change to the margin of safety is insignificant. Therefore, this change does not involve a significant reduction in a margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Richard J. Laufer.

Calvert Cliffs Nuclear Power Plant, Inc., Docket No. 50–317, Calvert Cliffs Nuclear Plower Plant, Unit No. 2, Calvert County, Maryland

Date of amendment request: September 30, 2003.

Description of amendment request: The proposed amendment would increase the maximum enrichment limit of the fuel assemblies that can be stored in the Unit 2 spent fuel pool by taking credit for soluble boron, burnup and configuration control in maintaining acceptable margins of subcriticality.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Would not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change will increase the maximum enrichment limit of the fuel assemblies that can be stored in the Unit 2 spent fuel pool (SFP) by taking credit for soluble boron, burnup and configuration control in maintaining acceptable margins of subcriticality. The proposed change will modify Technical Specification 4.3.1 "Criticality," add Technical Specification 3.7.16, "Spent Fuel Pool Boron Concentration" and add Technical Specification 3.7.17 "Spent Fuel Pool Storage." The postulated accidents for the SFP are basically four types; (1) dropped fuel assembly on top of the storage rack, (2) a misloading accident, (3) an abnormal location of a fuel assembly, and (4) loss-of-normal cooling to the SFP.

There is no increase in the probability of a fuel assembly drop accident in the SFP when considering the higher enriched fuel or the presence of soluble boron in the SFP water. Dropping a fuel assembly on top of the SFP storage racks is not credible at Calvert Cliffs due to the design of the spent fuel handling machine and the height of the SFP storage racks. The handling of fuel assemblies has always been performed in borated water and will not change as a result of crediting soluble boron in the SFP criticality analysis. The proposed change does not change the general design or characteristics of the fuel assemblies. Therefore, the proposed change does not increase the probability of a fuel assembly drop accident.

There is no increase in the probability of the accidental misloading of irradiated fuel assemblies into the SFP storage racks when considering the higher enriched fuel or the presence of soluble boron in the SFP water for criticality control. Fuel assembly placement will continue to be controlled pursuant to approved fuel handling procedures.

Due to the design of the SFP storage racks, an abnormal placement of a fuel assembly into the SFP storage racks is not possible. Also, the design of the SFP prevents an inadvertent placement of a fuel assembly between the outer most storage cell and the pool wall. The proposed change does not make any change to the design of SFP. Therefore, there is no increase in the probability of abnormal placement of a fuel assembly into the SFP storage racks.

The proposed change will not result in any changes to the SFP cooling system, and the fuel assembly design and characteristics are not changed by an increase in fuel enrichment. Therefore, there is no increase in the probability of a loss of SFP cooling. Also, since a high concentration of soluble boron has always been maintained in the SFP water, there is no increase in the probability of the loss of normal cooling to the SFP water considering the presence of soluble boron in the pool water for criticality control.

There is no increase in the consequences of an accidental drop, accidental misloading, or abnormal placement of a maximum enriched fuel assembly into the SFP storage racks, because the criticality analysis demonstrates that the pool will remain subcritical following either event. The Technical Specification limit for SFP boron concentration will ensure that an adequate SFP boron concentration will be maintained.

There is no increase in the consequences of a loss-of-normal SFP cooling because the Technical Specification boron concentration provides significant negative reactivity. Loss of the SFP water via boiling will not result in a loss of soluble boron, since the soluble boron is not volatile. Therefore, loss of SFP cooling system, without makeup flow, is not a mechanism for boron dilution. Even in the unlikely event that soluble boron in the SFP is completely diluted via unborated makeup flow, a pool completely filled with maximum enriched unburned assemblies will remain subcritical by a design margin that meets the requirements of 10 CFR 50.68.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change will increase the maximum enrichment limit of the fuel assemblies that can be stored in the Unit 2 SFP by taking credit for soluble boron, burnup and configuration control in maintaining acceptable margins of subcriticality. Increasing the maximum enrichment limit does not create a new type of criticality accident.

Soluble boron has been maintained in the SFP water and is currently required by procedures. Therefore, crediting soluble boron in the SFP criticality analysis will have no effect on normal pool operation and maintenance. Crediting soluble boron will only result in increased sampling to verify the boron concentration in accordance with the proposed Technical Specification Surveillance Requirement. This increased sampling will not create the possibility of a new or different kind of accident.

A dilution of the SFP soluble boron has always been a possibility. However, the boron dilution event previously had no consequences, since boron was not previously credited in the accident analysis. The initiating events that were considered for having the potential to cause dilution of the boron in the SFP to a level below that credited in the criticality analyses fall into three categories: dilution by flooding, dilution by loss-of-coolant induced makeup, and dilution by loss-of-cooling system induced makeup. The SFP dilution analysis demonstrates that a dilution event that could increase k-effective in the SFP to greater than 0.95 is not a credible event. It is not credible that dilution could occur for the required length of time without operator notice, since this event would activate the high level alarm and initiate Auxiliary Building flooding. In addition, in excess of 1,043,000 gallons of unborated water must be added to the SFP to reach the minimum soluble boron concentration. This is more water volume than is contained in both pretreated water storage tanks and also more water volume than is contained in the demineralized water storage tank and both condensate storage tanks combined. Even in the unlikely event that soluble boron in the SFP is completely diluted, the SFP will remain subcritical by a design margin that meets the requirements of 10 CFR 50.68.

Burned assemblies have been stored in the SFP for many cycles. Therefore, crediting burnup in the SFP criticality analysis will have no effect on normal pool operation and maintenance. Fuel assembly placement, although more complex, will continue to be controlled pursuant to approved fuel handling procedures and in accordance with Technical Specification spent fuel rack storage configuration limitations.

The proposed change will not result in any other change in the plant configuration or equipment design. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The Technical Specification changes proposed by this license amendment request will provide an adequate safety margin to ensure that the stored fuel assembly array of maximum enriched fuel will always remain subcritical. Those limits are based on a plant specific criticality analysis performed for the Calvert Cliffs Unit 2 SFP, that include technically supported margins.

Soluble boron is used to provide subcritical margin such that the SFP k-effective is maintained less than or equal to 0.95. Since k-effective is less than or equal to 0.95, the current margin of safety is maintained. In addition, while the criticality analysis utilized credit for soluble boron, the fuel in the SFP rack will remain subcritical with no soluble boron with a 95 percent probability at a 95 percent confidence level as required by 10 CFR 50.68. This substantial reduction in the SFP soluble boron concentration was evaluated and shown not to be credible.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendments request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Esquire, Counsel, Constellation Energy Group, Inc., 750 East Pratt Street, 5th floor, Baltimore, MD 21202.

NRC Section Chief: Richard J. Laufer.

Duke Energy Corporation, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of amendment request: October 16, 2003.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) 3.4.9 to change the minium pressurizer (PZR) heater capacity from 126 to 400 kW to correct a non-conservative TS associated with a PZR design basis deficiency.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated:

No. The proposed changes revise the minimum PZR [pressurizer] heater capacity required and capable of being powered from an emergency power supply source. UFSAR [Updated Final Safety Analysis Report] do not take credit for PZR heater operation; however, an implicit initial condition assumption of the safety analyses is that RCS [Reactor Coolant System] is operating at normal pressure. Assurance of this assumption is enhanced due to these proposed changes. Consequently, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any kind of accident previously evaluated:

No. These changes correct a non-conservative value from the TS [technical specification] and are necessary to assure RCS pressure control and adequate natural circulation cooling. The available heater capacity being powered from an emergency power supply is approximately 1000 kW for the most restrictive unit which exceeds the proposed 400 kW minimum capacity required by TS. The proposed changes help ensure that the RCS is operating at normal pressure which is an implicit initial assumption used in several UFSAR described safety analyses. Consequently, these changes do not create the possibility of a new or different kind of accident from any kind of accident previously evaluated.

3. Involve a significant reduction in a margin of safety:

No. The proposed change does not adversely affect any plant safety limits, set points, or design parameters. The change also does not adversely affect the fuel, fuel cladding, RCS, or containment integrity. Therefore, the proposed changes do not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are

satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Anne W. Cottington, Winston and Strawn, 1200 17th Street, NW., Washington, DC 20005.

NRC Section Chief: John A. Nakoski.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: December 5, 2003.

Description of amendment request: The proposed amendment would revise the Safety Limit Minimum Critical Power Ratio (SLMCPR) values in Technical Specification 1.1.A.1 to incorporate the results of the cycle-specific core reload analysis for Vermont Yankee Nuclear Power Station Cycle 24 operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. The operation of Vermont Yankee Nuclear Power Station in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The basis of the Safety Limit Minimum Critical Power Ratio (SLMCPR) is to ensure no mechanis0tic fuel damage is calculated to occur if the limit is not violated. The new SLMCPR values preserve the existing margin to transition boiling and probability of fuel damage is not increased. The derivation of the revised SLMCPR for Vermont Yankee for incorporation into the Technical Specifications, and its use to determine plant and cycle-specific thermal limits, have been performed using NRC [U.S. Nuclear Regulatory Commission] approved methods. These plant-specific calculations are performed each operating cycle and if necessary, will require future changes to these values based upon revised core designs. The revised SLMCPR values do not change the method of operating the plant and have no effect on the probability of an accident initiating event or transient.

Based on the above, Vermont Yankee has concluded that the proposed change will not result in a significant increase in the probability or consequences of an accident previously evaluated.

2. The operation of Vermont Yankee Nuclear Power Station in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes result only from a specific analysis for the Vermont Yankee core reload design. These changes do not involve any new or different methods for operating the facility. No new initiating events or transients result from these changes.

Based on the above, Vermont Yankee has concluded that the proposed change will not create the possibility of a new or different kind of accident from those previously evaluated.

3. The operation of Vermont Yankee Nuclear Power Station in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

The new SLMCPR is calculated using NRC approved methods with plant and cycle specific parameters for the current core design. The SLMCPR value remains high enough to ensure that greater than 99.9% of all fuel rods in the core will avoid transition boiling if the limit is not violated, thereby preserving the fuel cladding integrity. The operating MCPR limit is set appropriately above the safety limit value to ensure adequate margin when the cycle specific transients are evaluated. Accordingly, the margin of safety is maintained with the revised values.

As a result, Vermont Yankee has determined that the proposed change will not result in a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. David R. Lewis, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037–1128.

NRC Section Chief: Darrell J. Roberts, Acting.

Entergy Operations Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: December 19, 2003.

Description of Amendment Request: The proposed amendment deletes requirements from the Technical Specifications (TS) to maintain hydrogen recombiners and hydrogen monitors.

The NRC staff issued a notice of opportunity for comment in the **Federal Register** on August 2, 2002 (67 FR 50374), on possible amendments to eliminate the hydrogen recombiners from TS, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the Consolidated Line Item Improvement Process (CLIIP). The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated December 19, 2003.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG [Regulatory Guide] 1.97 Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents.

The regulatory requirements for the hydrogen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, and removal of the hydrogen monitors from TS will not prevent an accident management strategy through the use of the SAMGs, the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of

the hydrogen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident from any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3—hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Therefore, this change does not involve a significant reduction in the margin of safety. Removal of hydrogen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

Based upon the reasoning presented above, the requested change does not involve a significant hazards consideration. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: N. S. Reynolds, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

Exelon Generation Company, LLC, Docket No. STN 50–454, Byron Station, Unit 1, Ogle County, Illinois

Date of amendment request: December 5, 2003.

Description of amendment request: The proposed amendment would allow irradiation of two lead test assemblies (LTAs) and two "standard" Westinghouse 17x17 VANTAGE+ZIRLO™ assemblies beyond the current fuel rod-average licensing basis burnup value of 60,000 MWD/MTU up to 65,000 MWD/MTU during the current operating cycle (B1C13). Irradiation of these four assemblies is intended to confirm the acceptable use of the ZIRLO™ alloys to a discharge burnup level exceeding the current licensing basis.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Fuel rod defects or failures are not considered as initiators for any previously analyzed accident; therefore the requested license amendment will have no effect on the probability of any previously evaluated accident. In addition, NRC-approved methodologies and technical reports have been used in the B1C13 specific reload safety evaluation to confirm that the fuel rod design limits will be met; therefore, increasing the burnup limit of the specified fuel assemblies to the requested value will not increase the consequences of any previously analyzed accident.

The regular ZIRLO™ and ZIRLO™ (LT–1) high burnup fuel rods will continue to satisfy the specified acceptable fuel design limits (SAFDLs) specified in NRC-approved Westinghouse topical reports. The clad integrity of the ZIRLO™ and ZIRLO™ (LT–1) high burnup rods will be maintained as the subject fuel assemblies will be placed in less than limiting core locations and will continue to meet the safety parameter requirements. The acceptability of using the ZIRLO™ and ZIRLO™ (LT–1) high burnup rods has been evaluated and confirmed in the B1C13 Reload Safety Evaluation supported by the Westinghouse LTA Report, "Byron Unit 1 Cycle 13 LTA Report," dated August 2003.

It has been shown in WCAP–12610–P–A, that even though there are variations in core inventories of isotopes due to extended burnup up to 75,000 MWD/MTU, there are no significant increases of isotopes that are major contributors to accident doses. It is worthy to note that, at higher burnups, there is actually a reduction in certain isotopes that are major dose contributors under accident situations (*e.g.*, Kr-88). With only a limited number of ZIRLO™ and ZIRLO™ (LT–1) high burnup rods in the entire core, any variation of isotopes will be extremely small. Thus, the radiation dose limitations of 10 CFR 100, "Reactor Site Criteria," will not be exceeded.

Based on the above discussion, it is concluded that the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change to increase the current fuel rod-average burnup limit does not involve the use or installation of new equipment and all currently installed equipment will not be operated in a new or different manner. No new or different system interactions are created and no new processes are introduced. The proposed change will not introduce any new failure mechanisms, malfunctions, or accident initiators not already considered in the design and licensing bases.

Based on this evaluation, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed change to increase the current fuel rod-average burnup limit of 60,000 MWD/MTU up to 65,000 MWD/MTU during B1C13 will cause the following fuel rod design criteria to become more limiting: Fuel rod growth, clad fatigue, rod internal pressure and cladding corrosion. However, the regular ZIRLO™ and ZIRLO™ (LT–1) high burnup fuel rods will continue to satisfy the SAFDLs specified in NRC-approved Westinghouse topical reports as noted above. The clad integrity of the ZIRLO™ and ZIRLO™ (LT–1) high burnup rods and the appropriate margin to safety will be maintained as the subject fuel assemblies will be placed in less than limiting core locations and will continue to meet the safety parameter requirements. The acceptability of using the ZIRLO™ and ZIRLO™ (LT–1) high burnup rods has been evaluated and confirmed in the B1C13 Reload Safety Evaluation supported by the Westinghouse LTA Report, "Byron Unit 1 Cycle 13 LTA Report," dated August 2003.

Based on the above evaluation, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

Exelon Generation Company, LLC, Docket No. 50–265, Quad Cities Nuclear Power Station, Unit 2, Rock Island County, Illinois Date of amendment request:

Date of amendment request: November 14, 2003, as supplemented by letter dated December 23, 2003.

Description of amendment request: The proposed amendment would revise the values and wording of the technical specifications safety limit minimum critical power ratio (SLMCPR).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. Limits have been established consistent with NRC approved methods to ensure that fuel performance during normal, transient, and accident conditions is acceptable. The proposed change conservatively establishes the SLMCPR for Quad Cities Nuclear Power Station (QCNPS), Unit 2, Cycle 18 such that the fuel is protected during normal operation and during any plant transients or anticipated operational occurrences (AOOs).

Changing the SLMCPR does not increase the probability of an evaluated accident. The change does not require any physical plant modifications, physically affect any plant components, or entail changes in plant operation. Therefore, no individual precursors of an accident are affected.

The proposed change revises the SLMCPR to protect the fuel during normal operation as well as during any transients or anticipated operational occurrences. Operational limits will be established based on the proposed SLMCPR to ensure that the SLMCPR is not violated during all modes of operation. This will ensure that the fuel design safety criterion (*i.e.*, that at least 99.9% of the fuel rods do not experience transition boiling during normal operation and anticipated operational occurrences) is met. Since the proposed change does not affect operability of plant systems designed to mitigate any consequences of accidents, the consequences of an accident previously evaluated are not expected to increase.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Creation of the possibility of a new or different kind of accident would require creating one or more new precursors of that accident. New accident precursors may be created by modifications of plant configuration, including changes in allowable modes of operation. The proposed change does not involve any plant configuration modifications or changes to allowable modes of operation. The proposed change to the SLMCPR assures that safety criteria are maintained for QCNPS, Unit 2, Cycle 18.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

The SLMCPR provides a margin of safety by ensuring that at least 99.9% of the fuel rods do not experience transition boiling during normal operation and AOOs if the MCPR limit is not violated. The proposed change will ensure the appropriate level of fuel protection. Additionally, operational limits will be established based on the proposed SLMCPR to ensure that the SLMCPR is not violated during all modes of operation. This will ensure that the fuel design safety criteria (*i.e.*, that no more than 0.1% of the rods are expected to be in boiling transition if the MCPR limit is not violated) are met.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The supplemental letter contained clarifying information and did not change the initial no significant hazards consideration determination and did not expand the scope of the original **Federal Register** notice.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

Florida Power and Light Company, Docket No. 50–389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

Date of amendment request: December 2, 2003.

Description of amendment request: The proposed amendment would revise the Technical Specifications to allow a reduction in the minimum reactor coolant system flow, corresponding to an increase in the steam generator tube plugging limit from 15 percent to 30 percent.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Operation of the facility in accordance with the proposed amendment would involve a significant reduction in the margin of safety .

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, PO Box 14000, Juno Beach, Florida 33408–0420.

NRC Section Chief: Allen G. Howe.

Nuclear Management Company, LLC, Docket No. 50–305, Kewaunee Nuclear Power Plant, Kewaunee County, Wisconsin

Date of amendment request: October 8, 2003.

Description of amendment request: The proposed amendment is to revise Technical Specifications (TS) 4.2.b.3.a, "Inspection Frequency," for the Kewaunee Nuclear Power Plant (KNPP). The proposed one-time change would revise the steam generator (SG) inspection interval requirements in TS for KNPP to allow a 40-month inspection interval after one SG inspection.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed one-time change revises the Steam Generator (SG) inspection interval requirements in Technical Specifications (TS) 4.2.b.3.a, following the Kewaunee Nuclear Plant, spring 2003 refueling outage, to allow a 40-month inspection frequency after one inspection, rather than after two consecutive inspections results that are within the C–1 category.

The proposed on-time extension of the SG tube in-service inspection interval does not involve changing any structure, system, or component, or affect reactor operations. It is not an initiator of an accident and does not

change any existing safety analysis previously analyzed in the Kewaunee Updated Safety Analysis Report (USAR). As such, the proposed changes do not involve a significant increase in the probability of an accident previously evaluated.

Since the proposed change does not alter the plant design, there is no direct increase in SG leakage. Industry experience indicates that the probability of increased SG tube degradation would be very low. Additionally, steps described below will further minimize the risk associated with this extension. For example, the scope of inspections performed during the last KNPP refueling outage (*i.e.*, the first refueling outage following Steam generator replacement (SGR) exceeded the TS requirements for the first two refueling outages after SGR. That is, more tubes were inspected than were required by TS (*i.e.*, 100 percent inspection was performed). Currently, KNPP does not have an active SG damage mechanism, and will meet the current industry examination guidelines without performing additional SG inspections until the spring 2006 refueling outage. Additionally, as part of our SG Tube Surveillance Program, both a Condition Monitoring Assessment and an Operational Assessment are performed after each inspection and compared to the Nuclear Energy Institute (NEI) 97–06, "Steam Generator Program Guidelines," performance criteria. The results of the Condition Monitoring Assessment demonstrated that all performance criteria were met during the KNPP spring 2003 refueling outage, and the results of the Operational Assessment show that all performance criteria will be met over the proposed operating period. Considering these actions, along with improved SG design and reliability of Westinghouse replacement SGs, extending the SG tube inspection frequency does not involve a significant increase in the consequences of an accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change revises the SG inspection frequency requirements in TS 4.2.b.3.a, to allow a 40-month inspection interval after one inspection, rather than after two consecutive inspections with inspection results within the C–1 category.

The proposed change will not alter any plant design basis or postulated accident resulting from potential SG tube degradation. The scope of inspections (*i.e.*, 100 percent) performed during the last KNPP refueling outage (*i.e.*, the first refueling outage following SG replacement) significantly exceeded the TS requirements for the scope of the first two refueling outages after SG replacement.

Primary to secondary leakage that may be experienced during all plant conditions is expected to remain within current accident analysis assumptions. The proposed change does not affect the design of the SGs, the method of SG operation, or reactor coolant chemistry controls. No new equipment is being introduced, and installed equipment is not being operated in a new or different manner. The proposed change involves a one-time extension to the SG tube in-service inspection frequency, and therefore will not give rise to new failure modes. In addition, the proposed change does not impact any other plant system or components.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety?

The SG tubes are an integral part of the Reactor coolant System (RCS) pressure boundary that are relied upon to maintain the RCS pressure and inventory. The SG tubes isolate the radioactive fission products in the reactor coolant from the secondary system. The safety function of the SG is maintained by ensuring integrity of the SG tubes. In addition, the SG tubes comprise the heat transfer surface between the primary and secondary systems such that residual heat can be removed from the primary system.

SG tube integrity is a function of the design, environment, and current physical condition. Extending the SG tube inservice inspection frequency by one operating cycle will not alter the function or design of the SG. SG inspections conducted during the first refueling outage following SG replacement demonstrated that the SGs do not have an active damage mechanism, and the scope of those inspections significantly exceeded those required by the TS. These inspection results were comparable to similar inspection results for similar replacement SGs installed at other plants, and subsequent inspections at those plants yielded results that support this extension request. The improved design of the replacement SGs also provides reasonable assurance that significant tube degradation is not likely to occur over the proposed operating period.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bradley D. Jackson, Esq., Foley and Lardner, P.O. Box 1497, Madison, WI 53701–1497.

NRC Section Chief: L. Raghavan.

Nuclear Management Company, LLC, Docket No. 50–282, Prairie Island Nuclear Generating Plant, Unit 1, Goodhue County, Minnesota

Date of amendment request: August 27, 2003, as supplemented December 16, 2003.

Description of amendment request: The proposed amendment would revise Technical Specification 5.5.14, "Containment Leakage Rate Testing Program," to allow Unit 1 to be excepted from the requirements of Regulatory Guide 1.163, for post-modification integrated leakage rate testing associated with steam generator replacement.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change would provide the Prairie Island Nuclear Generating Plant an exception from performing a required containment integrated leak rate test following the replacement of the steam generators in Unit 1.

Integrated leak rate tests are performed to assure the leak-tightness of the primary containment boundary system, and as such they are not accident initiators. Therefore, not performing an integrated leak rate test will not affect the probability of an accident previously evaluated.

The intent of post-modification integrated leak rate testing requirements is to assure the leak-tight integrity of the area affected by the modification. For the Unit 1 steam generator replacement modification, this intent will be satisfied by performing the American Society of Mechanical Engineers code required inspections and tests. Since the leak-tightness integrity of the primary containment boundary affected by replacement of the steam generators will be assured, there is no change in the primary containment boundary's ability to confine radioactive materials during an accident.

Therefore adding a Technical Specification requirement that provides an exception for Unit 1 from the steam generator replacement post-modification integrated leak rate testing requirements does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change would provide the Prairie Island Nuclear Generating Plant an exception from performing a required containment integrated leak rate test following the replacement of the steam generators in Unit 1.

Providing an exception from performing a test does not involve a physical change to the plant nor does it change the operation of the plant. Thus it cannot introduce a new failure mode.

Therefore adding a Technical Specification requirement that provides an exception for Unit 1 from the steam generator replacement post-modification integrated leak rate testing requirements does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change would provide the Prairie Island Nuclear Generating Plant an exception from performing a required containment integrated leak rate test following the replacement of the steam generators in Unit 1.

The intent of post-modification integrated leak rate testing requirements is to assure the leak-tight integrity of the area affected by the modification. This intent will be satisfied by performing American Society of Mechanical Engineers code required inspections and tests. The acceptance criterion for American Society of Mechanical Engineers code system pressure testing for the base metal and welds is no leakage. In addition, the test pressure for the system pressure test will be several times that required during an integrated leak rate test. Since the leak-tight integrity of the primary containment boundary affected by replacement of the steam generators will be assured, there is no change in the primary containment boundary's ability to confine radioactive materials during an accident.

Therefore, adding a Technical Specification requirement that provides an exception for Unit 1 from the steam generator replacement post-modification integrated leak rate testing requirements does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts, and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: L. Raghavan.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania

Date of amendment request: December 22, 2003.

Description of amendment request: The proposed amendment would revise the Unit 1 and 2 Technical Specifications (TSs) by adding TS 3.3.1.3, "Oscillation Power Range Monitor (OPRM) Instrumentation," and revising TS 3.4.1, "Recirculation Loops Operating," and TS 5.6.5, "Core Operating Limits Report," to remove specifications and information related to current stability specifications which will no longer be needed.

Basis for proposed no significant hazards consideration determination:

As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

Response: No.

The OPRM most directly affects the APRM [average power range monitor] and LPRM [local power range monitor] portions of the Power Range Neutron Monitoring system. Its installation does not affect the operation of these sub-systems. None of the accidents or equipment malfunctions affected by these sub-systems are affected by the presence or operation of the OPRM. The APRM channels provide the primary indication of neutron flux within the core and respond almost instantaneously to neutron flux changes. The APRM Fixed Neutron Flux-High function is capable of generating a trip signal to prevent fuel damage or excessive reactor pressure. For the ASME [American Society of Mechanical Engineers] overpressurization protection analysis in FSAR [Final Safety Analysis Report] Chapter 5, the APRM Fixed Neutron Flux-High function is assumed to terminate the main steam isolation valve closure event. The high flux trip, along with the safety/relief valves, limits the peak reactor pressure to less than the ASME Code limits. The control rod drop accident (CRDA) analysis in Chapter 15 takes credit for the APRM Fixed Neutron Flux-High function to terminate the CRDA. The Recirculation Flow Controller Failure event (pump runup) is also terminated by the high neutron flux trip. The APRM Fixed Neutron Flux-High function is required to be OPERABLE in MODE 1 where the potential consequences of the analyzed transients could result in the Safety Limits (*e.g.*, MCPR [minimum critical power ratio] and Reactor pressure) being exceeded.

The installation of the OPRM equipment does not increase the consequences of a malfunction of equipment important to safety. The APRM and RPS [Reactor Protection System] systems are designed to fail in a tripped (fail safe) condition; the OPRM will have no affect on the consequences of the failure of either system. An inoperative trip signal is received by the RPS any time an APRM mode switch is moved to any position other than Operate, an APRM module is unplugged, the electronic operating voltage is low, or the APRM has too few LPRM inputs. These functions are not specifically credited in the accident analysis, but are retained for the RPS as required by the NRC approved licensing basis.

The OPRM allows operation under operating conditions presently restricted by the current Technical Specifications by providing automatic suppression functions in the area of concern in the event an instability occurs. The consequences of any accident or equipment malfunction are not increased by operating under those conditions. Although protected by the OPRM from thermal-hydraulic core instabilities above 30% core power, operation under natural core circulation conditions is not allowed. No accidents or transients of a type not analyzed in the FSAR are created by operating under these conditions with the protection of the OPRM system.

This change does not increase the probability of an accident as previously evaluated. The OPRM is designed and installed to not degrade the existing APRM, LRPM, and RPS systems. These systems will still perform all of their intended functions. The new equipment is tested and installed to the same or more restrictive environmental and seismic envelopes as the existing systems. The new equipment has been designed and tested to electromagnetic interference (EMI) requirements which assure correct operation of the existing equipment. The new system has been designed to single failure criteria and is electrically isolated from equipment of different electrical divisions and from non-1E equipment. The electrical loading is within the capability of the existing power sources and the heat loads are within the capability of existing cooling systems. The OPRM allows operation under operating conditions presently forbidden or restricted by the current Technical Specifications. No other transient or accident analysis assumes these operating restrictions.

Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This proposal does not create the possibility of a new or different type of accident from any accident previously evaluated. The OPRM system is a monitoring and accident mitigation system that cannot create the possibility for an accident not previously evaluated.

The OPRM will allow operation in conditions restricted by the current Technical Specifications. Although protected by the OPRM from thermal-hydraulic core instabilities above 30% core power, operation under natural circulation conditions is not allowed. No accidents or transients of a type not analyzed in the FSAR are created by operating under these conditions with the protection of the OPRM system. No new failure modes of either the new OPRM equipment or of the existing APRM equipment have been introduced. Quality software design, testing, implementation and module self-health testing provides assurance that no new equipment malfunctions due to software errors are created. The possibility of an accident of a new or different type than any evaluated previouly is not created.

The new OPRM equipment is designed and installed to the same system requirements as the existing APRM equipment and is designed and tested to have no impact on the existing functions of the APRM system. Appropriate isolation is provided where new interconnections between redundant separation groups are formed. The OPRM modules have been designed and tested to assure that no new failure modes have been introduced.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

There has been no reduction in the margin of safety as defined in the basis for the Technical Specifications. The OPRM system does not negatively impact the existing APRM system. As a result, the margins in the Technical Specifications for the APRM system are not impacted by this addition.

Current operation under the ICAs [interim corrective actions] provides an acceptable margin of safety in the event of an instability event as the result of preventive actions and Technical Specification controlled response by the control room operators. The OPRM system provides an increase in the reliability of the protection of the margin of safety by providing automatic protection of the MCPR safety limit, while the protection burden is significantly reduced for the control room operators. This protection is demonstrated as described above, and in the NRC reviewed and approved Topical Reports NEDO–32465–A and CENPD–400–P–A.

Replacement of the ICA operating restrictions from Technical Specifications with the OPRM system does not affect the margin of safety associated with any other system or fuel design parameter.

Therefore, this change does not involve a reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc, General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101,1179.

NRC Section Chief: Richard J. Laufer.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: November 17, 2003.

Description of amendment request: The proposed change would revise the Technical Specifications to delete the primary containment isolation valves and instrumentation associated with the permanent removal of the reactor vessel head spray piping.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does not involve a significant increase in the probability or consequences of an accident previously analyzed?

Response: No.

The proposed changes to Technical Specification Tables 3.3.2–1, 3.3.7.4–2, 3.4.3.2–1, and 3.6.3–1 do not involve a change in structures, systems, or components that would affect the probability or consequences of any accident previously evaluated in the Hope Creek Updated Final Safety Analysis Report.

The proposed changes involve eliminating piping and valves associated with the reactor head spray. The reactor head spray system was initially provided to cool down the steam dryer and separator during shutdown. The head spray system is not credited for the prevention or mitigation of any accident. Therefore, neither the offsite or control room radiological consequences are affected. The head spray piping removal and addition of a bolted flange on the reactor coolant pressure boundary enhances plant safety by eliminating a source of pipe whip and potential leakage. In addition, the drywell penetration will be capped and welded closed. This will maintain primary containment integrity and will be periodically tested in conjunction with the containment integrated leak rate test.

Therefore, as discussed above, this modification does not involve a significant increase in the probability or consequences from any accident previously analyzed.

2. Does not create the possibility of a new or different kind of accident from any accident previously analyzed?

Response: No.

The proposed changes to Technical Specification Tables 3.3.2–1, 3.3.7.4–2, 3.4.3.2–1, and 3.6.3–1 do not involve a change in structures, systems, or components that would create a new or different kind of accident from any accident previously evaluated in the Hope Creek Updated Final Safety Analysis Report.

The proposed change to eliminate the head spray piping and the addition of a bolted flange on the reactor coolant pressure boundary enhances plant safety by eliminating a source of pipe whip and potential leakage. In addition, the drywell penetration will be capped and welded closed. This will maintain primary containment integrity and will be tested in conjunction with the containment integrated leak rate test.

Therefore, as discussed above, this modification does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does not involve a significant reduction in the margin of safety?

Response: No.

The proposed change to delete the head spray valves from Tables 3.3.2–1, 3.3.7.4–2, 3.4.3.2–1, and 3.6.3–1 does not reduce any margin of safety as defined in the Technical Specifications or Bases. The bolted flange that will be installed on the head spray penetration will maintain the integrity of the reactor coolant pressure boundary. This flange would then be tested as part of the reactor pressure vessel hydrostatic test. In addition, the drywell penetration will be capped and welded closed. This will maintain primary containment integrity and will be tested as part of the containment integrated leak rate test.

Accordingly, based on the above, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, PO Box 236, Hancocks Bridge, NJ 08038.

NRC Section Chief: Darrell Roberts, Acting.

Southern Nuclear Operating Company, Inc., et al., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: October 13, 2003.

Description of amendment request: The proposed amendments would revise the Technical Specifications (TS) limiting conditions for operation 3.8.4, 3.8.5, and 3.8.6, on direct current sources, operating and shutdown, and battery cell parameters. The proposed amendments creates TS 5.5.19, for a battery monitoring and maintenance program. The bases are revised to be consistent with these changes. The proposed amendments are based on Technical Specification Task Force (TSTF) Traveler, TSTF–360, Revision 1.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed changes increase the Completion Time for an inoperable battery, relocate preventative maintenance requirements to licensee controlled programs, and generally restructure the TS [technical specification] requirements for DC [direct current] sources. The revised requirements will allow licensed operators to focus their attention on battery parameters that are indicative of battery operability as opposed to preventative maintenance issues. The increased Completion Time for an inoperable battery will allow corrective maintenance to be accomplished via a more orderly and effective work process. It will also minimize the potential for an additional shutdown/restart transient to comply with the TS in order to accomplish the required maintenance. The DC sources are not initiators to any analyzed accident sequence. Operation in accordance with the proposed TS will continue to ensure that the DC sources remain capable of performing their safety function and that all analyzed accidents will continue to be mitigated as previously analyzed.

2. Do the proposed changes create the possibility of a new or different kind of accident from any previously evaluated?

No. The proposed changes do not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Plant operation will not be altered, and all safety functions previously addressed in accident analyses will continue to be performed.

3. Do the proposed changes involve a significant reduction in a margin of safety?

No. The proposed changes will not adversely affect operation of plant equipment—principally the four Class 1E DC sources and the equipment supported by them. The changes aimed at restructuring the TS requirements for DC sources will have the effect of reducing the burden on licensed operators by focusing the TS requirements on conditions that impair DC source operability. Requirements related to preventive maintenance will be addressed via new Specification 5.5.19 and the plant maintenance program. Margin to the battery operability requirements will continue to be maintained at current levels in accordance with IEEE–450. The extended Completion Time for an inoperable battery has been shown to have a negligible impact on plant risk using the criteria of Regulatory Guides 1.174 and 1.177.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Arthur H. Domby, Troutman Sanders, Nations Bank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308–2216.

NRC Section Chief: John A. Nakoski.

Southern Nuclear Operating Company, Inc., et al., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: December 15, 2003.

Description of amendment request: The proposed amendments would revise Technical Specifications surveillance requirement (SR) 3.3.1.2 for the nuclear instrumentation system power range daily surveillance when operating above 15-percent rated thermal power. In addition, the format of SR 3.3.1.3 is being revised to be consistent with the format of the proposed change to SR 3.3.1.2.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change to SR [surveillance requirement] 3.3.1.2 does not significantly increase the probability or consequences of an accident previously evaluated in the FSAR [Final Safety Analysis Report]. This modification does not directly initiate an accident. The consequences of accidents previously evaluated in the FSAR are not adversely affected by this proposed change because the change to the NIS [nuclear instrumentation system] Power Range channel adjustment requirement ensures the conservative response of the channel even at part power levels. The proposed change to SR 3.3.1.3 is to change the format consistent with the format of the proposed change to SR 3.3.1.2.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change to SR 3.3.1.2 does not create the possibility of a new or different kind of accident than any accident already evaluated in the FSAR. No new accident scenarios, failure mechanisms, or limiting single failures are introduced as a result of the proposed change. The proposed Technical Specifications change does not challenge the performance or integrity of any safety-related systems. The proposed change to SR 3.3.1.3 is to change the format to be consistent with the format of the proposed change to SR 3.3.1.2.

3. Does the proposed change involve a significant reduction in the margin of safety?

The proposed change to SR 3.3.1.2 does not involve a significant reduction in a margin of safety. The proposed change does require a revision to the criterion for implementation of Power Range channel adjustment based on secondary power calorimetric calculation; however, the change does not eliminate any RTS [reactor trip system] surveillances or alter the frequency of surveillances required by the Technical Specifications. The revision to the criterion for implementation of the daily surveillance will have a conservative effect on the performance of the NIS Power Range channel, particularly at part power after normalization at 100% RTP [rated thermal power] conditions. The nominal trip setpoints specified by the Technical Specifications and the safety analysis limits assumed in the transient and accident analysis are unchanged. The margin of safety associated with the acceptance criteria for any accident is unchanged. The proposed change to SR 3.3.1.3 is to change the format to be consistent with the format of the proposed change to SR 3.3.1.2.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308–2216.

NRC Section Chief: John A. Nakoski.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of amendment request: December 1, 2003.

Description of amendment request: The proposed amendments would revise Technical Specifications Section 5.5.12, "Primary Leakage Rate Testing Program," to change the peak calculated post accident primary containment internal pressure to support a 10 psi increase in the nominal Unit 1 and 2 reactor operating pressure.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change to TS [technical specification] section 5.5.12, "Primary Containment Leakage Rate Testing Program", involves an increase to the peak post accident primary containment pressure. It does not involve physical changes to the primary containment structure itself, nor to any of its support systems and components, nor does it involve changes to any other systems and components designed for the prevention of previously analyzed events. Consequently, the proposed amendment does not involve a significant increase in the probability of occurrence of a previously evaluated event.

The increase in operating pressure for the Hatch reactors from 1035 psig to 1045 psig results in an increase to the peak post-accident primary containment internal pressure. This pressure increases from 50.5 to 50.8 psig for Unit 1 and from 46.9 to 47.3 psig for Unit 2. This is a very small increase with respect to the Unit 1 and 2 primary containment design pressure of 56 psig and with the maximum code allowable pressure of 62 psig. The primary containment thus remains capable of withstanding the post accident pressure and thus the consequences of a previously evaluated event are not increased.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

The primary containment boundary will not be altered by the proposed change to

Technical Specifications sections 5.5.12, Primary Containment Leakage Rate Testing Program. Furthermore, the primary containment will function as presently described in the Updated Final Safety Analysis Report and will be subject to the same structural and functional requirements. The containment will be operated, maintained and surveilled as before, with the exception of the increased peak post accident pressure, which changes the post accident test pressure acceptance criteria. As a result, no new modes of operation are introduced by this Technical Specifications change and therefore, the possibility of a new or different kind of accident from any previously evaluated is not created.

3. Does the proposed change involve a significant decrease in the margin of safety?

The change in the analyzed peak post accident containment pressure will require that the containment be tested to ensure that it meets leakage acceptance criteria at the new pressures of 50.8 psig and 47.3 psig for Units 1 and 2 respectively. Therefore, the primary containment's ability to sustain the slightly higher pressures will be verified during leak rate testing at the required intervals.

The Unit 1 peak pressure increases from 50.5 to 50.8 psig and the Unit 2 pressure increases from 46.9 to 47.3 psig. The primary containment design pressure is 56 psig for both units and the maximum code allowable pressure is 62 psig. Therefore, the margin to the design and maximum code allowable pressures has not been significantly affected. As a result, this proposed Technical Specifications change does not significantly reduce the margin of safety associated with the primary containment function.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: John A. Nakoski.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: May 12, 2003, as revised by letter dated December 5, 2003.

Brief description of amendment request: By letter dated December 5, 2003, Entergy submitted a revised application for amendment to Technical Specification (TS) 3.3.6.1, "Primary Containment and Drywell Isolation Instrumentation," to add a provision to the APPLICABILITY function that will eliminate the requirement that the Residual Heat Removal System Isolation, Reactor Vessel Water Level-Low, Level 3, be OPERABLE under certain conditions during refueling outages. Specifically, the proposed change requested in the original application dated May 12, 2003, would remove the requirement for this isolation function, specified in Table 3.3.6.1–1, when the upper containment reactor cavity is at the High Water Level condition specified in TS 3.5.2, "Emergency Core Cooling Systems Shutdown." The revised application adds a new surveillance requirement (SR) 3.3.6.1.9 to verify that the water level in the upper containment pool is greater than or equal to 22 feet 8 inches above the reactor pressure vessel flange every four hours, and adds a footnote to Table 3.3.6.1–1, Item 5.b, for MODE 5 that states that the function is not required when the upper containment reactor cavity and transfer canal gates are removed and SR 3.3.6.1.9 is met. The proposed SR and footnote are only applicable in MODE 5. The May 12, 2003, application was previously noticed in the **Federal Register** on June 10, 2003 (68 FR 34665).

Date of publication of individual notice in ***Federal Register:*** December 15, 2003 (68 FR 69726).

Expiration date of individual notice: January 14, 2004.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov.*

Duke Energy Corporation, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Duke Energy Corporation, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of application for amendments: July 14, 2003, as supplemented by letter dated October 1, 2003.

Brief description of amendments: The amendments extend from 1 hour to 24 hours the completion time for Condition B of Technical Specification 3.5.1, which defines requirements for the restoration of an emergency core cooling system accumulator when it has been declared inoperable for a reason other than boron concentration.

Date of issuance: December 23, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance December 23, 2003.

Amendment Nos.: 211, 205, 218, and 200.

Renewed Facility Operating License Nos. NPF–35, NPF–52, NPF–9, and NPF–17: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** October 14, 2003 (68 FR 59214).

The supplement dated October 1, 2003, provided clarifying information that did not change the scope of the July 14, 2003, application nor the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 23, 2003.

No significant hazards consideration comments received: No.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of application for amendment: January 9, 2003.

Brief description of amendment: The proposed Technical Specification (TS) amendment request changes the definition of a Logic System Functional Test, deletes the definition of a Simulated Automatic Actuation, clarifies Surveillance Requirement 4.5.G.1.a regarding simulated automatic actuation testing, and revises associated TS Bases.

Date of Issuance: December 23, 2003.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment No.: 216.

Facility Operating License No. DPR–28: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** February 4, 2003 (68 FR 5674).

The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated December 23, 2003.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of application for amendment: October 24, 2003.

Brief description of amendment: The amendment revises TS 3.1.8, "Scram Discharge Volume (SDV) Vent and Drain Valves," for the condition of having one or more SDV vent or drain lines with one valve inoperable.

Date of issuance: December 30, 2003.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No: 161.

Facility Operating License No. NPF–29: The amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** November 25, 2003 (68 FR 66135).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 30, 2003.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of application for amendment: May 8, 2003, as supplemented by letter dated October 24, 2003.

Brief description of amendment: The amendment changes Technical Specification (TS) 3.3.6.1, "Primary Containment and Drywell Isolation Instrumentation," to add a note allowing intermittent opening of penetration flow paths, under administrative control, that are isolated to comply with TS ACTIONS and to revise the operability requirement for the Reactor Core Isolation Cooling (RCIC) steam supply line low pressure isolation instrumentation to be consistent with the RCIC system operability requirements.

Date of issuance: January 8, 2004.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No: 162.

Facility Operating License No. NPF–29: The amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** June 10, 2003 (68 FR 34664).

The October 24, 2003, supplemental letter provided clarifying information that did not change the scope of the original **Federal Register** notice or the original no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 8, 2004.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket No. 50–410, Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of application for amendment: September 3, 2003.

Brief description of amendment: The amendment modified Technical Specification (TS) requirements for mode change limitations to adopt the TS Task Force (TSTF) change TSTF–359, "Increase Flexibility in Mode Restraints."

Date of issuance: January 5, 2004.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment No.: 109.

Facility Operating License No. NPF–69: Amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 30, 2003 (68 FR 56345).

The staff's related evaluation of the amendment is contained in a Safety Evaluation dated January 5, 2004.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–311, Salem Nuclear Generating Station, Unit No. 2, Salem County, New Jersey

Date of application for amendment: July 1, 2003, as supported by letter dated June 16, 2003, and supplemented on November 11, 2003.

Brief description of amendment: The requested changes revise License Condition 2.C.(10) to document changes to the Salem Post-Fire Safe Shutdown (SSD) strategy for Fire Areas 2–FA–AB–64B, 2–FA–AB–84B, and 2–FA–AB–84C. The licensee requested changes to the SSD as a result of recent plant modifications implemented in response to the resolution of Electrical Raceway Fire Barrier System issues at Salem.

Date of issuance: January 7, 2004.

Effective date: As of the date of issuance, and shall be implemented within 30 days.

Amendment No.: 242.

Facility Operating License No. DPR–75: This amendment revised the Facility Operating License.

Date of initial notice in ***Federal Register:*** July 16, 2003 (68 FR 42134). The supporting and supplemental

letters dated June 16, and November 11, 2003, contained clarifying information that did not change the NRC staff's proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 7, 2004.

No significant hazards consideration comments received: No.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: May 22, 2003.

Brief description of amendments: The amendments revise Technical Specification (TS) 3/4.3.2, "Engineering Safety Features Actuation System Instrumentation," and TS 3/4.9.9, "Refueling Operations—Containment Ventilation Isolation System," governing radiation monitoring instrumentation, to relax restrictions on containment purge valve operation.

Date of issuance: January 5, 2004.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 160 and 150.

Facility Operating License Nos. NPF–76 and NPF–80: The amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** October 14, 2003 (68 FR 59221).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 5, 2004.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket Nos. 50–260 and 50–296, Browns Ferry Nuclear Plant, Units 2 and 3, Limestone County, Alabama

Date of application for amendments: April 14, 2003, as supplemented by letters dated September 5 and November 7, 2003.

Brief description of amendments: The amendments revised Technical Specification (TS) 3.3.4.1, "End-Of-Cycle Recirculation Pump Trip (EOC-RPT) Instrumentation," and TS 3.7.5, "Main Turbine Bypass System," to reference additional core limits adjustment factors for linear heat generation rate for equipment out-of-service conditions. Also, Section b of TS 5.65. "Core Operating Limits Report (COLR)," was revised to add references to the Framatome Advanced Nuclear Power analytical methods what will be used in the upcoming fuel cycles to determine core operating limits.

Date of issuance: December 30, 2003.

Effective date: Date of issuance, to be implemented within 60 days from the completion of Unit 3 Spring 2004 and Unit 2 Spring 2005 refueling outages.

Amendment Nos.: 287 & 245.

Facility Operating License Nos. DPR–52, and DPR–68. Amendments revised the TSs.

Date of initial notice in ***Federal Register:*** May 27, 2003 (68 FR 28858).

TVA's supplemental letters provided clarifying information that did not expand the scope of the original application or change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 30, 2003.

No significant hazards consideration comments received: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual 30-day Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the Commission's Public Document

Room, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Assess and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov*.

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. By February 19, 2004, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and electronically on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If there are problems in accessing the document, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. Because of the continuing disruptions in delivery of mail to United States Government offices, it is requested that petitions for leave to intervene and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov*. A copy of the petition for leave to intervene and request for hearing should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and because of continuing disruptions in delivery of mail to United States Government offices, it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

STP Nuclear Operating Company, Docket No. 50–499, South Texas Project, Unit 2, Matagorda County, Texas

Date of amendment request: December 27, 2003 as supplemented by letter dated December 27 and two letters dated December 28, 2003.

Description of amendment request: The amendments revise Technical Specification (TS) 3.8.1, "AC Sources—Operating," to extend the allowed outage time for Unit 2 Standby Diesel Generator (SDG) 22 from 21 days to 113 days as a one-time change for the purpose of making repairs to SDG 22.

Date of issuance: December 30, 2003.

Effective date: December 30, 2003.

Amendment No.: 149.

Facility Operating License No. NPF–80: Amendment revised the Technical Specifications.

Public comments requested as to final no significant hazards consideration (NSHC): No.

The Commission's related evaluation of the amendment, finding of emergency circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated December 30, 2003.

Attorney for licensee: A.H. Gutterman, Esquire, Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

Dated at Rockville, Maryland, this 13th day of January 2004.

For the Nuclear Regulatory Commission.

Eric J. Leeds,

Deputy Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–1104 Filed 1–16–04; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 57(a); SEC File No. 270–376; OMB Control No. 3235–0428.

Form U–57; SEC File No. 270–376; OMB Control No. 3235–0428.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Under rule 57(a) a Form U–57 must be used by a person filing under sections 33(a)(3)(B) and 33(c)(1) of the Act. The 101 annual responses together incur about 405 burden hours to comply with these requirements. The Commission estimates that the total annual reporting and recordkeeping burden is 405 (101 annual responses x 10 hours = 1010 burden hours). This represents the same estimated hours annually in the paperwork burden from the prior estimate. The Commission needs the information required by Rule 57(a) in order for the Commission to be informed of when a registered holding company becomes a foreign utility company or when it acquires a foreign utility company. The Commission uses this information to determine the existence of detriment to the interests the Act was designed to protect. Compliance with the requirements to provide the information is mandatory. The information will not be kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: January 7, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1072 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, 450 Fifth Street, NW, Washington, DC 20549.

Extension: Rule 55; SEC File No. 270–376; OMB Control No. 3235–0430.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Under rule 55, a filing must be under section 33(c)(1) of the Act for a "safe harbor" for acquisitions of foreign utility companies by registered holding companies. The filing is made only for foreign utility companies that meet specific criteria. Rule 55 is a proposal, and has not yet been adopted in final. The Commission estimates that 11 annual responses together incur about 39,710 burden hours to comply with these requirements. The Commission estimates that the total annual reporting and recordkeeping burden is 110 (11 annual responses × 10 hours = 110 burden hours). This represents a decrease of 39,600 hours annually in the paperwork burden from the prior estimate, and this decrease was caused by a decrease in the number of annual responses. The Commission needs the information because it gives the registered holding company a "safe harbor" when it acquires a foreign utility company that meets specified criteria. The Commission uses this information to determine the existence of detriment to the interests the Act was designed to protect. Compliance with the requirements to provide the information is mandatory. The information will not be kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: January 9, 2004.
Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 04–1073 Filed 1–16–04; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.
Extension: Rule 11Aa3–2; SEC File No. 270–439; OMB Control No. 3235–0500.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 11Aa3–2 provides that self-regulatory organizations (SROs) may, acting jointly, file a national market system plan or may propose an amendment to an effective national market system plan by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (b)(4) and (5) of Rule 11Aa3–2.

The collection of information is designed to permit the Commission to achieve its statutory directive to facilitate the development of a national market system. The information is used to determine if a national market system plan, or an amendment thereto, should be approved and implemented.

The respondents to the collection of information are self-regulatory organizations (as defined by the Act), including national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board.

The respondents to the collection of information are self-regulatory organizations (as defined by the Act), including national securities exchanges and national securities associations.

Ten respondents file an average total of thirteen responses per year, which corresponds to an estimated annual response burden of 433 hours.

Written 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Dated: January 9, 2004.
Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 04–1074 Filed 1–16–04; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.
Extension: Rule 87; SEC File No. 270–474; OMB Control No. 3235–0552.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Information relevant to Rule 87 (17 CFR 250.87) under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) ("Act") is required to be reported under Item 8 of Form U5–S. Item 8 of Form U5–S requires reporting of any recurring goods and service transactions in excess of $100,000 provided by an electric or gas utility to any associate company under Rule 87(a)(3). Item 8 of Form U5–S also requires reporting of any goods and service transactions in excess of $100,000 by any non-utility subsidiary to any associate company under Rule 87 (b)(1). It is estimated that the total number of respondents is 200. The average number of responses per respondent is 1 response annually. The burden of responding is accounted for primarily through Form U5–S. To account for administrative time, the Commission estimates that the total annual reporting burden under rule 87 is 1 hour per respondent.

These estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms. There is no requirement to keep the information in the forms confidential because it is public information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: January 9, 2004.
Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 04–1075 Filed 1–16–04; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.
Extension: Form U–1; SEC File No. 270–128; OMB Control No. 3235–0125.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995

(44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Under rule 20(c) of the Act, Form U–1 must be used by any person filing for amending an application or declaration under sections 6(b), 7, 9(c)(3), 10, 12(b), (c), (d), or (f) of the Act. The form must also be used for filings under any rule under other sections of the Act for which a form is not prescribed. The Commission estimates that the total annual reporting and recordkeeping burden is 24,753 (111 annual responses × 223 hours = 24,753 burden hours). This represents a decrease of 2,684 hours annually in the paperwork burden from the prior estimate, and this decrease was caused by a decrease in the number of annual responses. The Commission needs the information because rule 20(c) requires it. The Commission uses this information to determine the existence of detriment to the interests the Act was designed to protect. Compliance with the requirements to provide the information is mandatory. The information will not be kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549.

Dated: January 9, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1076 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 1(c) and Form U5S; SEC File No. 270–168; OMB Control No. 3235–0164.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Under rule 1(c) and section 14 of the Public Utility Holding Company Act of 1935 ("Act"), Form U5S must be filed annually by all registered holding companies. Form U5S contains broad ranging information such as a description of system companies, acquisitions and sales of utility assets, securities transactions, and other information necessary for the staff to ascertain compliance with the Act. The Commission estimates that the total annual reporting and recordkeeping burden is 445.5 (28 original annual responses plus 5 amendments × 13.5 hours = 445.5 burden hours). This represents an increase of 189 hours annually in the paperwork burden from the prior estimate, and this increase was caused by an increase in the number of registered holding companies over the period as well as the need for some registrants to make a subsequent amendment to the Form U5S due to the inadequacy of their original filing. The Commission needs the information because rule 1(c) requires it. The Commission uses this information to determine the existence of detriment to the interests the Act was designed to protect. Compliance with the requirements to provide the information is mandatory. The information will not be kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: January 7, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1077 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49058; File No. SR–Amex–2002–35]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto by the American Stock Exchange LLC To Codify in Rules 128A, 1000, and 1000A the Current Practices Regarding the Participation in Exchange Traded Fund Trades Executed on the Exchange by Registered Traders and Specialists and the Allocation by the Specialist of Those Trades to the Appropriate Party

January 12, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 22, 2002, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change. On February 13, 2003, September 8, 2003, November 3, 2003,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and December 10, 2003, respectively, the Amex filed Amendment Nos. 1, 2, 3, and 4 to the proposed rule change.[3] The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to codify in Amex Rules 128A, 1000, and 1000A current practices regarding the participation in Exchange Traded Fund trades executed on the Exchange by registered traders and specialists and the allocation by the specialist of those trades to the appropriate party. The text of the proposed rule change, as amended, is set forth below. Deleted language is in [brackets]; proposed new language is *italicized*.[4]

* * * * *

Rule 128A Automatic Execution for Exchange Traded Funds

The Exchange shall determine the size and other parameters of orders eligible for execution by its Automatic Execution System (Auto-Ex). An Auto-Ex eligible order for any account in which the same person is directly or indirectly interested may only be entered at intervals of no less than 10 seconds between entry of each such order on the same side of the market in a security. Members and member organizations are responsible for establishing procedures to prevent orders in a security on the same side of the market for any account in which the same person is directly or indirectly interested from being entered at intervals of less than 10 seconds.

* * * Commentary

.01 through .04 No change.

.05 Specialists and Registered Options Traders that sign-on to Auto-Ex will be automatically allocated the contra side of Auto-Ex trades for ETFs [according to the following schedule:] *in accordance with participation percentages ("target ratios") determined by the ETF Trading Committee.*

[Number of ROTs Signed on to Auto-Ex in a Crowd	Approximate Number of Trades Allocated to the Specialist Throughout the Day ("Target Ratio")	Approximate Number of Trades Allocated to ROTs Signed on to Auto-Ex Throughout the Day ("Target Ratio")
1	60%	40%
2–4	40%	60%
5–7	30%	70%
8–15	25%	75%
16 or more	20%	80%]

At the start of each trading day, the sequence in which trades will be allocated to the specialist and Registered Options Traders signed-on to Auto-Ex will be randomly determined. Auto-Ex trades then will be automatically allocated in sequence on a rotating basis to the specialist and to the Registered Options Traders that have signed-on to the system so that the specialist and the crowd achieve their "target ratios" over the course of a trading session. If an Auto-Ex eligible order is greater than 100 shares, Auto-Ex will divide the trade into lots of 100 shares each. Each lot will be considered a separate trade for purposes of determining target ratios and allocating trades within Auto-Ex.

.06 No change.

* * * * *

Rule 1000 Portfolio Depositary Receipts

(a) through (b) No change.

* * * Commentary

.01 through .04 No change.

.05 [Reserved]

.06 [Reserved]

.07 (a) When two or more bids (offers) are made simultaneously by the specialist dealing for his own account and by registered traders, all such bids (offers) shall be on parity and any securities sold (bought) in execution of such bids (offers) shall be divided among the specialist and registered trader(s) so that the specialist shall receive a percentage, as determined by the ETF Trading Committee, of the shares executed and the registered traders shall divide the remainder in accordance with Commentary .08(a)(iii). Notwithstanding the foregoing, neither the specialist nor a registered trader will be allocated more executed shares than the number representing the specialist's or registered trader's portion of the aggregate quote size, except when the number of executed shares to be allocated exceeds the aggregate quotation size disseminated for that Portfolio Depositary Receipt.

(b) The above provision applies only when the specialist and registered trader(s) are on parity and does not include situations where a customer order is also on parity with the specialist and registered traders. When a customer is on parity with the specialist and registered traders, the specialist will allocate executed shares (1) to the customer and to those registered traders or specialist on parity with the customer on equal basis subject to Commentary .08(a)(v) below; and then (2) to the specialist and the registered trader in accordance with Commentary .08(a)(iii) below. The following rules set forth provisions regarding priority and parity of registered traders and specialists when customer orders are involved: Rule 111, Commentary .07 provides that registered traders in establishing or increasing a position may not retain priority over or have parity with a customer order, and Rule 155 requires a specialist to yield precedence to orders entrusted to him as agent before executing a purchase or sale at the same price for an account in which he has an interest.

.08 (a) It is the responsibility of the specialist to allocate executed Portfolio Depositary Receipts among all participants to a trade.

(i) In order for specialists to fulfill this function, registered traders must announce either at the start of the trading day, upon entry into the trading crowd or prior to the dissemination of a quotation, the number of shares for each Portfolio Depositary Receipts in which they are willing to participate. The specialist may not assume a size for any registered trader and only those registered traders that have announced their sizes as discussed above will be allocated any executed shares.

(ii) The registered traders announced sizes shall be promptly communicated to the Exchange as required by SEC Rule 11Ac1–1(c).

(iii) As transactions occur the specialist shall allocate to the extent mathematically possible (A) the portion of the executed shares that the customer is entitled to and the portion of the executed shares to those on parity with the customer on an equal basis subject to subparagraph (v) of this paragraph (a); (B) the portion of the executed shares that the specialist is entitled to in accordance with Commentary .07 above; and (C) the portion of the

[3] *See* letters from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 12, 2003 ("Amendment No. 1"); September 5, 2003 ("Amendment No. 2"); October 30, 2003 ("Amendment No. 3"); and December 9, 2003 ("Amendment No. 4"). Amendment No. 4 replaced Form 19b–4 in its entirety.

[4] With the Exchange's consent, the Commission has made technical corrections to the text of the proposed rule change, which the Exchange has committed to correct formally by filing an amendment. Telephone conversation between Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, and Cyndi N. Rodriguez, Special Counsel, Division, Commission, on January 8, 2004.

executed shares participating registered traders are entitled to individually. The allocation pursuant to (C) is subject to the following provisions:

1. Where all participants have equal stated sizes, their participations shall be equal;

2. Where participants' stated sizes are not equal, their participations will depend upon whether the number of executed shares left to be allocated exceeds in the aggregate the participants' stated sizes;

3. If the number of executed shares left to be allocated does not exceed the participants' aggregate stated sizes, the specialist will allocate the executed shares equally, unless a participant's stated size is for an amount less than an equal allocation, then the smallest sizes will be allocated first, until the number of executed shares remaining to be allocated requires an equal allocation.

4. If the number of executed shares left to be allocated does exceed the participants' aggregate stated sizes, the specialist will allocate the executed shares by first allocating to each participant the number of executed shares equal to each participant's stated size with the remainder being allocated based on the percentage a participant's stated size is of the participants' aggregate stated size.

5. The following chart illustrates how different numbers of executed shares will be allocated to participants whose aggregate stated size is 1,000 shares:

Number of Executed Shares To Be Allocated

Each participant's stated size	2,000	900	700	500
500	1,000	400	250	168
300	600	300	250	167
200	400	200	200	165

(iv) In the event a specialist or registered trader declines to accept any portion of the available executed shares, any remaining executed shares shall be apportioned among the remaining participants who bid or offered at the best price at the time the market was established in accordance with paragraph (iii) above, until all executed shares have been allocated.

(v) Specialists and registered traders may direct some or all of their participation amount to competing public orders in the trading crowd.

(b) Notwithstanding the foregoing, when the transaction occurs without the participation of the specialist (either as principal or agent), the floor broker representing the contra-side of the trade distributes the executed shares equally among the participating registered traders, unless a registered trader's portion of the disseminated size is less than an equal distribution. That registered trader will be given a less than equal distribution and the remaining contracts will be allocated equally among the remaining participants to the trade. In addition, if neither the specialist nor a floor broker representing a customer is participating in the trade, the participating registered traders shall allocate the executed shares among themselves and other participants on parity in accordance with subparagraph (a)(iii) above.

* * * * *

Rule 1000A Index Fund Shares

(a) through (b) No change.

* * * Commentary

.01 through .05 No change.

.06 [Reserved]

.07 [Reserved]

.08 (a) When two or more bids (offers) are made simultaneously by the specialist dealing for his own account and by registered traders, all such bids (offers) shall be on parity and any securities sold (bought) in execution of such bids (offers) shall be divided among the specialist and registered trader(s) so that the specialist shall receive a percentage, as determined by the ETF Trading Committee, of the orders executed and the registered traders shall divide the remainder in accordance with Commentary .09(a)(iii). Notwithstanding the foregoing, neither the specialist nor a registered trader will be allocated more executed shares than the number representing the specialist's or registered trader's portion of the aggregate quote size, except when the number of executed shares to be allocated exceeds the aggregate quotation size disseminated for that Portfolio Depositary Receipt.

(b) The above provision applies only when the specialist and registered trader(s) are on parity and does not include situations where a customer order is also on parity with the specialist and registered traders. When a customer is on parity with the specialist and registered traders, the specialist will allocate executed shares (1) to the customer and to those registered traders or specialist on parity with the customer on equal basis subject to Commentary .09(a)(v) below; and then (2) to the specialist and the registered trader in accordance with Commentary .09(a)(iii) below. The following rules set forth provisions regarding priority and parity of registered traders and specialists when customer orders are involved: Rule 111, Commentary .07 provides that registered traders in establishing or increasing a position may not retain priority over or have parity with a customer order, and Rule 155 requires a specialist to yield precedence to orders entrusted to him as agent before executing a purchase or sale at the same price for an account in which he has an interest.

.09 (a) It is the responsibility of the specialist to allocate executed Index Shares among all participants to a trade.

(i) In order for specialists to fulfill this function, registered traders must announce either at the start of the trading day, upon entry into the trading crowd or prior to the dissemination of a quotation, the number of shares for each Index Fund Share in which they are willing to participate. The specialist may not assume a size for any registered trader and only those registered traders that have announced their sizes as discussed above will be allocated any executed shares.

(ii) The registered traders announced sizes shall be promptly communicated to the Exchange as required by SEC Rule 11Ac1–1(c).

(iii) As transactions occur the specialist shall allocate to the extent mathematically possible (A) the portion of the executed shares that the customer is entitled to and the portion of the executed shares to those on parity with the customer on an equal basis subject to subparagraph (v) of this paragraph (a); (B) the portion of the executed shares that the specialist is entitled to in accordance with Commentary .08 above; and (C) the portion of the executed shares participating registered traders are entitled to individually. The allocation pursuant to (C) is subject to the following provisions:

1. *Where all participants have equal stated sizes, their participations shall be equal;*

2. *Where participants' stated sizes are not equal, their participations will depend upon whether the number of executed shares left to be allocated exceeds in the aggregate the participants' stated sizes;*

3. *If the number of executed shares left to be allocated does not exceed the participants' aggregate stated sizes, the specialist will allocate the executed shares equally, unless a participant's stated size is for an amount less than an equal allocation, then the smallest sizes will be allocated first, until the number of executed shares remaining to be allocated requires an equal allocation.*

4. *If the number of executed shares left to be allocated does exceed the participants' aggregate stated sizes, the specialist will allocate the executed shares by first allocating to each participant the number of executed shares equal to each participant's stated size with the remainder being allocated based on the percentage a participant's stated size is of the participants' aggregate stated size.*

5. *The following chart illustrates how different numbers of executed shares will be allocated to participants whose aggregate stated size is 1,000 shares:*

Number of Executed Shares To Be Allocated

Each participant's stated size	2,000	900	700	500
500	1,000	400	250	168
300	600	300	250	167
200	400	200	200	165

(iv) In the event a specialist or registered trader declines to accept any portion of the available executed shares, any remaining executed shares shall be apportioned among the remaining participants who bid or offered at the best price at the time the market was established in accordance with paragraph (iii) above, until all executed shares have been allocated.

(v) Specialists and registered traders may direct some or all of their participation amount to competing public orders in the trading crowd.

(b) Notwithstanding the foregoing, when the transaction occurs without the participation of the specialist (either as principal or agent), the floor broker representing the contra-side of the trade distributes the executed shares equally among the participating registered traders, unless a registered trader's portion of the disseminated size is less than an equal distribution. That registered trader will be given a less than equal distribution and the remaining contracts will be allocated equally among the remaining participants to the trade. In addition, if neither the specialist nor a floor broker representing a customer is participating in the trade, the participating registered traders shall allocate the executed shares among themselves and other participants on parity in accordance with subparagraph (a)(iii) above.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Since the inception of trading Exchange Traded Funds [5] at the Exchange, both specialists together with registered traders ("traders") have had the responsibility of making markets in these products.[6] Exchange rules require that both specialists' and traders' transactions constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and they should not enter into transactions or make bids or offers that are inconsistent with such a course of dealings. Specialists and traders shall engage, to a reasonable degree under the existing circumstances, in dealings for their own accounts when there exists a lack of price continuity or a temporary disparity between the supply of and demand for a specific ETF. In discussing the role of a registered trader, the Commission has stated "* * * registered floor traders will be expected to trade in a way that *assists* the specialist in maintaining a fair and orderly market * * *"[7] (emphasis supplied). Specialists do, however, have additional obligations and responsibilities and are subject to certain costs that registered traders do not have, which include: (1) Their continuous obligation to the market, updating and disseminating quotes in all securities; (2) reflecting all market interest in the displayed quotes; (3) acting as contra-party on the automatic execution system at all times; (4) the fixed staffing costs committed to market making in a particular security whether it is actively traded or not; (5) the costs of licenses to list and trade these products; (6) the costs associated with participating in educational and marketing functions; and (7) the costs associated with a course of dealings designed to attract order flow to the Exchange.

In the course of making markets, specialists are often on parity with registered traders, that is, bidding and offering simultaneously to provide liquidity. Generally, Exchange Rule 126 provides that when bids (offers) are made simultaneously all such bids (offers) are on parity, and any securities sold (bought) in execution of such bids (offers) shall be divided as equally as possible between those on parity up to the participant's stated or generally known sizes. In addition, as further discussed below, the trading crowds in many option classes give the specialist a greater than equal share when on parity with registered traders. This proposal seeks to codify in the Exchange's rules these current allocation practices.

Although this rule proposal seeks to codify the participation in and

[5] Exchange Traded Funds include SPDRS, DIAMONDS and the NASDAQ 100 shares as well as other products listed pursuant to Rules 1000 and 1000A. These products will be referred to hereinafter as "ETFs."

[6] *See* Amex Rule 958, Commentary 10.

[7] *See* Securities Exchange Act Release No. 11144 (December 19, 1974), 40 FR 3258 (January 20, 1975).

allocation of trades among specialists and registered traders on parity, the following is a general description of the Exchange's rules regarding customer priority and parity. Exchange Rules 155 and 111 for specialists and registered traders, respectively, set forth their obligations and responsibilities when handling or interacting with customer orders. Amex Rule 155 requires a specialist to yield precedence to orders entrusted to him as agent before executing a purchase or sale at the same price for an account in which he has an interest. Amex Rule 111, Commentary .07 provides that registered traders in establishing or increasing a position may not retain priority over or have parity with a customer order. Thus, the rules would require that, when the specialist as agent receives a customer's marketable limit order, he and any registered trader establishing or increasing a position yield precedence to the customer order. However, registered traders closing or reducing a position and specialists not acting in an agency capacity can be on parity with the customer order.

It is the specialist's responsibility to allocate executed ETF shares among all participants to a trade. This is generally a manual process involving the inputting of participant information into the Point of Sale (or POS) Book. However, as provided in the proposed Rules 1000, Commentary .08(b) and 1000A, Commentary .09(b), whenever a trade occurs without the participation of the specialist (*i.e.*, the order is represented by a floor broker with registered traders as contra-parties to the trade), the Floor Broker representing the contra-side of the trade would distribute the executed shares equally among the participating registered traders, unless a registered trader's portion of the disseminated quote size is less than an equal distribution. That registered trader would be given a less than equal distribution, and the remaining shares would be allocated equally among the remaining participants to the trade. In addition, when only registered traders are on both sides of a trade (*i.e.*, neither the specialist nor a customer is participating in the trade), the registered traders would allocate the executed shares among themselves in accordance with the same provisions setting forth allocations by the specialist.[8] In this situation, as well as others, registered traders are only required to participate up to their portion of the Exchange's disseminated quote size as required by the firm quote rule.[9]

Depending upon the level of activity and volatility of a particular ETF, the level of participation of an individual registered trader in each ETF would vary. Registered traders who regularly or only occasionally trade a particular ETF are currently expected to and would be required under the proposed codification in Rules 1000 and 1000A, to announce, either at the start of the trading day, upon entry into the trading crowd, or prior to the dissemination of a quotation, the number of shares in which they are willing to participate. These generally known sizes would be aggregated into the size disseminated by the Exchange pursuant to the firm quote rule so that the disseminated quote in each ETF reflects the level of participation by the specialist and each registered trader. While the specialist would not be required to announce his size to the trading crowd, his size could be determined from the disseminated quote size. As transactions occur, the specialist would allocate ETF shares to registered traders based upon these stated participation sizes.

The Exchange states that over the years, it, as well as registered traders and specialists, has recognized that, given their role, specialists should be entitled to a greater than equal share when on parity with registered traders. As a result, a practice has developed in Amex trading crowds for many products to give the specialist a greater than equal share when on parity with registered traders. The Exchange now seeks to codify this practice.

The Exchange believes that it is appropriate to provide a greater participation to specialists since they have responsibilities and are subject to certain costs that registered traders do not have. For example, they have a continuous obligation to the market; to update and disseminate quotes in all securities; to reflect all market interest in the displayed quotes; and to act as contra-party on Auto-Ex at all times. In addition, specialists incur the fixed staffing costs committed to market making in a particular security whether it is actively traded or not, and the costs associated with participating in educational and marketing functions to attract order flow. In order to attract to the Exchange specialist units that are willing to accept these responsibilities, the Amex believes it is necessary to provide specialists with an enhanced participation in ETFs. The Exchange also believes that in order to be competitive with other exchanges that currently trade ETFs without market makers or registered traders, it must have the flexibility to determine the appropriate specialist participation.

The Exchange has determined that the specialist's participation for each ETF can and should vary depending upon the liquidity of the product, the type of orders sent to the Exchange and its competitors, and the type of order flow the Exchange seeks to attract in each ETF product. As a result, the Exchange has established the ETF Trading Committee ("Committee") to determine the level of the specialist's participation on a case-by-case basis for ETFs.[10] The Committee shall not determine in any ETF the specialist's participation level at anything less than the specialist participation level in place today.[11]

Exchange policy currently applies the following specialist's participation levels:

Number of traders on parity	*Approximate number of shares allocated to the specialist*	*Approximate number of shares allocated to the traders (as a group)*
1	*60%*	*40%*
2–4	*40%*	*60%*
5–7	*30%*	*70%*
8–15	*25%*	*75%*
16 or more	*20%*	*80%*

The Committee would be composed of the Exchange's four Floor Governors, the Chairmen (or their designee) of the Specialists Association, the Options Market Makers Association and the Floor Brokers Association, and three members of the Exchange's senior staff. It is expected that the designated Committee member from the Specialists Association specialize in one or more ETF products, and that the designated Committee member from the Options Market Maker Association trade one or more ETF products on a regular basis. All members of the Committee, including Exchange senior staff members, would have a vote on determining the level of specialist participation for each ETF. The Exchange currently trades over 100 different ETFs whose volume and liquidity vary widely. Each ETF would be evaluated individually by the Committee to determine the appropriate

[8] *See* proposed Rules 1000, Commentary .08(a)(iii) and 1000A, Commentary .09(a)(iii).

[9] *See* Rule 11Ac–1–1 under the Act, 17 CFR 240.11Ac–1–1.

[10] The Exchange states that the Committee would be described and approved by the Exchange's Board of Governors on an annual basis as part of the Exchange's Committee structure. The Committee and its structure would also be discussed in an Information Circular that is expected to be issued after this proposed rule change is approved by the Commission.

[11] Footnote 11, which includes a table, has been incorporated in the text.

level of specialist participation based on the liquidity of the product, the type of orders sent to the Exchange and its competitors, and the type of order flow the Exchange seeks to attract in each ETF product. An enhanced participation, if deemed appropriate by the Committee, would give specialists the ability to attract order flow to the Exchange and thereby give its customers tighter, more competitive markets. As a result, the Exchange would be able to attract new specialist units and retain the services of existing units.

It should be emphasized that the participation rights being established by the Committee would apply only when the specialist and/or registered traders are on parity and would not include situations where a customer order is also on parity with the specialist and registered traders. It should be noted, however, that a specialist cannot be on parity with an order for which he is acting as agent, and registered traders (who never act as agents and trade only for their own accounts) cannot be on parity with a customer when either establishing or increasing their position in the ETF. In such situations, as provided in proposed Rules 1000, Commentary .08(a)(iii) and 1000A, Commentary .09(a)(iii), the specialist would first allocate executed shares to the customer and to the specialist and/or those registered traders on parity with the customer. Any shares that remain would be allocated among the specialist and registered traders in accordance with proposed Rules 1000, Commentary .07 and 1000A, Commentary .08, which provides that the specialist would receive a participation in the remaining shares in accordance with the level set by the Committee. In addition, neither the specialist nor a registered trader would be allocated more executed shares than the number of shares representing the specialist's or registered trader's portion of the aggregate quotation size that the responsible broker or dealer would be obligated to communicate to the Exchange pursuant to firm quote rule, except when the number of executed shares to be allocated exceeded the aggregate quotation size disseminated for that ETF. Thus, for the following two examples, assume that the aggregate quotation size is 1,000 shares, the specialist's portion is 250 shares, and the registered trader's portion is 750 shares.

First example. An off-floor order to sell 800 shares is submitted for execution at the disseminated bid. The Committee has determined for this ETF that the specialist would be entitled to 60% of the executed shares. The specialist, however, would only be allocated 250 executed shares, and the registered trader would be allocated 550 executed shares.

Second example. An off-floor order to sell 2,000 shares is submitted for execution at the disseminated bid. The specialist and registered trader would first be allocated 250 shares and 750 shares respectively, plus the specialist would receive 60% of the remaining 1,000 shares for a total of 850 shares, and the registered trader would receive 40% for a total of 1,150 shares.

Once the specialist determines his portion of the trade depending upon the number of traders on parity, he would deduct his portion and allocate the remaining shares to the registered traders based upon: (i) An equal distribution, as described in the first example below; (ii) filling the smallest size(s) first, as described in the second example below; (iii) a combination based on filling the smallest size first and equal distribution, as described in the third example below; or (iv) prorated based on the registered traders' generally known sizes and the percentage those sizes represent of their aggregate disseminated size, as described in the fourth example below. The number of shares in the incoming order would determine which of the methods would be used in the allocation.

Assume the following information for each of the following four examples: the disseminated bid for a particular ETF has an aggregate size of 10,000 shares. The specialist is bidding for 6,500 shares, and four registered traders' generally known sizes are as follows: Trader A—2,000 shares; Trader B—1,000 shares; Trader C—300 shares; and Trader D—200 shares. There are no customer orders participating in the bid. The Committee has determined for this ETF that the specialist would receive 40% of the executed shares, and the registered traders would split the remaining 60%.

First example. An off-floor order to sell 1,000 shares is submitted for execution at the disseminated bid. The specialist would allocate the executed shares as follows: the specialist would receive 400 shares (or 40%), and would allocate the remaining executed shares equally to each of the four traders 150 shares (or 25% of the remaining 600 shares).

Second example. An off-floor order to sell 5,000 shares is submitted for execution at the disseminated bid. The executed shares would be allocated by the specialist as follows: (i) The specialist would receive 40% (2,000 shares) of the 5,000 executed shares pursuant to the Committee's determination; and (ii) the remaining 60% (3,000 shares) would be divided among the registered traders based upon their generally known sizes with an attempt to completely fill the smallest size(s) first, which in this example would be 200 shares for Trader D, 300 shares for Trader C, and 1,000 shares for Trader B. A total of 1,500 shares would be deducted, leaving 1,500 shares to be allocated to Trader A.

Third example. An off-floor order to sell 2,000 shares is submitted for execution at the disseminated bid. The executed shares would be allocated by the specialist as follows: (i) The specialist would receive 40% (800 shares) of the 2,000 executed shares pursuant to the Committee's determination; and (ii) the remaining 60% (1,200 shares) would be divided among the registered traders based upon their generally known sizes with an attempt to completely fill the smallest size(s) first and an equal distribution of any remainder. Thus, the smallest sizes would be filled first: 200 shares for Trader D, and 300 shares for Trader C, and the remaining 1,100 shares would be divided equally, with 550 shares distributed each to Trader A and Trader B. Trader B would not receive 1,000 shares (its generally known size) because such size would be more than an equal share of the remaining 1,100 shares.

Fourth example. An off-floor order to sell 20,000 shares is submitted for execution at the disseminated bid. Pursuant to the firm quote rule, the specialist and registered traders, as the responsible broker or dealers, would be obligated to execute order(s) at the disseminated bid up to their disseminated size. The specialist and traders would be able to execute the first 10,000 shares at the disseminated bid and execute the remaining shares at a lower bid or bids. If, however, the specialist and registered traders have determined, either individually or collectively (pursuant to Rule 958(h)(ii)), to execute the entire order at their disseminated bid, the executed shares would be allocated as follows: (i) The specialist would receive 6,500 executed shares representing his portion of the aggregate quotation size, plus 40% of the remaining 10,000 executed shares pursuant to the participation rates set forth above for a total of 10,500 executed shares; and (ii) the remaining 60% (9,500 shares) would be divided among the registered traders proportionally based upon their generally known sizes, the aggregate of which, in this example would be 3,500 shares: Trader A would receive an allocation of approximately 5,420 shares (2,000/3,500=57% of the 9,500); Trader B would receive an allocation of approximately 2,750 shares (1,000/3,500=29% of the 9,500 shares); Trader C would receive an allocation of approximately 810 shares (300/3,500=8.5% of the 9,500 shares); and Trader D would receive an allocation of approximately 520 shares (200/3,500=5.5% of the 9,500 shares).

In addition, the proposed rule text sets forth a chart that illustrates how different numbers of executed shares would be allocated to registered traders after the specialist has allocated portions to the customer and to the specialist. In each example, the chart assumes the aggregate stated size is 1,000 shares:

Number of Executed Shares To Be Allocated				
Each participant's stated size	2,000	900	700	500
500	1,000	400	250	168
300	600	300	250	167
200	400	200	200	165

The first column illustrates the situation when the number of executed shares exceeds the registered traders' aggregate stated size, and each registered trader has determined either individually or collectively to participate for a larger size. The rest of the columns illustrate situations when the number of executed shares is less than the registered traders aggregate stated size: The second column illustrates the situation when two of the three registered traders' smaller sizes would be filled first and the third registered trader would be allocated the remainder; the third column illustrates the situation when only one registered trader's smallest size would be filled and the remaining executed shares would be allocated equally between the two remaining registered traders; and the fourth column illustrates the situation when all executed shares would be allocated equally among the participating registered traders.

In addition, a question has arisen with respect to other products in which the Exchange has codified its rules regarding the allocation of executed orders [12] of whether a specialist or registered options trader can decline an allocation of executed contracts. As noted above, the firm quote rule requires specialists and registered traders to be "firm" up to their disseminated size unless one of the exceptions set forth in the rule applies. If a specialist or registered trader declines an allocation or "backs away" from his disseminated size in whole or in part, he would be in violation of the firm quote rule, investigated, and sanctioned accordingly. If the other participants to the disseminated quote size determine to increase the size of their participation to cover for the declining specialist or registered trader, the executed shares would be allocated based upon the principles discussed above. That is, the specialist's participation would be based upon one less registered trader participating, and the allocation among registered traders would be increased proportionately. Moreover, if the size of the incoming order is greater than the disseminated size and one or more registered traders are not willing to participate in a size larger than their disseminated size, then the additional executed shares would be allocated to the remaining participants based upon their participation rights as set forth in proposed Rules 1000, Commentary .08 and 1000A, Commentary .09.

Finally, with respect to automatic execution for ETFs, the Exchange proposes to amend Rule 128A to replace the schedule set forth in the rule, which shows the percentage of the approximate number of trades allocated to the specialist and registered traders signed on to Auto-Ex in a given ETF, with a reference to the Committee's determination of the appropriate percentages to be used in allocating Auto-Ex executed ETF shares.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act [13] in general, and furthers the objectives of section 6(b)(5) of the Act [14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[12] *See* Securities Exchange Act Release No. 47729 (April 24, 2003), 68 FR 23344 (May 1, 2003) (codifying the allocation of option contracts and trades).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2002–35. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2002–35 and should be submitted by February 10, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1082 Filed 1–16–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49049; File No. SR–Amex–2003–103]

Self-Regulatory Organizations; American Stock Exchange, LLC; Order Granting Accelerated Approval to Proposed Rule Change Relating to Issuer Fees

January 9, 2004.

On November 25, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1034 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend sections 140, 141, 142, and 144 of the Amex *Company Guide* to designate as non-refundable the current one-time $5,000 application processing fee, establish a late change of $2,500 payable by issuers whose annual listing fees are more than 60 days past due, and increase fees for listing additional shares. The Exchange further proposed to amend Sections 141 and 142 of the Amex *Company Guide* to clarify that annual listing fees and additional listing fees do not apply to Nasdaq National Market securities to which the Exchange has extended unlisted trading privileges.

The proposed rule change was published for comment in the **Federal Register** on December 11, 2003.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirement of Section 6(b)(4) of the Act that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charged among its members and issuers and other persons using its facilities.[4]

Furthermore, the Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register.** Specifically, the Commission notes the Exchange has represented that these fee changes are necessary to adequately fund the Exchange's listed equities business and develop value-added services for Amex listed issuers.[5] The Exchange also represents that it has experienced a surge in listing applications and needs to implement the fee changes in an expeditious manner in order to provide appropriate funding for its application review process.[6] Accordingly, the Commission finds good cause, consistent with sections 6(b)(4) and 19(b)(2) of the Act,[7] to approve the proposed rule change on an accelerated basis.[8]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–Amex–2003–103) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1118 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49067; File No. SR–BSE–2003–19]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendments No. 1 and 2 Thereto by the Boston Stock Exchange, Inc. Relating to the LLC Operating Agreement of the Proposed New Exchange Facility To Be Operated by the Boston Options Exchange Group LLC

January 13, 2004.

On October 16, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposal to establish, through an operating agreement among its owners, a Delaware limited liability company known as the Boston Options Exchange Group LLC ("BOX LLC"). BOX LLC would operate a new options trading facility of the Exchange. On October 23, 2003, the Commission published the proposal in the **Federal Register**.[3] The Commission received one comment on the proposal.[4] On November 14, 2003, BSE submitted Amendment No. 1 to the proposal.[5] On January 9, 2004, BSE submitted Amendment No. 2 to the proposal.[6] This order approves the proposed rule change, issues notice of and solicits comment on Amendments No. 1 and 2, and approves Amendments No. 1 and 2 on an accelerated basis.

I. Description of the Proposal

A. Corporate Organization of BOX LLC

Through a series of related filings, BSE is proposing to establish a new options trading facility[7] to be known as the Boston Options Exchange ("BOX").[8] In this filing, BSE is seeking the Commission's approval of the operating agreement of BOX LLC (the "LLCOA"). Unlike a corporation's charter or bylaws, the LLCOA is a signed contract between the owners of BOX LLC

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48686 (December 5, 2003), 68 FR 69095.

[4] 15 U.S.C. 78f(b)(4).

[5] *See* SR–Amex–2003–103.

[6] Telephone conversation between Eric Van Allen, Assistant General Counsel, Amex, and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission, on January 6, 2004.

[7] 15 U.S.C. 78f(b)(4) and 78s(b)(2).

[8] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48650 (October 17, 2003), 68 FR 60731 ("Notice").

[4] *See infra* Section II.

[5] *See* letter from George W. Mann, Jr., General Counsel, BSE, to Nancy Sanow, Division of Market Regulation ("Division"), Commission, dated November 13, 2003 ("Amendment No. 1"). In Amendment No. 1, BSE proposes a technical change to substitute the term "BSE" for the phrase "Regulatory Services Provider and its Affiliates."

[6] *See* letter from George W. Mann, Jr., General Counsel, BSE, to Nancy Sanow, Division, Commission, dated January 9, 2004 ("Amendment No. 2"). In Amendment No. 2, BSE proposes to clarify the restrictions on the Transfer of BOX LLC units and to clarify the Commission's jurisdiction over the owners of BOX LLC.

[7] *See* Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2).

[8] Today the Commission is approving three other BSE proposals that together establish the BOX facility. *See* Securities Exchange Act Release Nos. 49066 (January 13, 2004) (SR–BSE–2003–17) (establishing fee schedule for proposed BOX facility); 49065 (January 13, 2004) (SR–BSE–2003–04) creating Boston Options Exchange Regulation LLC to which BSE would delegate its self-regulatory functions with respect to BOX facility); and 49068 (January 13, 2004) (SR–BSE–2002–15) (approving trading rules for BOX facility) ("BOX Rules"). In addition, the Commission previously approved BSE rules providing for the allocation of market maker appointments in the BOX facility. *See* Securities Exchange Act Release No. 48644 (October 16, 2003), 68 FR 60423 (October 22, 2003) (SR–BSE–2003–13).

("unitholders").[9] BSE has asserted that certain provisions of the LLCOA do not constitute "rules of an exchange" within the meaning of Section 3(a)(27) of the Act[10] and Rule 19b–4. Accordingly, BSE did not file, and the Commission is not addressing, these provisions.

B. Current Ownership and Control of BOX LLC

Currently, there are three unitholders who have a direct controlling interest in BOX ("direct controlling parties"): Bourse de Montréal Inc. ("Bourse") (31.27%), the largest derivatives exchange in Canada; BSE (26.89%); and Interactive Brokers Group LLC ("IBG") (22.41%), a registered broker-dealer that intends to apply to be an Option Participant in the BOX facility.[11] None of the remaining unitholders holds more than a 5% interest in BOX LLC. There is one person that has an indirect controlling interest in BOX LLC (*i.e.*, is an "indirect controlling party"): Mr. Thomas Peterffy, who holds a controlling interest in IBG, which has a direct controlling interest in BOX LLC. No person or entity has a controlling interest in either BSE or Bourse.

C. Changes in Ownership of BOX LLC

Section 8.1(a) of the LLCOA defines a Transfer broadly to be any disposition of, sale, assignment, exchange, participation, subparticipation, encumbrance, or other transfer of units, and provides that, except in certain limited circumstances, no Person may directly or indirectly Transfer any BOX LLC units, or any rights arising thereunder, without the prior approval of the board of directors of BOX LLC.[12] To be eligible for such approval, the proposed transferee must be: (1) Of high professional and financial standing; (2) able to carry out its duties as a unitholder under the LLCOA; and (3) under no regulatory or governmental disqualification. Section 8.1(b) provides, in addition, that a Person shall be admitted to BOX only if such Person, among other things, accepts in writing the terms and provisions of the LLCOA and the BOX Board accepts it by resolution. Section 8.4(a) provides that no Transfer of BOX LLC units shall take place if such transaction is prohibited by the LLCOA or any state, federal, or provincial securities law. Section 8.4(d) provides that any Transfer of BOX LLC units that contravenes Article 8 of the LLCOA shall be void and ineffectual and shall not bind or be recognized by BOX LLC.

Section 8.4(e) of the LLCOA provides that, beginning after Commission approval of this proposed rule change, BOX LLC must provide the Commission with written notice ten days prior to the closing date of any acquisition that results in a unitholder's percentage ownership interest in BOX LLC, alone or together with any affiliate,[13] meeting or crossing either the 5%, 10%, or 15% thresholds. Section 8.4(f) provides that any Transfer of BOX LLC units that results in the acquisition and holding by any unitholder, alone or together with any affiliate, of an interest that meets or crosses the 20% threshold or any successive 5% threshold (*i.e.*, 25%, 30%, *etc.*), would trigger an amendment to the LLCOA that would constitute a proposed rule change that BSE would have to file with the Commission under Section 19(b) of the Act.[14] In addition, Section 8.4(f) provides that an amendment to the LLCOA resulting from a Transfer of BOX LLC units that reduces BSE's ownership in BOX LLC to below the 20% threshold would constitute a proposed rule change under Section 19(b) of the Act.

Section 8.4(g) of the LLCOA provides for indirect changes in control of BOX LLC. Any person that acquires a controlling interest (*i.e.*, an interest of 25% or greater) in a unitholder that holds 20% or more of the BOX LLC units would be required to agree to become a party to the LLCOA and abide by its terms.[15] The amendment to the LLCOA caused by the addition of the indirect controlling party would trigger a proposed rule change that BSE would have to file with the Commission pursuant to Section 19(b) of the Act. The rights and privileges of the direct controlling party would be suspended until this proposed rule change becomes effective under the Act or until the indirect controlling party ceases to have a controlling interest in the direct controlling party.

In addition to the requirements for proposed rule changes relating to direct and indirect changes in control of BOX LLC, Section 4.3(b) of the LLCOA prohibits unitholders from entering into voting trust agreements with respect to their ownership interests in BOX LLC.

D. Commission Jurisdiction Over Owners of BOX LLC

In Section 19.6(a), each unitholder of BOX LLC acknowledges that, to the extent that they are related to BOX activities, the books, records, premises, officers, directors, agents, and employees of the unitholder shall be deemed to be the books, records, premises, officers, directors, agents, and employees of BSE for the purpose of and subject to oversight pursuant to the Act. In Section 19.6(b), each unitholder and the officers, directors, agents, and employees thereof irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, the Commission, and BSE[16] for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of or relating to BOX activities or Section 19.6(a). Also as provided in Section 19.6(b) of the LLCOA, each unitholder and the officers, directors, agents, and employees thereof waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claim that they are not personally subject to the jurisdiction of the

[9] While ownership interests in a corporation are generally referred to as "shares" or "stock," ownership interests in an LLC are referred to as "units." Therefore, the owners of BOX LLC are referred to as "unitholders."

[10] 15 U.S.C. 78c(a)(27).

[11] An Options Participant is a firm or organization that is registered with the Exchange to participate in options trading on BOX as an order flow provider and/or as a market maker. *See* BOX Rules, Chapter I, Section 1(a)(40).

[12] In Amendment No. 2, the BSE filed changes to Article 8 to enhance BOX's ability to prevent Transfers of BOX LLC units in contravention of the LLCOA. *See* Amendment No. 2, *supra* note .

[13] The term "affiliate" is defined in Section 1.1 of the LLCOA and means, with respect to any person, any other person controlling, controlled by, or under common control with, such person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise with respect to such person. A person is presumed to control any other person, if that person: (1) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25% or more of a class of voting security, or has the power to sell or direct the sale of 25% or more of a class of voting securities of the person; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25% or more of the capital of the partnership.

[14] For example, assume that a unitholder owns a 28% interest in BOX LLC and buys units constituting an additional 3%. Because the unitholder would cross the 30% ownership threshold, the acquisition would trigger an amendment to the LLCOA that BSE would have to submit as a proposed rule change. However, an acquisition of an additional 3% that would raise the unitholder's interest from 31% to 34% would not trigger a proposed rule change.

[15] For example, assume Company XYZ owns a 25% interest in BOX LLC and Firm ABC acquires 35% of Company XYZ. Firm ABC must execute an amendment to the LLCOA whereby Firm ABC agrees to become a new party to the agreement and abide by all of its provisions. Furthermore, a person could become subject to Section 8.4(g) of the LLCOA if it acquires an indirect controlling interest in a direct controlling party of BOX LLC.

[16] Such jurisdiction includes Delaware for matters relating to the organization or internal affairs of BOX LLC, provided that such matter is not related to trading on, or the regulation of, the BOX Market. *See* Section 19.6(b) of the LLCOA; *see also* Amendment No. 2, *supra* note.

Commission; that the suit, action or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter of the suit, action, or proceeding may not be enforced in or by such courts or agency.

Section 19.6(c) of the LLCOA provides that the BSE and each unitholder shall take such action as is necessary to ensure that such unitholder's officers, directors, and employees consent to the application of Section 19.6 with respect to their BOX-related activities.[17] Finally, Section 19.6(c) further provides that the Bourse and the BSE shall take such action as is necessary to ensure that, with respect to their BOX-related activities, the Bourse's officer, directors, and employees consent to the communication of their "personal information" by the Bourse to the Commission and the BSE and agree to waive the protection of such "personal information" that is provided by the Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q.c.P–39.1 ("Private Sector Privacy Act").[18]

E. Governance of BOX LLC

Section 4.2(b) of the LLCOA gives the board of directors of BOX LLC the power and responsibility to manage the business of BOX LLC, select and evaluate the performance of the Senior Executive, and establish and monitor capital and operating budgets. Section 4.1(a) provides that the board of BOX LLC will consist of between six and 13 directors. Section 4.1(b) provides that, initially, Bourse, BSE, and IBG will be entitled to designate two directors each. Moreover, for as long as BOX remains a facility of the Exchange, BSE has the right to designate at least one director. Section 4.1(c) provides that any new unitholder that acquires a prescribed percentage interest in BOX LLC also would be entitled to designate one director. Section 4.8 provides that, except as otherwise expressly provided in the LLCOA or as requested by the board, no unitholder shall take part in the day-to-day management or operation of the business or affairs of BOX LLC.

Pursuant to Section 4.1(d) of the LLCOA, a director shall be terminated by the board: (i) In the event such director has violated any provision of the LLCOA; or (ii) if the board determines that such action is necessary or appropriate in the public interest or for the protection of investors. In addition, Section 4.2(a) requires each director to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the Commission and BSE pursuant to their regulatory authority. Section 4.2(a) also requires each director to take into consideration whether his or her actions as a director would cause BOX LLC to engage in conduct that fosters and does not interfere with its ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest.

F. Regulation of BOX

BSE will operate BOX as a facility of the Exchange. Accordingly, BSE has responsibility under the Act for the BOX facility. In this regard, Sections 12.1 and 15 of the LLCOA each provide that the books, records, premises, officers, directors, agents, and employees of BOX shall be deemed to be the books, records, premises, officers, directors, agents, and employees of BSE for the purpose of and subject to oversight pursuant to the Act. Moreover, under Section 5.3 of the LLCOA, each unitholder agrees to comply with the federal securities laws and the rules and regulations thereunder; to cooperate with the Commission and BSE pursuant to their regulatory authority and the provisions of the LLCOA; and to engage in conduct that fosters and does not interfere with BOX LLC's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest.

Section 5.9 of the LLCOA further provides that, after appropriate notice and opportunity for hearing, the board, by a two-thirds vote, including the affirmative vote of BSE and excluding the vote of the unitholder subject to sanction, may suspend or terminate a unitholder's voting privileges or ownership: (i) In the event such unitholder is subject to a statutory disqualification, as defined in Section 3(a)(39) of the Act; (ii) in the event such unitholder has violated any provision of the LLCOA or any federal or state securities law; or (iii) if the board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

In addition, Section 4.4(a) of the LLCOA provides that BOX LLC may not take any major action unless such action is approved by a majority of the board, including the affirmative vote of all of the directors designated by BSE. A "major action" is defined in Section 4.4(b) to include, among other things, a merger or consolidation involving BOX LLC, a sale of any material portion of its assets, the dissolution or winding-up of BOX LLC, entry by BOX into any line of business other than that set forth in the LLCOA, entering into any agreement, commitment, or transaction with an affiliate of a unitholder that is not on commercially reasonable terms, and the purchase of any units of BOX LLC.

Section 16.2(a) of the LLCOA generally provides that a unitholder may not disclose any confidential information of BOX LLC to any person, except as expressly provided by the LLCOA. However, Section 16.2(b) provides exceptions for, among other things, disclosure required by the federal securities laws or in response to a request by the Commission pursuant to the Act or by the BSE. Similarly, Section 16.5 of the LLCOA provides that nothing in the LLCOA should be interpreted as to limit or impede the rights of the Commission, BSE, or BOXR to access or examine BOX Confidential Information, or to limit or impede the ability of unitholders, or their officers, directors, agents, or employees, to disclose BOX Confidential Information to the Commission, BSE, or BOXR.[19]

G. Ownership Restrictions on BOX Unitholders Who Are Also Options Participants

Section 8.4(h) of the LLCOA imposes a "voting collar" on any unitholder who, alone or together with an affiliate, has an interest in BOX LLC in excess of 20% and is also an Options Participant in the BOX market. The interests owned by such a unitholder in excess of 20% are deemed "excess units." No unitholder who is also an Options Participant is permitted to vote or give proxy rights to vote with respect to any excess units. However, Section 8.4(h) further provides that the excess units would be considered for quorum purposes of any meeting of the board, and the person presiding over quorum and vote matters would vote the excess

[17] *See* Amendment No. 2, *supra* note.

[18] *Id.*

[19] *See* Amendment No. 2, *supra* note .

units in the same proportion that the units held by the other unitholders are voted.

BSE is proposing a temporary exemption until January 1, 2014 from the voting collar provisions of Section 8.4(h) for IBG, a unitholder that is also an Options Participant. Under the second paragraph of Section 8.4(h), IBG is permitted to vote its excess units, but only with respect to any vote regarding a merger, consolidation, or dissolution of BOX LLC or any sale of all or substantially all of the assets of BOX LLC.

II. Comment Received

The Commission received one comment letter on the proposal, from the Chicago Board Options Exchange ("CBOE").[20] CBOE's principal concern is that BSE and its partners propose to create a new securities exchange to act as a market for the trading of standardized securities options without registering the new exchange as a national securities exchange. Moreover, CBOE questions whether "a web of undertakings and provisions embodied in various complex and apparently overlapping agreements (not all of which have been filed with the Commission) will be sufficient to assure the adequacy of regulation and of the Commission's jurisdiction over BOX and its owners," and questions "how the independence of BOX's governance will be assured" and "the conflicts between its for-profit structure and its regulatory obligations will be resolved."

In addition, CBOE criticizes the manner in which BSE presented the LLCOA to the Commission for its review under Section 19(b) of the Act, arguing that BSE should have filed the LLCOA in its entirety, rather than in redacted form. In support of that view, CBOE likens an LLCOA to the articles of incorporation of a corporation and claims that, if an entity organized as a corporation applied for registration as a national securities exchange, it would be required to provide its articles in their entirety. CBOE argues, in addition, that "the filing does not present a comprehensive description of who are the owners of BOX," noting that only the three controlling unitholders that collectively have an ownership interest of 80.67% were listed. CBOE notes that its concerns about the ownership and control of BOX LLC were "heightened by the fact that BOX's largest single owner is a non-U.S. person." CBOE also objects to redactions to the LLCOA regarding the "major actions" over which BSE had veto power, arguing that a proper analysis of BOX's governance and regulation could not be performed without the redacted information. CBOE concludes that "the idea that an applicant can pick and choose which provisions of the [LLCOA] of an exchange to submit for review is wholly inconsistent with the statutory scheme of exchange regulation provided for in the Exchange Act."

III. Discussion

After careful consideration of the proposal and the comment letter submitted by CBOE, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[21] In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,[22] which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade; to facilitate transactions in securities; to remove impediments to and perfect the mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.

A. BOX as a Facility of the Exchange

The Commission believes that the proposed rule change is consistent with Section 6(b)(1) of the Act[24] in that, upon establishing the BOX facility, BSE will remain so organized, and have the capacity to be able, to carry out the purposes of Act. Moreover, the Commission believes that the BSE's proposal to operate BOX as its facility is properly filed under Section 19(b) of the Act and Rule 19b–4 thereunder, and that BOX is not required, separate from BSE, to apply for registration as a national securities exchange pursuant to Section 6(a) of the Act.[25]

BOX LLC is the limited liability company established under Delaware law that will operate the BSE's proposed options trading facility.[26] The BSE is a registered exchange and, therefore, an SRO with obligations to comply with the Act and to enforce compliance by its members and persons associated with its members with the Act, the rules thereunder, and its own rules. As the CBOE points out in its comment letter, the rules of an exchange, as defined in Section 3(a)(27) of the Act, include the constitution, articles of incorporation, bylaws, and rules. Thus, any changes to these BSE instruments would have to be filed pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder. The LLCOA, however, is the organizational document of the BOX LLC, not the BSE.

Nevertheless, certain provisions in the LLCOA may be rules of an exchange if they are the stated policies, practices, and interpretations, as defined in Rule 19b–4 of the Act, of the BSE. Any proposed rule or any proposed change in, addition to, or deletion from any such rules of an exchange must be filed pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder. In its comment letter, the CBOE contends that the BSE should have filed the entire LLCOA. The Commission, however, does not believe that Section 19(b) of the Act and Rule 19b–4 thereunder requires that all provisions of a document must be filed solely because some provisions of that document are rules of the exchange.[27]

BSE has filed the proposed rule change to establish BOX LLC as the operator of one of its facilities, despite the fact that BSE does not hold the largest ownership interest in BOX LLC. As a preliminary matter, the Commission does not believe that the ownership structure of BOX LLC precludes approval of this proposal. The Act does not require that an SRO have any ownership interest in the operator of one of its facilities.

In a similar prior case involving the establishment of ArcaEx as a facility of the Pacific Exchange ("PCX"), the Commission determined that a national securities exchange need not have a significant ownership interest in the operator of one of its facilities.[28] This

[20] *See* letter from William J. Brodsky, Chairman and Chief Executive Officer, CBOE, to Jonathan G. Katz, Secretary, Commission, dated November 20, 2003.

[21] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78f(b)(1).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(b)(1).

[25] 15 U.S.C. 78f(a).

[26] The Commission notes that the BOX facility includes the server, its hardware and software, wherever located.

[27] The CBOE also states that it assumed that the BSE would only file changes to those provisions of the operating agreement included in this filing. In this regard, the Commission clarifies that whether or not a proposed rule change must be filed under Section 19(b) of the Act is not determined solely on the basis of whether the original rule was filed.

[28] *See* Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225, 55229–30 (November 1, 2001) (approving SR–PCX–00–25) ("PCX/Arca Approval Order"). ArcaEx is operated by Archipelago Exchange LLC ("Arca LLC"). At the time of this approval, PCX's ownership interest in Arca LLC consisted solely of a 10% interest in

determination was predicated on the extent to which PCX, as the SRO, regulates and oversees ArcaEx, notwithstanding its limited ownership interest in the operator of the facility. As the Commission stated in the PCX/ArcaEx Approval Order: "the PCX will be fully responsible for all activity that takes place through ArcaEx, including its regulation and oversight, because ArcaEx is a part of the Exchange."[29] Similarly, the Commission believes that BOX LLC can be approved as the operator of the BOX facility on the same basis that it approved Arca LLC as the operator of the ArcaEx facility. BSE will be the SRO for the BOX facility, and BOX LLC will conduct the facility's business operations in a manner consistent with the regulatory and oversight responsibilities of BSE.[30]

Although BOX LLC itself will not carry out any regulatory functions, all of its activities must be consistent with the Act. Under Section 5.3 of the LLCOA, each unitholder of BOX LLC agrees to comply with federal securities law; to cooperate with the Commission and BSE pursuant to their regulatory authority and the provisions of the LLCOA; and to engage in conduct that fosters and does not interfere with BOX LLC's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest. Section 4.2(a) of the LLCOA imposes similar obligations on each director of BOX LLC. Section 4.2(a) also requires each director to cooperate with the Commission and BSE in carrying out their regulatory responsibilities. These provisions reinforce the notion that BOX, as a facility of an exchange, is not solely a commercial enterprise; it is an integral part of an SRO registered pursuant to the Act and, as such, is subject to obligations imposed by the Act.

These obligations endure so long as BOX is a facility of the Exchange, regardless of the size of BSE's ownership interest in BOX LLC, the operator of that facility. The BSE currently owns a controlling interest in the operator of the facility and if, in the future, it wishes to reduce its interest in BOX LLC to below 20%, the amendments to the LLCOA to effect such a Transfer of units would, pursuant to Section 8.4(f)(ii) of the LLCOA, have to be filed as a proposed rule change under Section 19(b) of the Act. The Commission believes that this is a reasonable measure to alert the Commission to a significant reduction of BSE's interest in BOX LLC. Such a reduction could warrant additional review of the LLCOA to ensure that BSE's responsibilities as the SRO of the BOX facility are not compromised.

The LLCOA includes additional provisions that make special accommodations for BSE as the SRO of the BOX facility. For example, Section 4.4(a) of the LLCOA provides that BOX LLC may not take any major action unless such action is approved by a majority of the BOX LLC board, including the affirmative vote of all of the directors designated by BSE.[31] Section 4.1(b) of the LLCOA provides that, with its present ownership interest, BSE is entitled to two seats on the board. Section 4.1(b) also gives BSE a perpetual right to designate at least one director on the BOX LLC board regardless of whether it maintains any ownership interest. In addition, Section 5.2 of the LLCOA allows BSE to act on behalf of BOX LLC in regulatory matters, despite a general prohibition against unitholders committing or acting on behalf of BOX LLC.[32] Finally, as provided in Amendment No. 2, Sections 16.2(b) and 16.5 of the LLCOA allows BSE, and the other unitholders, their officers, directors, agents, and employees, to disclose to the Commission Confidential Information of BOX.[33]

Because the BSE has proposed to operate BOX as its facility, the BSE's obligations under the Act extend to its members' activities on BOX, as well as to the operation and administration of BOX. The Commission believes that Section 19 of the Act affords the Commission the ability to determine whether the BSE's proposal is consistent with the Act, as would a separate application by BOX to register as a securities exchange.[34] More specifically, the Commission believes that these provisions described above are consistent with the Act and enhance the ability of BSE to carry out its self-regulatory responsibilities with respect to its BOX facility.

B. Changes in Control of BOX LLC

The Commission believes that the restrictions in the LLCOA on direct and indirect changes in control of BOX LLC are sufficient so that BSE is able to carry out its self-regulatory responsibilities and that the Commission can fulfill its responsibilities under the Act. Schedule D of the LLCOA lists all unitholders of BOX LLC, the number of units each holds, and the percentage of ownership in BOX LLC that such units represent. A change to this schedule (as well as to any other provision of the LLCOA) would have to be filed with the Commission if so required under Section 19(b) of the Act and Rule 19b–4 thereunder. In addition, Section 8.4(f) of the LLCOA provides that BSE must file with the Commission as a proposed rule change any amendment to the LLCOA resulting from a proposed acquisition of BOX LLC units that would cause the acquirer to meet or cross the 20% ownership threshold or any subsequent 5% ownership threshold (*e.g.*, 25%, 30%, 35%, *etc.*).

Furthermore, Section 8.4(e) of the LLCOA requires BSE to inform the Commission in writing at least ten days before any proposed acquisition of BOX LLC units that would result in the acquirer meeting or crossing the 5%, 10%, or 15% ownership thresholds. The Commission believes that this approach is consistent with the Act in that it is analogous to the ongoing reporting

Archipelago Holdings LLC, the parent company of Arca LLC. *See* 66 FR at 55225.

[29] *Id.* at 66 FR at 55229 (citation omitted). PCX established a new subsidiary, PCX Equities Inc. ("PCXE"), to which it delegated its authority as an SRO to surveil and regulate the PCX's trading functions. In its approval order, the Commission noted that PCX retained ultimate responsibility for the operation, administration, rules, and regulation of PCXE. The Commission added that PCX must review rulemaking and disciplinary decisions of PCXE and direct PCXE to take action that may be necessary to effectuate the purposes and functions of the Act. *See id.*

[30] BSE—through a newly established wholly owned subsidiary, Boston Options Exchange Regulation LLC ("BOXR") "will assume all regulatory responsibilities under the Act for the BOX facility. *See* SR–BSE–2003–04, *supra* note.

[31] CBOE objects to the fact that BSE redacted from the published version of the LLCOA certain of the major actions over which the controlling unitholders and BSE (regardless of whether it remains a controlling unitholder) will have veto power. BSE is not required to file these portions of Section 4.4(b) under Section 19(b) of the Act and Rule 19b-4 thereunder if they do not constitute a material aspect of the operation of the BOX facility, or are otherwise rules of, or stated policies, practices or interpretations, of the exchange. See Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27). *See also* 17 CFR 240.19b–4(b).

[32] In the event that BSE ceases to be a unitholder of BOX LLC at some future date, the Commission would have to consider whether this provision should be amended so that BSE could continue to carry out its regulatory responsibilities with respect to BOX.

[33] *See* Amendment No. 2, *supra* note.

[34] This is consistent with the Commission's approval of ArcaEx as the equities trading facility of PCX pursuant to a rule filing submitted by the PCX under Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), and Rule 19b–4 hereunder, 17 CFR 240.19b–4. See PCX/Arca Approval Order, *supra* note.

requirements of Form 1,[35] the application for (and amendments to the application for) registration as a national securities exchange. Exhibit K of Form 1 requires any exchange that is a corporation or partnership to list any persons that have an ownership interest of 5% or more in the exchange;[36] and Rule 6a–2(a)(2) under the Act[37] requires an exchange to update its Form 1 within ten days after any action that renders inaccurate the information previously filed in Exhibit K.

Exhibit K imposes no obligation on an exchange to report parties whose ownership interest in the exchange is less than 5%. Similarly, Section 8.4(e) of the LLCOA requires BSE to notify the Commission of an interest in BOX LLC only when that interest reaches 5% or more. The Commission does not believe that the identity of a party that has less than a 5% interest in a facility of a national securities exchange is a "rule of the exchange" that must be filed pursuant to Section 19(b) and Rule 19b–4(b) thereunder. In this regard, the Commission does not agree with CBOE's comment that the filing "does not present a comprehensive description of who are the owners of BOX."

In addition, Section 8.4(g) of the LLCOA would require an indirect controlling party to join the LLCOA. This amendment to the agreement would trigger a proposed rule change that BSE must file with the Commission pursuant to Section 19(b) of the Act. The proposed rule change would alert the Commission to the existence of a proposed indirect controlling party and present the Commission and BSE with an opportunity to determine what additional measures, if any, might be necessary to provide sufficient regulatory jurisdiction over the proposed indirect controlling party.[38] The Commission understands that Section 8.4(g) of the LLCOA would apply to any ultimate parent of BOX LLC, no matter how many levels of ownership are involved, provided that a controlling interest exists between each link of the ownership chain.

In conclusion, the Commission believes that Sections 8.4(e), (f), and (g) of the LLCOA, together with the requirements of Section 19(b) of the Act and Rule 19b–4 thereunder, provide the Commission with sufficient authority over changes in control of BOX LLC to enable the Commission to carry out its regulatory oversight responsibilities with respect to BSE and the BOX facility.

C. Regulatory Jurisdiction Over Owners of BOX LLC

The Commission believes that the terms of the LLCOA provide the Commission and BSE with sufficient regulatory jurisdiction over the controlling parties and other unitholders of BOX LLC to carry out their responsibilities under the Act. In Section 19.6(a), each unitholder of BOX LLC acknowledges that—to the extent that they are related to BOX activities—the books, records, premises, officers, directors, agents, and employees of the unitholder are deemed to be the books, records, premises, officers, directors, agents, and employees of BSE itself for the purpose of and subject to oversight pursuant to the Act. Moreover, in Sections 12.1 and 15 of the LLOCA, all of the BOX LLC unitholders acknowledge that the books, records, premises, officers, directors, agents, and employees of BOX are deemed to be the books, records, premises, officers, directors, agents, and employees of BSE for the purpose of and subject to oversight pursuant to the Act. These provisions would enable the Commission to exercise its authority under Section 19(h)(4) of the Act[39] with respect to the officers and directors of BOX LLC and of all unitholders of BOX LLC, since all such officers and directors—to the extent that they are acting in matters related to BOX activities—would be deemed to be the officers and directors of BSE itself. Furthermore, the records of any unitholder—to the extent that they are related to BOX activities—are subject to the Commission's examination authority under Section 17(b)(1) of the Act,[40] as these records would be deemed to be the records of BSE itself.

In addition, in Section 19.6(b) of the LLCOA, each unitholder—and each officer, director, agent, and employee thereof—irrevocably submits to the exclusive jurisdiction of the U.S. federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of or relating to BOX activities. In addition, each unitholder—and each officer, director, agent, and employee thereof—waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claim that it is not personally subject to the jurisdiction of the Commission; that the suit, action or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter of the suit, action, or proceeding may not be enforced in or by such courts or agency. Moreover, pursuant to Section 19.6(c) of the LLCOA, the BSE and each unitholder are required to take such action as is necessary to ensure that such unitholder's officers, directors, and employees consent to the application of these requirements with respect to their BOX-related activities. Section 19.6(c) further requires the Bourse and the BSE to take such action as is necessary to ensure that the Bourse's officers, directors, and employees consent to the communication of their personal information to the Commission and the BSE and agree to waive the protection of such personal information that is provided by the Private Sector Privacy

[35] 17 CFR 249.1 and 17 CFR 249.1a.

[36] This reporting requirement applies only to exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange. *See* Form 1, Exhibit K. Exhibit K applies only to the exchange itself, not to entities that operate facilities of the exchange.

[37] 17 CFR 240.6a–2(a)(2).

[38] BOX LLC currently has an indirect controlling party, Mr. Thomas Peterffy, who holds a controlling interest in IBG. Under Section 19.6(a) of the LLCOA, IBG acknowledges that, to the extent that they are related to BOX activities, the officers and directors of IBG are deemed to be the officers and directors of BSE for the purpose of and subject to oversight pursuant to the Act. Because Mr. Peterffy is an officer and director of IBG, he is deemed, with respect to IBG's BOX activities, to be an officer and director of BSE itself, thereby subjecting him to Commission authority under Section 19(h)(4) of the Act, 15 U.S.C. 78s(h)(4). Furthermore, under Section 19.6(b) of the LLCOA, IBG and its officers and directors (including Mr. Peterffy) irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws arising out of or relating to their BOX activities. In addition, as a registered broker-dealer, IBG is subject to Commission authority pursuant to Section 15(b)(4) of the Act, 15 U.S.C. 78o(b)(4). Also, a "person associated with a broker or dealer" is defined in Section 3(a)(18) of the Act, 15 U.S.C. 78c(a)(18), to include in part an officer or director of a broker or dealer, as well as any person directly or indirectly controlling such broker or dealer. Under Section 15(b)(6) of the Act, 15 U.S.C. 78o(b)(6), the Commission has the authority to censure a person associated with a broker or dealer, place limitations on such person's activities or functions, suspend such person for a period not exceeding twelve months or bar such person from being associated with a broker or dealer. Mr. Peterffy, as an officer and director of, and the holder of a controlling interest in, IBG, falls within the definition of "person associated with a broker or dealer" and therefore is subject to the Commission's authority under Section 15(b)(6) of the Act.

[39] 15 U.S.C. 78s(h)(4). Section 19(h)(4) authorizes the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (1) Willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange.

[40] 15 U.S.C. 78q(b)(1).

Act. Finally, under Section 5.3 of the LLCOA each unitholder of BOX LLC agrees to cooperate with the Commission and BSE pursuant to their regulatory authority.

The Commission also notes that, even in the absence of these provisions of the LLCOA, Section 20(a) of the Act[41] provides that any person with a controlling interest in BOX LLC would be jointly and severally liable with and to the same extent that BOX LLC is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

The Commission believes that, together, these provisions grant the Commission sufficient jurisdictional authority over the controlling parties and other unitholders of BOX LLC. Moreover, BSE is required to enforce compliance with these provisions because they are "rules of the exchange" within the meaning of Section 3(a)(27) of the Act.[42] A failure on the part of BSE to enforce its rules could result in suspension or revocation of registration under Section 19(h)(1) of the Act.[43]

D. Ownership Restrictions on BOX Option Participants

The Commission believes that the restriction on voting trust agreements in Section 4.3(b) of the LLCOA is reasonable and consistent with the Act. In the absence of such a provision, unaffiliated parties could act in concert and evade the LLCOA's provisions regarding changes in control of BOX LLC.[44] A voting trust agreement would not necessarily be inconsistent with the Act, but any unitholders wishing to establish a voting trust agreement would first have to amend the LLCOA to enable them to do so. Such amendment would trigger a proposed rule change, thus affording the Commission an opportunity to review the matter.

In addition, the Commission believes that the voting collar provision that prevents a unitholder that is also a BOX Options Participant from voting any excess units of BOX LLC (*i.e.*, units in excess of a 20% aggregate interest) is reasonable and consistent with the Act. It is common for members who trade on an exchange to have ownership interests in the exchange. However, a member's interest could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that is also a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently surveilling the member's conduct or from punishing any conduct that violates the rules of the exchange or the federal securities laws. An exchange also might be reluctant to surveil and enforce its rules zealously against a member that the exchange relies on as its largest source of capital.

The Commission believes that a limited temporary exemption for IBG from the voting collar provision is justified and consistent with the Act. The exemption is designed to afford IBG some ability to protect its investment but also to limit the possibility that the Exchange's ability to carry out its self-regulatory responsibilities would be impaired. Under the exemption, IBG would be permitted to vote its excess units, but only with respect to a merger, consolidation, or dissolution of BOX LLC or a sale of all or substantially all of the assets of BOX LLC. This exemption is substantially similar to an exemption granted to founder members of the International Securities Exchange ("ISE").[45]

E. Accelerated Approval

Pursuant to Section 19(b)(2) of the Act,[46] the Commission may not approve any proposed rule change, or amendment thereto, before the thirtieth day after publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for making that finding. The Commission hereby finds good cause for approving Amendments No. 1 and 2, prior to the thirtieth day after publishing notice of these amendments in the **Federal Register**. Amendment No. 1 makes only one technical change to the rule text. Amendment No. 2 merely clarifies the restrictions on the Transfer of BOX LLC units and the Commission's jurisdiction over BOX LLC unitholders. The Commission believes that no purpose would be served by delaying approval of the amended proposal, particularly in light of the fact that only one comment letter was received in response to the original notice. Therefore, the Commission finds that good cause exists to accelerate approval of Amendments No. 1 and 2 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 1 and 2, including whether Amendments No. 1 and 2 are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All submissions should refer to File No. SR–BSE–2003–19. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should be submitted by February 10, 2004.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[47] that the proposed rule change (SR–BSE–2003–19) is approved, and Amendments No. 1 and 2 to the proposed rule change are approved on an accelerated basis.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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[41] 15 U.S.C. 78t(a).

[42] 15 U.S.C. 78c(a)(27).

[43] 15 U.S.C. 78s(h)(1).

[44] However, the LLCOA treats as belonging to a single unitholder any BOX LLC units held by affiliated parties of the unitholder. *See* Sections 8.4(e)–(g) of the LLCOA.

[45] *See* Securities Exchange Act Release Nos. 45803 (April 23, 2002), 67 FR 21306, 21307 (April 30, 2002) (approval of SR–ISE–2002–01) (conversion of ISE from an LLC to a corporation); and 42455 (February 24, 2000), 65 FR 11388, 11391–92 (March 2, 2000) (File No. 10–127) (approval of registration of ISE as a national securities exchange).

[46] 15 U.S.C. 78s(b)(2).

[47] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49065; File No. SR–BSE–2003–04]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 2 and 3 to Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Creation of the Boston Options Exchange Regulation, LLC

January 13, 2004.

I. Introduction

On July 17, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to create a new options regulatory subsidiary, Boston Options Exchange Regulation, LLC ("BOXR"). On July 25, 2003, the Exchange amended the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on August 1, 2003.[4] The Commission received one comment letter.[5] On October 10, 2003, the Exchange filed Amendment No. 2 to the proposed rule change.[6] On November 14, 2003, the Exchange filed Amendment No. 3 to the proposed rule change.[7] This order approves the proposed rule change, as amended. In addition, the Commission is approving on an accelerated basis, and soliciting comments on, Amendment No. 2 and Amendment No. 3.

II. Description of the Proposed Rule Change

The Exchange proposes to create a new, wholly-owned, options regulatory subsidiary, BOXR, and to transfer to it all of the assets and liabilities that solely support the regulation of the standardized equity options trading business of the BSE. Upon this transfer, the BSE would continue to be the self-regulatory organization ("SRO") for BOXR and the Boston Options Exchange ("BOX"), the BSE's proposed new exchange facility for the trading of standardized equity options securities.[8] The BSE's Delegation Proposal would be effected through: (i) The addition of Chapter XXXVI to the BSE Rules of the Board of Governors ("Delegation Plan"); (ii) proposed By-Laws for BOXR; and (iii) amendments to the BSE Constitution.

A. Delegation Plan

The BSE is a founding and controlling member of BOX LLC, and has entered into various agreements with BOX LLC under which BOX LLC would operate BOX as a facility of the BSE.[9] The BSE, through BOXR, would be responsible for all regulatory functions related to the facility, and BOX LLC would be responsible for the business operations of the facility, to the extent those activities are not inconsistent with the regulatory and oversight functions of the BSE and BOXR.

The BSE would delegate specified regulatory authority to BOXR to oversee the BOX market. BOXR would conduct all necessary surveillance of the trading effected through the BOX facility, and enforce compliance by Options Participants with the BOX Rules, applicable BSE Rules, and the federal securities laws and the rules thereunder. BOXR would have regulatory oversight authority over BOX LLC and its officers, directors, agents and employees, each of whom would be required to cooperate with BOXR in the fulfillment of its regulatory obligations.[10]

1. BOXR

BOXR would be operated as a Delaware limited liability company, all of the issued shares of stock of which would be owned by the BSE. Current BSE members would retain their memberships, and thus, their ownership interests in the BSE. BOXR would be governed by the Delegation Plan, the BOXR By-Laws, and applicable BSE Rules.

2. Regulation of BOXR

As discussed above, BOXR would operate as a subsidiary of the BSE, which is a national securities exchange registered under Section 6 of the Act.[11] The BSE, as the SRO, would retain ultimate responsibility for compliance by Options Participants with the federal securities laws, the rules and regulations thereunder, and BOX Rules, as well as the BSE Rules specifically cross-referenced and incorporated by reference into the BOX Rules.[12] Pursuant to the proposed BOX Rules, Options Participants would be granted trading rights for options listed on the Exchange and traded on BOX.[13] Options Participant status would confer neither a right to participate in trading on the BSE (other than options trading on BOX), nor an entitlement to the rights and responsibilities regarding the

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[1] Exchange Act Section 19(b)(1), 15 U.S.C. 78s(b)(1).

[2] Exchange Act Rule 19b–4, 17 CFR 240.19b–4.

[3] *See* letter from John Boese, Vice President, Legal and Compliance, Exchange, to Deborah Flynn, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 25, 2003 ("Amendment No. 1"). Amendment No. 1 replaces the proposed rule change in its entirety.

[4] *See* Securities Exchange Act Release No. 48229 (July 25, 2003), 68 FR 45284 ("Delegation Proposal").

[5] *See* letter from William J. Brodsky, Chairman and Chief Executive Officer, Chicago Board Options Exchange ("CBOE"), to Jonathan Katz, Secretary, Commission, dated August 26, 2003 ("CBOE Letter").

[6] *See* letter from John Boese, Vice President, Legal and Compliance, Exchange, to Nancy Sanow, Assistant Director, Division, Commission, dated October 10, 2003 ("Amendment No. 2"). In Amendment No. 2, the Exchange proposes to revise Section 14(e)(iii)(A) of the proposed BOXR By-Laws to state that the Options Participant representatives presented by the BOXR Nominating Committee for appointment to the BSE Board of Governors and the BOXR Board must be officers or directors of a firm approved as an Options Participant. In addition, the BSE proposes to incorporate into the BSE Constitution and the BOXR By-Laws provisions that would limit the Exchange's use of confidential information relating to the activities of Exchange members and Options Participants and develop policies and procedures to prevent disclosure of such information.

[7] *See* letter from George W. Mann, Executive Vice President and General Counsel, Exchange, to Nancy Sanow, Assistant Director, Division, Commission, dated November 13, 2003 ("Amendment No. 3"). In Amendment No. 3, the Exchange proposes to revise Section 14(e)(i) of the proposed BOXR By-Laws to state that the public representatives on BOXR Nominating Committee shall have no material business relationship with a broker, dealer, the BSE, BOX or BOXR. In addition, the BSE proposes to incorporate into Article I, Section 3 of the BSE Constitution definitions of the terms "BOX," "BOX Options Participant" or "BOX Participant," "BOXR," "BOXR Board," and "BOXR Nominating Committee."

[8] BOX would provide automatic order execution capabilities to BOX Options Participants ("Options Participants") for standardized equity options securities listed or traded on the BSE, and would be operated by Boston Options Exchange Group, LLC ("BOX LLC"). *See* Securities Exchange Act Release No. 49068 (January 13, 2004) (SR–BSE–2002–15) ("BOX Trading Rules").

[9] Under the Exchange Act, "the term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service." *See* Exchange Act Section 3(a)(2), 15 U.S.C. 78c(a)(2).

[10] *See* BOX LLC Operating Agreement, Article 5, Section 5.3, Securities Exchange Act Release No. 48650 (October 17, 2003), 68 FR 60731 (October 23, 2003) (SR–BSE–2003–19).

[11] Exchange Act Section 6, 15 U.S.C. 78f.

[12] For such purposes of cross-referencing, interpreting and applying the Rules of the BSE to BOX Options Participants, any reference to "member" of the BSE in such cross-referenced rules is to be read as a synonym for "Options Participant" on BOX, whether order flow provider, market maker or both. *See* BOX Trading Rules, Chapter I, Section 2(c). For this reason, Options Participants would be statutory "members" of BSE.

[13] *See* BOX Trading Rules, Chapter II, Section 1(a).

governance of the BSE of a BSE Member.[14] Options Participants would not have ownership interests in the BSE, although they would have certain voting and representation rights.[15]

Pursuant to the proposed changes to the BSE Constitution, the BSE Board would be composed of the BSE Chairman, Vice Chairman and 20 governors, one of whom would represent Options Participants to provide input on the BSE Board. This governor ("Options Participant Governor") would be nominated by the BOXR Nominating Committee [16] and must be either an officer or director of an Options Participant.[17] The BSE Board would be required to appoint the candidate presented by the BOXR Nominating Committee.[18]

While ultimately responsible, the BSE would delegate specific self-regulatory responsibilities to BOXR, pursuant to the proposed Delegation Plan. Specifically, BOXR would assume responsibility with respect to the options business of the Exchange for, among other things: (i) Interpreting rules governing the activities of Options Participants; (ii) determining regulatory and trading policies relating to the business activities of Options Participants; (iii) assuring compliance with BSE Rules, BOX Rules, the federal securities laws and rules thereunder; (iv) administering surveillance programs and systems for enforcing rules governing the conduct and trading activities of Options Participants on BOX; (v) examining and investigating Options Participants and their associated persons to determine if they have violated the BSE Rules, BOX Rules, the federal securities laws or the rules thereunder; (vi) administering the BOXR enforcement and disciplinary programs; (vii) determining whether applicants meet the requirements for an Options Participant; (viii) placing restrictions on the business activities of Options Participants and their associated persons consistent with the public interest, the protection of investors and the federal securities laws; (ix) proposing fees and charges; (x) overseeing the operation of the BOX trading facility; (xi) administering the Exchange's involvement in the national market system plans for options; and (xii) developing, administering and enforcing listing standards for securities traded on BOX.[19]

While BOXR would have extensive delegated authority to regulate and oversee the options trading business, the BSE, as the SRO, would retain the ultimate responsibility for the Rules and regulations of BOX, as well as for the operation and administration of the BSE's subsidiary, BOXR. As part of its self-regulatory responsibilities, the BSE would review disciplinary decisions of BOXR, review and ratify proposed rule changes recommended by BOXR, and direct BOXR to take action that may be necessary to effectuate the purposes and functions of the Act.[20]

B. BOXR By-Laws

1. BOXR Board

Pursuant to the proposed BOXR By-Laws, the BOXR Board would consist of no fewer than seven and no more than thirteen directors, and would be composed of (i) the Chief Executive Officer ("CEO") of the BSE (who would be considered a member for voting purposes, but not for purposes of calculating the number of Public Directors and Options Participant Directors, as defined below); (ii) at least fifty percent Public Directors; [21] and (iii) at least twenty percent, but no fewer than two, nominees of Options Participants ("Options Participant Directors").[22]

The BSE, as the founder and sole member, would appoint the initial BOXR Board. Subsequently, the BOXR Board would be nominated by the sitting BOXR Board, subject to the nominating procedures discussed below [23] for the selection of the Options Participant Directors. The BOXR Board would be elected by the BSE Board, as the BSE is the sole shareholder of BOXR. The BSE would have the right to approve, remove, and replace any member of the BOXR Board by virtue of its status as sole shareholder, subject to the proposed BOXR By-Laws.[24] Any vacancy on the BOXR Board would be filled with a person, appointed by the BSE Board or Executive Committee, who satisfies the classification associated with the vacant seat, *i.e.*, a member of the public or a representative of an Options Participant.

The Options Participants Directors must be officers or directors of an Options Participant and must be elected by a plurality of votes cast by Options Participants, following nomination by the BOXR Nominating Committee or by petition of at least five Options Participants.[25] The BSE, as the sole member, would be required to appoint the Options Participant Directors so chosen and put forth to the BSE Board by the BOXR Nominating Committee.[26]

2. BOXR Committees

The BSE would commence BOXR operations with two committees: A BOXR Nominating Committee and a BOXR Hearing Committee, both of which would provide for Options Participant involvement in the oversight of the day-to-day operations of BOX.

a. *BOXR Nominating Committee.* The BOXR Nominating Committee would be responsible for nominating Options Participant candidates for two positions on the BOXR Board, one position on the BSE Board, and any vacant positions on the BOXR Nominating Committee (collectively, the "available positions"), and for presenting the slate of these candidates to the BSE Board. The BOXR Nominating Committee would consist of seven members, six of whom would be elected by a plurality of the Options Participants voting by secret ballot in the annual election. The seventh would be appointed by the BOXR Board, and must be one of the BOXR Board's existing Public Directors. Of the six elected members, five would represent broker-dealer Options Participants of BOX (at least one of which would be a market maker on BOX), and one would be a representative of the public.[27]

In addition, Options Participants would be able to submit additional nominees for each of the available positions. Independent nominations for

[14] *See* BOX Trading Rules, Chapter II, Section 1(e).

[15] As discussed below, under Section 6(b)(3) of the Exchange Act, the rules of an exchange must assure that its members are fairly represented in the selection of its directors and administration of its affairs. Exchange Act Section 6(b)(3), 15 U.S.C. 78f(b)(3).

[16] *See* discussion of the proposed BOXR Nominating Committee below.

[17] *See* proposed BOXR By-Laws, Section 14(e)(3)(A), as amended by Amendment No. 2.

[18] *See* proposed changes to Article II, Section 4 of the BSE Constitution.

[19] Proposed Delegation Plan, Section 2(C).

[20] Proposed Delegation Plan, Section 2(A) and 2(D).

[21] "Public Director" is defined as a director who has no material business relationship with a broker or dealer, or the BSE, BOX, or BOXR. *See* proposed BOXR By-Laws, Definition (p).

[22] Proposed BOXR By-Laws, Section 4.

[23] *See* discussion of the proposed BOXR Nominating Committee below.

[24] Proposed Section 7 of the BOXR By-Laws would permit the BSE to remove any or all of the directors on the BOXR Board at any time, with cause, only if a determination is reasonably and promptly made by the BSE Board by a majority vote, that, based upon the facts known to the BSE Board at the time such determination is made that the director sought to be removed: (i) Acted in bad faith; (ii) did not act in a manner in the best interests of BOXR; (iii) engaged in conduct which was unlawful; or (iv) deliberately breached his or her duty to BOXR.

[25] *See* discussion of the proposed BOXR Nominating Committee below.

[26] Proposed Amendments to Article II, Section 4 of the BSE Constitution would require the BSE to elect the slate presented by the BOXR Nominating Committee.

[27] Proposed BOXR By-Laws, Section 14(e).

each of the available positions would require a petition of five Options Participants. Options Participants alone would vote at the annual election, by plurality, to choose the individuals who would represent them in the available positions. Following the annual election, the successful candidates would be presented to the BSE Board by the Chairman of the BOXR Nominating Committee for appointment to their respective available positions. Pursuant to the proposed changes to the BSE Constitution, the BSE Board would be required to appoint the candidates presented by the BOXR Nominating Committee.[28]

b. *Hearing Committee.* The BOXR disciplinary process would be similar to the existing BSE disciplinary process, and would be governed by a BOXR Hearing Committee, which would be appointed by the Chairman of the Board of BOXR. The BOXR Hearing Committee would be comprised of at least one Options Participant member and such number of other members as the Chairman may deem necessary.[29]

The BOXR Chief Regulatory Officer, or his staff, would authorize the initiation of disciplinary hearings and proceedings. The BOXR Hearing Committee would conduct hearings, render decisions and impose sanctions. Decisions of the BOXR Hearing Committee would be appealable for review to the BOXR Board. Any decision of the BOXR Board subsequently would be appealable to the BSE Board, which would have discretion as to whether to hear such appeal. In addition, the BSE Board could choose to review a decision of the BOXR Board on its own motion. If the BSE Board were to not order review of a decision of the BOXR Board, or, in its discretion, were to elect not to hear an appeal of a decision of the BOXR Board, then the decision of the BOXR Board would be deemed to be the final action of the Exchange. Any decision of the BSE Board, or the BOXR Board (in cases where the BSE Board in its discretion has elected not to hear the appeal) would be ultimately appealable to the Commission. As with all BSE decisions, the Commission would have the authority to review final disciplinary sanctions imposed by BOXR or the BSE on Options Participants, including sanctions imposed for violations of BOX Rules.[30]

[28] See proposed changes to Article II, Section 4 of the BSE Constitution.

[29] Proposed BOXR By-Laws, Section 14(f).

[30] Exchange Act Section 19(d)(2), 15 U.S.C. 78s(d)(2).

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[31] In particular, the Commission believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,[32] in general, and furthers the objectives of Section 6(b)(5),[33] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. Moreover, the Commission believes that the proposed rule change furthers the objectives of Section 6(b)(3) of the Act,[34] in that it assures fair representation of Options Participants in the selection of directors and the administration of the affairs of the BSE and BOXR. Finally, the Commission believes that the BSE's proposal to establish BOXR is consistent with the BSE's obligation under Section 6(b)(1) of the Act[35] to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Act, the rules thereunder, and the rules of the Exchange.

A. BOX as a Facility of the BSE

The Commission received one comment letter on the proposed rule change that strongly opposes the BSE's proposal.[36] Specifically, CBOE argues that, by seeking approval for BOX as a facility of the BSE, the BSE has improperly circumvented the exchange registration process, thereby avoiding scrutiny of BOX's ownership and governance. In CBOE's view, BOX's failure to seek registration as a national securities exchange has prevented consideration of the "potential conflict between BOX's regulatory responsibilities and its for-profit structure, and how the Commission's jurisdiction over BOX's non-U.S. owners can be assured."[37] CBOE supports this assertion by stating its view that had BOX "sought registration as a national securities exchange, its principle governing document, the Operating Agreement of BOX LLC, would have been filed as an exhibit to its application," which would have subjected any subsequent changes to the BOX LLC Operating Agreement to the Act's Section 19(b) rule filing process. In addition, CBOE argues that, if BOX had submitted such an application, BOX would have had to assure the Commission that its members would be subject to appropriate regulation and that BOX would both be organized and have the capacity to carry out the purposes of the Act and comply with its provisions. CBOE argues that, because BOX was not required to register as a national securities exchange, BOX has been granted an unfair competitive advantage over CBOE and the other registered options exchanges.[38]

The Commission believes that the BSE's proposal that BOX be operated as its facility is properly filed under Section 19(b) of the Act and Rule 19b–4 thereunder,[39] and that BOX is not required, separate from the BSE, to register as a national securities exchange under Section 6(a) of the Act.[40] Moreover, as an SRO, the BSE is required to comply with the Act and to enforce compliance by its members and persons associated with its members with the Act.[41] Because the BSE has proposed to operate BOX as its facility, the BSE's obligations under the Act extend to its members' activities on BOX, as well as to the operation and administration of BOXR. The Commission notes that the instant rule filing relates not to the approval of

[31] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. Exchange Act Section 3(f), 15 U.S.C. 78c(f).

[32] Exchange Act Section 6(b), 15 U.S.C. 78f(b).

[33] Exchange Act Section 6(b)(5), 15 U.S.C. 78f(b)(5).

[34] Exchange Act Section 6(b)(3), 15 U.S.C. 78f(b)(3).

[35] Exchange Act Section 6(b)(1), 15 U.S.C. 78f(b)(1).

[36] *See* CBOE Letter, *supra* note 5.

[37] *Id.*

[38] *Id.*

[39] Exchange Act Section 19(b), 15 U.S.C. 78s(b) and Exchange Act Rule 19b–4, 17 CFR 240.19b–4. *See* Securities Exchange Act Release No. 42759 (May 5, 2000), 65 FR 30654 (May 12, 2000) (SR–PCX–99–39) (order approving the Pacific Exchange's proposal to operate Archipelago as an equity trading facility) ("PCX/Arca Order"). The Commission notes that Section 19(b) of the Act, and Rule 19b–4 thereunder, require that any proposed change to any material aspect of the operation of the facilities of the SRO must be filed with the Commission.

[40] Exchange Act Section 6(a), 15 U.S.C. 78f(a). *See* PCX/Arca Order, *supra* note 39.

[41] Exchange Act Section 6(b)(1), 15 U.S.C. 78f(b)(1).

BOX,[42] but to the delegation of regulatory responsibility between the BSE and its wholly-owned subsidiary, BOXR, as well as to the fair representation issues with respect to the composition of the BSE Board, the BOXR Board, and the operation of the BOXR Board committees. Consequently, the Commission believes that Section 19 of the Act[43] affords the Commission a comparable ability to determine whether the BSE's proposal is consistent with the Act as would a separate application by BOX to register as a securities exchange.

B. Fair Representation

The Commission finds that the proposed changes to the composition of the BSE Board and the proposed composition of the BOXR Board are structured in a manner that satisfies the fair representation requirements of Section 6(b)(3) of the Act.[44]

Under Section 6(b)(3) of the Act,[45] the rules of an exchange must assure that its members are fairly represented in the selection of its directors and in the administration of its affairs. The section 6(b)(3) fair representation requirement allows statutory members to have a voice in an exchange's use of its self-regulatory authority. Moreover, this statutory requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange pursuant to its rules, and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.

1. BSE Board

As discussed above, under the proposal, the BSE Board, composed of the BSE Chairman, Vice Chairman, and 20 governors, would include one governor representing Options Participants to provide input on the BSE Board. This Options Participant Governor must be presented by the BOXR Nominating Committee, and must be either an officer or director of an Options Participant.[46] The BSE Board would be required, pursuant to the proposed amendments to the BSE Constitution, to appoint the candidate selected by Options Participants and presented by the Chairman of the BOXR Nominating Committee.[47] Moreover, as discussed below, the nominating process would allow for Options Participants to nominate additional candidates for the BSE Board on the petition of five Options Participants.[48]

The BSE Constitution would continue to require that the BSE Board include ten securities industry representatives, representing members of the BSE (one of whom would be the Options Participant Governor), and ten public representatives.[49] All of the governors, other than the Options Participant Governor, would continue to be elected to the BSE Board by a plurality of BSE members (other than Options Participants), voting in the BSE's annual election, following nomination by the BSE Nominating Committee or by independent petition of fifteen BSE members (other than Options Participants).[50]

In its comment letter, CBOE argues that the BSE's proposal does not satisfy the statutory requirement that members must be fairly represented in the governance of a national securities exchange and in the administration of its affairs. Specifically, CBOE contends that the representation of one Options Participant on the 22-person BSE Board does not satisfy the statutory requirements of fair representation. Because Options Participants would have a voice in the administration of the affairs of the BSE, and BSE members (other than Options Participants) would continue to elect ten of 22 members on the BSE Board, the Commission believes that the proposal satisfies the fair representation requirements of Section 6(b)(3) of the Act.[51]

2. BOXR Board

Pursuant to the proposal, the BOXR Board would consist of no fewer than seven nor more than thirteen directors. The composition of the BOXR Board would be: (i) The CEO of the BSE (who would be considered a member of the Board for voting purposes, but not for purposes of calculating the number of Public Directors and Options Participant Directors); (ii) at least fifty percent Public Directors;[52] and (iii) at least twenty percent, but no fewer than two, Options Participant Directors.[53]

a. *BOXR Nominating Committee.* Because the BOXR Nominating Committee is responsible for selecting Options Participant representatives for the BOXR Board, the BSE Board, and the BOXR Nominating Committee, its composition should generally reflect the composition of Options Participants (*i.e.*, the users). As discussed above, the BOXR Nominating Committee would consist of seven members, six of whom would be elected by a plurality of the Options Participants voting by secret ballot in the annual election and one of whom would be appointed by the BOXR Board and must be one of the BOXR Board's existing Public Directors.[54] Of the six elected members, five would represent broker-dealer Options Participants (at least one of which would be a BOX market maker) and the sixth would be a representative of the public. The seven members of the BOXR Nominating Committee would therefore include two representatives of the public and five representatives of the Options Participants.[55]

Moreover, Options Participants have an additional opportunity to nominate other candidates. Specifically, five Options Participants may petition to add a nominee to be included on the ballot.[56] Finally, the Commission notes that Options Participants would vote to select the Options Participant nominees to the available positions on the BSE Board, the BOXR Board, and BOXR Nominating Committee from among those nominated by the BOXR Nominating Committee and by petition. The BSE, as the sole shareholder of BOXR, would be required, pursuant to its Constitution, to appoint the Options Participant nominees so selected by the Options Participants and presented to the BSE Board by the Chairman of the BOXR Nominating Committee.[57]

In its comment letter, CBOE argues that because the BSE Board would appoint the BOXR Board, Options Participants would not have the right to choose which Options Participants serve on the BOXR Board, in violation of the fair representation requirements of the Act.[58] As just discussed, however, pursuant to the proposed changes to the BSE Constitution, the BSE Board would be required to appoint the BOXR Options Participant candidates selected

[42] The BSE has filed the BOX LLC Operating Agreement and the BOX Trading Rules under separate cover. The Commission is approving both of these related filings concurrently with the instant proposal. *See* Securities Exchange Act Release Nos. 49067 (January 13, 2004) (SR–BSE–2003–19) and 49068, *supra* note 8.

[43] Exchange Act Section 19, 15 U.S.C. 78s.

[44] Exchange Act Section 6(b)(3), 15 U.S.C. 78f(b)(3).

[45] *Id.*

[46] *See* proposed BOXR By-Laws, Section 14(e)(iii)(A), as amended by Amendment No. 2.

[47] *See* proposed changes to Article II, Section 4 of the BSE Constitution.

[48] Proposed BOXR By-Laws, Section 14(e).

[49] BSE Constitution, Article I, Section I.

[50] BSE Constitution, Article II, Sections 1, 3, and 4.

[51] Exchange Act Section 6(b)(3), 15 U.S.C. 78f(b)(3).

[52] *See supra* note 20, for a definition of Public Directors.

[53] Proposed BOXR By-Laws, Section 4.

[54] *See supra* note 21, for a definition of Public Directors.

[55] Proposed BOXR By-Laws, Section 14(e).

[56] *See* proposed BOXR By-Laws, Section 14(e).

[57] *See* proposed changes to Article II, Section 4 of the BSE Constitution.

[58] See CBOE Letter, *supra* note 5.

by the Options Participants and presented to the BSE Board by the Chairman of the BOXR Nominating Committee.

Furthermore, the proposed composition of the BOXR Board would provide Options Participant representation comparable to that provided to members of PCX Equities, Inc. ("PCXE") and the American Stock Exchange LLC ("Amex"), both of which the Commission found consistent with the Act.[59] PCXE's by-laws provide that at least twenty percent, but no fewer than two, of the directors on the PCXE board be Equity Trading Permit Holders ("ETP Holders")[60] nominated by a nominating committee, six of seven members of which shall be ETP Holders.[61] Similarly, the Amex's constitution provides that four of the eighteen members of the Amex board of governors be floor governors proposed by either the Amex nominating committee (consisting of three floor members and two public members), or by petition of 25 regular or options principle members, and selected by a plurality of the Amex regular and options principle members voting together as a single class.[62] The Commission similarly believes that the BSE's proposal is consistent with the Act. The Commission believes further that the proposed petition process, coupled with the right to vote for their representatives, should help to ensure that Options Participants have the opportunity to be involved in the selection of their representatives for the BOXR Board, the BSE Board, and the BOXR Nominating Committee. Thus, as with the BSE Board, the fair representation requirements are satisfied.

b. *BOXR Hearing Committee.* The Commission finds that the proposed composition and authority of the BOXR Hearing Committee are consistent with Sections 6(b)(3)[63] and 6(b)(7)[64] of the Act, respectively. The BOXR Hearing Committee would include at least one Options Participant member, which should help to ensure that decisions of the BOXR Hearing Committee are made in a fair and impartial manner, as required by Section 6(b)(3) of the Act. Moreover, because aggrieved Options Participants may appeal decisions of the BOXR Hearing Committee to the BOXR Board, the BSE Board, and, ultimately, to the Commission, the Commission finds that the proposal should provide for a fair procedure for disciplining Options Participants and overseeing any denial, prohibition or limitation of membership or access to BOX or its services, in satisfaction of the standards set forth in Section 6(b)(7) of the Act.[65]

C. Proposed Delegation of Authority to BOXR

Although the BSE has delegated certain regulatory authority over BOX to BOXR, and certain operational authority over BOX to BOX LLC, the BSE, as the SRO, retains the ultimate responsibility for the operation, administration, rules, and regulation of BOX, BOXR, and BOX LLC. Pursuant to the proposed BSE Rules, the BSE must approve any proposed changes to the BOXR By-Laws and the BOX Rules, and such proposed changes must be filed by the BSE with the Commission pursuant to Section 19(b) of the Act[66] and Rule 19b–4[67] thereunder.[68] The BSE also must review disciplinary decisions of BOXR and direct BOXR to take any action that may be necessary to effectuate the purposes and functions of the Act.[69]

Furthermore, pursuant to the proposed Delegation Plan, the Commission would have oversight over the premises, personnel, and records of BOXR and BOX LLC to the same extent that it currently has oversight over the premises, personnel, and records of the BSE. The books, records, premises, officers, directors, agents and employees of BOXR and BOX LLC would be deemed to be the books, records, premises, officers, directors, agents and employees of the BSE for purposes of, and subject to, oversight pursuant to the Act.[70] The books and records of BOXR and BOX LLC would be subject at all times to inspection and copying by the BSE and the Commission, and the books and records of BOX LLC would be subject at all times to inspection and copying by BOXR.[71] In addition, BOXR and BOX LLC would be required to maintain all books and records related to BOX within the United States.[72]

The Commission believes that neither Amendment No. 2 nor Amendment No. 3 significantly alters the original proposal, which was subject to a full notice and comment period, or raises any novel issue of regulatory concern. Moreover, the Commission believes that the changes made to the BSE Rules and the BOXR By-Laws strengthen and clarify the proposal.[73] Therefore, the Commission finds that granting accelerated approval to Amendment No. 2 and Amendment No. 3 is appropriate and consistent with Section 19(b)(2) of the Act.[74] Accordingly, the Commission hereby finds good cause for approving Amendment No. 2 and Amendment No. 3 to the proposal, prior to the 30th day after publishing notice of these amendments in the **Federal Register**.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2 and Amendment No. 3, including whether the proposed amendments are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–BSE–2003–04. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW.,

[59] *See* PCX/Arca Order, *supra* note 39 and Securities Exchange Act Release No. 40622 (October 30, 1998), 63 FR 59819 (November 5, 1998) (File Nos. SR–Amex–98–32, SR–NASD–98–56, SR–NASD–98–67).

[60] An ETP Holder is an entity that has been issued a permit to effect securities transactions on the PCXE's trading facility and has status as a "member" of the Pacific Exchange, Inc., as that term is defined in Section 3 of the Act. Archipelago Exchange Facility Rules 1.1(m) and 1.1(n).

[61] *See* Bylaws of PCX Equities, Inc., Article III, Section 3.02. *See also* Archipelago Exchange Facility Rule 3.2, Equity Committees.

[62] The NASD must approve the floor governors, but may reject the nominees only on specific regulatory grounds. *See* Amex Constitution, Article II, Section 1.

[63] Exchange Act Section 6(b)(3), 15 U.S.C. 78f(b)(3).

[64] Exchange Act Section 6(b)(7), 15 U.S.C. 78f(b)(7).

[65] *Id.*

[66] Exchange Act Section 19(b), 15 U.S.C. 78s(b).

[67] Exchange Act Rule 19b–4, 17 CFR 240.19b–4.

[68] The BSE Board must review and ratify all proposed rule changes recommended by the BOXR Board before they are submitted to the Commission. *See* Section 2(D) of the proposed Delegation Plan.

[69] Proposed Delegation Plan, Sections 2(A)(4) and 2(A)(10).

[70] Proposed Delegation Plan, Sections 1(b) and 2(B)(1).

[71] Proposed Delegation Plan, Section 2(B)(1).

[72] Proposed Delegation Plan, Section 2(B)(2).

[73] *See supra* notes 6 and 7.

[74] Exchange Act Section 19(b)(2), 15 U.S.C. 78s(b)(2).

Washington, DC 20549–0609. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–2003–04 and should be submitted by February 10, 2004.

V. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[75] that the proposed rule change (File No. SR–BSE–2003–04), as amended by Amendment No. 1, be, and hereby is, approved, and Amendment No. 2 and Amendment No. 3 are approved on an accelerated basis.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1115 Filed 1–16–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49066; File No. SR–BSE–2003–17]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change Establishing Fees for the Boston Options Exchange Facility and Approving the Portion of the Proposed Rule Change Relating to Linkage Fees on a Pilot Basis Until January 31, 2004

January 13, 2004.

I. Introduction

On November 14, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change that would establish fees for the Exchange's options trading facility, Boston Options Exchange ("BOX").[3] On November 20, 2003, the Exchange's rule proposal was published for comment in the **Federal Register**.[4] No comment letters were received on the proposal. This order approves the proposed rule change and approves the portion of the proposed rule change relating to linkage fees on a pilot basis until January 31, 2004.

II. Description of Proposal

In conjunction with its proposal to operate a new options facility—BOX—the BSE proposes a fee schedule relating to the BOX market.

A. BOX Trading Fees

The BSE proposes to establish trading fees related to the BOX market. The fees would apply to Public Customers,[5] broker-dealers, and Market Makers.[6]

1. Per Contract Fees

Executions of Public Customer orders would not be subject to a trading fee. Executions of orders for broker-dealer proprietary accounts and BOX Market Maker accounts would be charged a $0.20 per contract trade execution fee, or a $0.40 per contract fee for trades against an order that BOX's automatic trading system ("Trading Host") filters to prevent trading through the NBBO, pursuant to the NBBO filter procedures set forth in Chapter V, Section 16(b) of the BOX Rules. The BSE proposes to assess the $0.40 per contract fee to Market Makers as an incentive for Market Makers to post competitive quotations, and to broker-dealers for the cost of providing a service that is not available to broker-dealers on other exchanges. In addition, executions on behalf of broker-dealer proprietary accounts and BOX Market Maker accounts would be charged any passed-through licensing fees for Exchange Traded Funds ("ETFs"), if applicable. At BOX's launch, the only applicable surcharge on ETFs would be a $0.10 per contract fee for options on the Nasdaq 100 ("QQQ").

2. Alternative Trading Fees: BOX Minimum Activity Charge

The pricing model proposed for Market Makers includes a Minimum Activity Charge ("MAC") for each class to which a Market Maker is appointed. The MAC would vary depending on the total trading volume across all options exchanges, as determined by the Options Clearing Corporation ("OCC") clearing data,[7] in a particular class, and would be equal to approximately $0.20 times the number of contracts equaling 1% of the total industry-wide volume. As noted above, the per contract trading fee for a Market Maker is $0.20 per contract. If the total per contract trading fees for a Market Maker in a given month do not exceed the total MAC for all classes for which that Market Maker holds appointments, that Market Maker would be charged the total MAC, rather than the trading fee. Thus, if a Market Maker's monthly trading activity is low, the MAC may be applicable. If, however, a Market Maker's total trading fees exceed the MAC, the Market Maker would pay the trading fees.

The MAC would not be applied during the first three calendar months following BOX's launch. Subsequently, the MAC would be "indexed" to BOX's overall market share as determined by OCC clearing volumes. Specifically, at the beginning of each calendar month, BOX would calculate its market share for the previous month (market share equals the total BOX traded volume divided by the total OCC cleared volume for the classes that BOX has listed). If BOX's overall market share is less than 10%, BOX would reduce the MAC applicable to each Market Maker as follows: (1) If BOX's market share were less than 5%, the MAC would be 33.3% of the full MAC; and (2) if BOX's market share were between 5% and 10%, the MAC would be 66.7% of the full MAC.

3. Volume Discounts

The Exchange would provide certain volume discounts if a Market Maker's average daily volume in a given month exceeds certain thresholds.

B. Other Fees

1. InterMarket Linkage

The Exchange is proposing on a pilot basis, until January 31, 2004,[8] fees for trades executed via the InterMarket Linkage ("Linkage"). These Linkage fees include charges to Options Participants, such as a $0.40 per contract charge for a trade in the BOX market, that is

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[75] Exchange Act Section 19(b)(2), 15 U.S.C. 78s(b)(2).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49068 (January 13, 2004).

[4] *See* Securities Exchange Act Release No. 48787 (November 14, 2003), 68 FR 65477 (November 20, 2003).

[5] A Public Customer is a person that is not a broker or dealer in securities. *See* BOX Rules, Chapter I, Sec. 1(a)(50).

[6] A Market Maker registered with the Exchange is vested with the rights and responsibilities specified in Chapter VI of the BOX Rules.

[7] For purposes of determining the MAC for each options class listed by BOX, the options classes listed by BOX would be divided into six classes, based on the total trading volume of each class across all U.S. options exchanges as determined by OCC data. The classifications would be adjusted at least twice annually (in January and July, based on the average daily volume for the preceding six month period). If exceptional events or news occur in a given class, the Exchange may review the MAC level for that class at anytime. The BSE would file a proposed rule change with the Commission regarding any changes to its fees, including the MAC, pursuant to section 19 of the Act. 15 U.S.C. 78s.

[8] If the BSE seeks to extend the pilot period for the effectiveness of these fees, the BSE would file a proposed rule change pursuant to Section 19(b) of the Act. 15 U.S.C. 78s(b).

triggered by an away market's satisfaction request,[9] as well as a $0.20 per contract charge levied on away markets for inbound Principal ("P") and Principal as Agent ("PA") orders. This charge to an away market would not be in addition to any other per contract charges on BOX and is comparable to the regular trading fee for Market Maker and broker-dealer accounts on BOX. The side of a BOX trade opposite an inbound P or PA order would be billed as any other BOX trade.

2. Compliance Assessment if BSE Is the Designated Options Examining Authority

The BSE also proposes to charge a monthly compliance assessment of $1,500 for firms for which the BSE assumes examination responsibilities under the inter-exchange allocation process of the Revised Options-related Sales Practice 17d–2 Plan ("17d–2 Plan"),[10] pursuant to Rule 17d–2 under the Act.[11]

3. Technology and Other Fees

The BSE would charge fees relating to BOX's Points of Presence ("PoP"), the sites where BOX Participants connect to the BOX network for communication with the BOX Trading Host. Each of these PoPs is operated by a third party supplier under contract to BOX. Through connection fees, BOX would recover the fees charged by each PoP contractor for the use of the facility by a BOX Participant. The amount to be paid by each BOX Participant is variable based on its particular configuration, the determining factors would be the number of physical connections a BOX Participant has and the associated bandwidth.

Additionally, BSE proposes fees relating to certain installation and hosting costs, which are related to the physical installation of equipment (generally routers, though possibly other hardware) at the PoP site. BOX Participants would be required to pay this fee only if they have physical installations at the BOX PoP for which BOX incurs fees from its service suppliers.

BSE also proposes to charge a "Cross Connect" fee per physical connection, which varies by size from the smallest (T–1) to the largest (CAT 5).[12]

4. Fees for Optional Services and Fees for Entities Other Than BOX Participants

BSE proposes a fee for Common Message Switch ("CMS") Order Routing Services offered as an alternative to the FIX protocol and proprietary gateways to the BOX Trading Host. The CMS Gateway is an optional service provided by BOX to those BOX Participants who use the CMS protocol for routing orders. CMS may be used only for agency activities (and not proprietary orders and market maker activities).

BSE also proposes a fee for the use of its Back Office Trade Management Software ("TMS"), an optional software, which BOX Participants may subscribe to in order to manage their BOX trades prior to their transmission by BOX to OCC. TMS is useful only to BOX Participants acting as agent for public customers or other broker-dealer accounts. If a firm is able to include all relevant clearing data on an order prior to sending it to BOX, this software is not required since the order entry formats of BOX messages allow the BOX Participant to achieve straight through processing.

Finally, BSE proposes a fee for testing and support for third party service providers. Third party service providers, generally either Independent Software Vendors ("ISVs"), who provide "front end" trading software systems, or service bureaus, which provide and operate order routing systems for broker-dealers, may connect to the BOX Trading Host test platform. This connection is used by third party service providers both to establish initial compatibility of their software as well as to maintain this connectivity as the BOX Trading Host implements upgrades and evolutions. This fee would be charged directly to the third party service provider, not the BOX Participant, and would not be charged to BOX Participants who connect their proprietary software systems to the BOX Trading Host.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[13] and, in particular, the requirements of section 6(b)(4) of the Act.[14] Section 6(b)(4) requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission finds that the proposal to establish fees for the BOX facility is consistent with section 6(b)(4) of the Act, in that the proposal is reasonably tailored to apportion fees to BOX Participants and third party service providers based on the services the BOX facility will provide to these users.

The Commission believes that the base trading fees charged to the constituents of the BOX market are reasonable, particularly in light of the trading fees charged by other options exchanges. In addition, the per contract trading fees are the same for all broker-dealers and Market Makers. Moreover, the $0.40 per contract fee for the execution against the exposure of an order that BOX's Trading Host filters against the NBBO is reasonable as BSE represents that it would be levied against broker-dealers to recover the cost of providing a service, and against Market Makers as an incentive to post competitive quotations.

The Commission believes that the proposed MAC that would be charged if a Market Maker's monthly trading activity were below a certain threshold is reasonable. The Commission notes that the BSE has based the MAC on its evaluation of data from the OCC and plans to review the MAC categories at least twice a year. Even if a BOX Market Maker were to trade a number of contracts less than that required to avoid paying the MAC, the per contract costs associated with trading on BOX would still be comparable to charges imposed by other exchanges.

The Commission also finds that the other fees proposed by BOX are reasonable. The InterMarket Linkage fees proposed by BOX are generally consistent with those charged by the other options exchanges. The monthly compliance assessment for firms for which BSE assumes examination responsibilities is based on the regulatory services that BSE will provide and is consistent with the regulatory fees charged by other exchanges. Finally, the technology fees assessed by BOX are based on the BOX participants' usage of the services

[9] Consistent with the national market system plan governing the operation of the Linkage, no fees will be charged to the parties sending the satisfaction request to BOX. Rather, the fee will be charged to the BOX Options Participant that was responsible for the trade-through that caused the satisfaction request to be sent.

[10] The BSE plans to join the 17d–2 Plan as a participant.

[11] 17 CFR 240.17d–2.

[12] These fees include one-time charges, not applicable for BOX participants connected prior to the BOX launch, and monthly fees, applicable only after the BOX launch.

[13] The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(4).

provided, as well as on the costs for the physical installations of equipment.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act [15] that the proposed rule change (File No. SR–BSE–2003–17) is hereby approved and the portion of the proposed rule change relating to linkage fees is approved on a pilot basis until January 31, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1116 Filed 1–16–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49068; File No. SR–BSE–2002–15]

Self Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 3 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 4 Thereto by the Boston Stock Exchange, Inc. Establishing Trading Rules for the Boston Options Exchange Facility

January 13, 2004.

I. Introduction

On October 31, 2002, the Boston Stock Exchange, Inc. ("BSE" or "Exchange"), submitted to the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish trading rules for the proposed Boston Options Exchange ("BOX") [3] facility. On December 18, 2002, the BSE filed Amendment No. 1 that entirely replaced the original rule filing.[4] On January 9, 2003, the BSE filed Amendment No. 2 that entirely replaced the original rule filing and Amendment No. 1.[5] Amendment No. 2 was published in the **Federal Register** on January 22, 2003 ("BOX Proposing Release").[6]

The Commission received 43 comment letters in response to the January 22, 2003, notice.[7]

In response to the comment letters, the BSE filed Amendment No. 3 to the proposal.[8] The proposed changes were published for comment in the **Federal Register** on August 22, 2003.[9] The Commission received 301 comment letters in response to Amendment No. 3.[10] In response to the comment letters,

[15] 15 U.S.C. 78s(b)(2).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term "BOX" means the Boston Options Exchange or Boston Stock Exchange Options Exchange, an options trading facility of the Exchange under section 3(a)(2) of the Act. *See* proposed BOX Rules, Chapter I, sec. 1(a)(6) (definition of "BOX").

[4] *See* letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division of Market Regulation ("Division"), Commission, dated December 18, 2002 ("Amendment No. 1").

[5] *See* letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division, Commission, dated January 8, 2003 ("Amendment No. 2").

[6] Securities Exchange Act Release No. 47186 (January 14, 2003), 68 FR 3062 (January 22, 2003).

[7] *See* letters to Jonathan G. Katz, Secretary, Commission, from Paul Fred, CEO, PFTC Trading, LLC, dated January 24, 2003; Myron Wood, Statistician, Changes, LLC, dated January 30, 2003; Mike Ianni, dated February 2, 2003; Shawn Gibson, Senior VP, Equity Derivatives, Scott & Stringfellow, dated February 6, 2003; CSFB Next Fund, Inc., Interactive Brokers Group, LLC, LabMorgan Corporation, Salomon Brothers Holding Company, Inc., UBS (USA) Inc., dated February 6, 2003; Sallerson-Troob, LLC, dated February 9, 2003; Christopher D. Bernard, dated February 10, 2003; George Papa, Director, PEAK6 Investments, dated February 10, 2003; Frank Hirsch, CBOE Market Maker, dated February 10, 2003; Richard W. Cusack, Operations Manager, Sparta Group of Chicago, LP, dated February 11, 2003; Paul Britton, CEO, MAKO Global Derivatives LLC, dated February 11, 2003; John Colletti, Samuelson Trading, dated February 11, 2003; Robert S. Smith, Chief Technology Officer, GETCO, LLC, dated February 11, 2003; Phillip Sylvester, CBOE Market Maker, dated February 11, 2003; Keith Fishe, DRW Holdings, LLC, dated February 11, 2003; Daniel C. Bigelow, President, Monadnock Capital Management, dated February 11, 2003; Erich Tengelsen, Chicago Trading Company, dated February 12, 2003; Thomas Peterffy, Chairman, David M. Battan, Vice President and General Counsel, Interactive Brokers LLC, dated February 12, 2003; John T. Thomas, Van Der Moolen USA LLC, dated February 12, 2003; Robert C. Sheehan, Electronic Brokerage Systems LLC, dated February 12, 2003; Thomas J. Murphy, TJM Investments, LLC, dated February 12, 2003; Meyer S. Frucher, Chairman and Chief Executive Officer, Philadelphia Stock Exchange, Inc. ("Phlx"), dated February 12, 2003 ("Phlx Letter 1"); Michael Resch, dated February 12, 2003; Todd Silverberg, General Counsel, Susquehanna International Group LLP, dated February 12, 2003; Michael J. Simon, Senior Vice President and Secretary, International Securities Exchange, Inc. ("ISE"), dated February 12, 2003 ("ISE Letter 1"); Juan Carlos Pinilla, Managing Director, Equity Derivatives Trading, JP Morgan, dated February 12, 2003; Marc J. Liu, Options Specialist, AGS Specialist Partners, dated February 12, 2003; Jan-Joris Hoefnagel, President, Optiver Derivatives Trading, dated February 13, 2003; Steve Tumen, CEO, and David Barclay, General Counsel, Equitec Group, LLC, dated February 14, 2003; Michael J. Ryan, Jr., Executive Vice President & General Counsel, American Stock Exchange LLC ("Amex"), dated February 14, 2003 ("Amex Letter 1"); William J. Brodsky, Chairman and Chief Executive Officer, Chicago Board Options Exchange, Inc. ("CBOE"), dated February 14, 2003 ("CBOE Letter 1"); Paul Roesler, Lead Market Maker, Pacific Exchange, Inc. ("PCX"), dated February 14, 2003; Andrew W. Lo, dated February 15, 2003; Nicholas Bonn, Executive Vice President, State Street Global Markets, LLC, dated February 21, 2003; Robert Bellick, Christopher Gust, Wolverine Trading, LLC, dated February 27, 2003; Philip D. DeFeo, Chairman and CEO, PCX, dated February 27, 2003 ("PCX Letter 1"); Thomas N. McManus, Executive Director and Counsel, Morgan Stanley, dated March 3, 2003; Philip C. Smith, Jr., Vice President, Options, The Interstate Group, dated March 7, 2003; Bryan Rule, dated March 11, 2003; Michael J. Ryan, Jr., Executive Vice President & General Counsel, Amex, dated March 13, 2003 ("Amex Letter 2"); David Hultman, dated March 25, 2003; Stephen D. Barret, dated March 26, 2003; and John Welker, dated June 11, 2003.

[8] *See* letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division, Commission, dated August 15, 2003 ("Amendment No. 3").

[9] Securities Exchange Act Release No. 48355 (August 15, 2003), 68 FR 50813 (August 22, 2003) ("Amendment No. 3 Notice").

[10] *See* letters to Jonathan G. Katz, Secretary, Commission, from R.J. Casey, dated September 2, 2003; Gary Sutton, dated September 2, 2003; Dr. Jay Charles Soper, dated September 2, 2003; Darshan Arora, dated September 2, 2003; Carl Erikson, dated September 2, 2003; Dwayne Logie, dated September 2, 2003; David B. Pincus, dated September 2, 2003; Dmitri Gerasimenko, dated September 2, 2003; Dr. Gary T. Hirst, Chairman, Hirst Investment Management Inc., dated September 2, 2003; Doug Brunner, dated September 2, 2003; David Richardson, dated September 2, 2003; Eddie Wan, dated September 2, 2003; Donald Tolchin, dated September 2, 2003; Austin B. Tucker, dated September 2, 2003; Ilya Dorfman, dated September 2, 2003; Carey Pierce, dated September 2, 2003; David Maple, dated September 2, 2003; Gregory Cone, dated September 2, 2003; Byron Sears, dated September 2, 2003; Chad B. Harris, Managing Director, Sharp People Scottsdale, dated September 2, 2003; Clint Rasschaert, dated September 2, 2003; Michael Burgess, dated September 2, 2003; Edward C. Spengler II, dated September 2, 2003; Basilio Chen, dated September 2, 2003; Sam Wheat, dated September 2, 2003; Wie-Ming Ang, dated September 2, 2003; Douglas A. DeMoss, dated September 2, 2003; Karl Aschenbrenner, dated September 2, 2003; C.E. Sherrod, dated September 2, 2003; Alan Johnson, dated September 2, 2003; John Mazur, dated September 2, 2003; Skyler Christensen, dated September 2, 2003; Rachel Fitz, dated September 2, 2003; Billb Billb, dated September 2, 2003; Damodharan Ramkumar, dated September 3, 2003; Jim McNeil, dated September 3, 2003; Dr. Donald R. Berger, dated September 3, 2003; Scott Alber, dated September 3, 2003; Eric Glasband, dated September 3, 2003; Frank Sandy, dated September 3, 2003; Mu Chou Liu, ITresources, dated September 3, 2003; Vernon Hehn, dated September 3, 2003; Anthony J. Benincasa, dated September 3, 2003; Gregg Richter, dated September 3, 2003; L. Jerry L. Jones, dated September 3, 2003; Francis Borriello, dated September 3, 2003; David D. Smith, dated September 3, 2003; Robert H. Dean, dated September 3, 2003; Joseph Szoecs, dated September 3, 2003; E. Eimas, dated September 3, 2003; Curtis G. Thompson, Black Swan Trading, dated September 3, 2003; Tom Harney, dated September 3, 2003; Jim Schmechel, dated September 3, 2003; Tom Fisher, dated September 3, 2003; Andrew Eisenhawer, dated September 3, 2003; David Nemes, dated September 3, 2003; Leland Stevenson, dated September 3, 2003; David Strauss, dated September 3, 2003; Jim Engelken, dated September 3, 2003; Jim Woo, dated September 3, 2003; Marc Poussard, Bae Systems, dated September 3, 2003; William W. Williams, dated September 3, 2003; Steve Sundberg, Software Engineer, General Dynamics Land Systems, dated September 3, 2003; Fang Gu, dated September 3, 2003; Stanley Arron, dated September 3, 2003; Matti Luomanen, dated September 3, 2003; Robert Jinks, dated September 3, 2003; Daniel Torres, dated September 3, 2003; Michael Vilkin, dated September 3, 2003; Harvey Carmel, dated September 3, 2003; Barry Wolfe,

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dated September 3, 2003; Zhenyu Yang, dated September 3, 2003; John Jagerson, CNBCU Personal Trainer, dated September 3, 2003; Roark Janis, dated September 3, 2003; Barry R. Schotz, dated September 3, 2003; Peter Reese, dated September 3, 2003; Chadwick McHugh, dated September 3, 2003; Ray Crews, dated September 3, 2003; Kevin Bates, dated September 3, 2003; Vineet Jain, dated September 3, 2003; Steven K. Gross, Penso Capital Markets, LLC, dated September 3, 2003; Jeffrey S. Hauge, dated September 3, 2003; Harry I. Brown, Jr., dated September 3, 2003; Sai Rao, dated September 3, 2003; J. Mentesseg, dated September 3, 2003; Arthur E. Blossom, dated September 3, 2003; Michael Selbs, dated September 3, 2003; Jeff Schanker, dated September 3, 2003; L.W. Kramer, dated September 3, 2003; William J. Sheppard, dated September 3, 2003; Paul Levin, dated September 3, 2003; André L. Morissette, dated September 3, 2003; Shuowen Yang, dated September 3, 2003; Steve Kragen, dated September 3, 2003; Richard Berry, dated September 3, 2003; Bob Palfreeman, dated September 3, 2003; Anthony P. Matthews, dated September 3, 2003; Zoran Djokic, dated September 3, 2003; Mark Williamson, dated September 3, 2003; Yul Lipner, dated September 3, 2003; Charles Thompson, dated September 3, 2003; Peter Gum, dated September 3, 2003; Harvey Lichterman, dated September 4, 2003; Ronald Scott, dated September 3, 2003; Libero Greco, dated September 3, 2003; Ralph Berry, dated September 3, 2003; Philip Tonne, dated September 3, 2003; Bruce, dated September 3, 2003; David E. Banks, September 3, 2003; Eli Y. Khoury, dated September 3, 2003; Lawrence Soh, dated September 3, 2003; John Davidson, dated September 3, 2003; Paul Feingold, dated September 3, 2003; Matt Kubitsky, dated September 3, 2003; Jesse Principato, dated September 3, 2003; Peter Ritter, dated September 3, 2003; Ron Young, dated September 3, 2003; Peter Zetlin, dated September 3, 2003; Peter Zwag, dated September 3, 2003; Daniel Fitzpatrick, dated September 3, 2003; Rick Westerfield, dated September 3, 2003; Gary Kemp, dated September 3, 2003; Larry Pinkus, dated September 3, 2003; Joel Reingold, dated September 3, 2003; Harald Kempf, dated September 3, 2003; Domenico Ciampa, dated September 3, 2003; Wenhao Li, dated September 3, 2003; Doug Layton, dated September 3, 2003; Jack Scholze, dated September 3, 2003; Doug Churchill, dated September 3, 2003; Bobby Emory, dated September 3, 2003; Richard Phillips, dated September 3, 2003; Bernhard Abmayr, dated September 3, 2003; Gene Liang, dated September 3, 2003; Dvir Langer, dated September 3, 2003; Chin Chin Tan, dated September 3, 2003; James F. Kelly, dated September 3, 2003; Charles M. Steiner, dated September 3, 2003; Joseph Grodsky, dated September 3, 2003; Aaron Zalewski, dated September 3, 2003; Jay Texan, dated September 3, 2003; Mark Rubensohn, dated September 3, 2003; Charles LaPointe, dated Septembér 3, 2003; Martin Rosenblatt, dated September 3, 2003; Dr. Günther Hofbauer, dated September 3, 2003; Dean Huang, dated September 4, 2003; Roger Britton, dated September 4, 2003; N. Kaiser, dated September 4, 2003; Roger Easton, dated September 4, 2003; Kirk Cooley, dated September 4, 2003; Venkatesh Janakiraman, dated September 4, 2003; John Welker, September 4, 2003; David Johnston, Mercury Advertising, dated September 4, 2003; Wayne LaFlamboy, dated September 4, 2003; Joe Milliner, dated September 4, 2003; Ken Peek, dated September 4, 2003; Ron Bliss, dated September 4, 2003; Rong Lin, dated September 4, 2003; Ted Kreuser, dated September 4, 2003; Randy G. Malm, dated September 4, 2003; Jeff Levitt, Director of Research, Stanton Chase International, dated September 4, 2003; Ron Baakkonen, Manager, Electronic Trading & Retail Flow, PEAK6 Investments, LP, dated September 4, 2003; Wayne Chang, dated September 4, 2003; Jerome Ablon, dated September 5, 2003; Tim Crowley, dated September 5, 2003; Eugen, dated September 5, 2003; Paul Fred, CEO PFTC Trading LLC, dated September 5, 2003; Phillip J. Sylvester, dated September 5, 2003; Wilbur Su, dated September 6, 2003; Mike Rouzer, dated September 6, 2003; Bryant Otter, dated September 6, 2003; William Christie, dated September 6, 2003; Spencer Ball, dated September 6, 2003; Neil Lulla, dated September 7, 2003; John Doe, dated September 7, 2003; Mo Soysa, dated September 7, 2003; Grady G. Thomas, Jr., President, The Interstate Group, Division of Morgan Keegan & Co., Inc., dated September 8, 2003; Don Bayne, dated September 8, 2003; Rolf van der Klink, dated September 8, 2003; Andrew W. Lo, dated September 9, 2003; Richard Hallas, dated September 9, 2003; Michael Bock, dated September 9, 2003; Nicholas J. Bonn, Executive Vice President and CFO, State Street Global Markets, LLC, dated September 10, 2003; Stephen D. Barrett, Wainwright Financial Services, dated September 10, 2003; Miguel Ladios, dated September 10, 2003; Stephen Kaelber, dated September 10, 2003; Paul Britton, CEO, MAKO Global Derivatives, LLC, dated September 10, 2003; Simon Lubershane, dated September 10, 2003; Chris Cobb, dated September 10, 2003; Steven Quirk, Saen Options, dated September 10, 2003; Donald W. Pendergast, Jr., dated September 10, 2003; Todd Silverberg, General Counsel, Susquehanna International Group, LLP, dated September 11, 2003; Todd Batiste, dated September 11, 2003; Diane Dowling, dated September 11, 2003; John Colin Jones, dated September 11, 2003; Kenneth M. King, President, K & S Inc., Member Boston Stock Exchange, dated September 11, 2003; John Keazirian, Executive Vice President, Rho Trading Securities, LLC, dated September 11, 2003; Robert E. Shultz, dated September 11, 2003; Simon Yates, Managing Director, Credit Suisse First Boston, dated September 11, 2003; Michael J. Ryan, Jr., Executive Vice President and General Counsel, Amex, dated September 12, 2003 ("Amex Letter 3"); David Weisberger, Managing Director, Citigroup Global Markets Inc., dated September 12, 2003; Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx, dated September 12, 2003 ("Phlx Letter 2"); William Bartlett, Parallax Fund, LP, dated September 12, 2003; Yomo Guiamo, dated September 12, 2003; Mike Ianni, dated September 12, 2003; Dennis Michiels, dated September 12, 2003; Linda M. Sarkisian, President, Sarkisian Securities, dated September 12, 2003; Robert C. Sheehan, Chairman, Electronic Brokerage Systems, LLC, dated September 12, 2003; Michael J. Simon, Senior Vice President and General Counsel, ISE, dated September 12, 2003 ("ISE Letter 2"); Eric Tripp, President, BMO Nesbitt Burns Securities Limited, dated September 12, 2003; Joseph Lombardi, dated September 13, 2003; Mano Appapillai, dated September 14, 2003; Derek Mahar, dated September 14, 2003; Philip D. DeFeo, Chairman and Chief Executive Officer, PCX, dated September 15, 2003 ("PCX Letter 2"); Harvey Bernstein, dated September 15, 2003; Harilaos Mantzoros, Xenos Trading, dated September 15, 2003; Thomas Peterffy, Chairman, Interactive Brokers Group, LLC, dated September 16, 2003; William J. Brodsky, Chairman and Chief Executive Officer, CBOE, dated September 16, 2003 ("CBOE Letter 2"); Andrew Henry, Managing Member, Henry Capital Management, LLC, dated September 16, 2003; Bastiaan van Kempen, Director, Optiver US, LLC, dated September 16, 2003; Steve Verbos, dated September 17, 2003; Craig Hancey, dated September 18, 2003; Allison Brandsma, dated September 19, 2003; Fabrizio J. Fili, dated September 20, 2003; Ralph Winters, dated September 21, 2003; Mary McDermott-Holland, Senior Vice President, Franklin Portfolio Associates, dated September 23, 2003; Lewis P. Dickey, General Partner, Options Unlimited, dated September 24, 2003; James C. Miller III, Chairman, The CapAnalysis Group, LLC, dated September 26, 2003; H. Kaur, dated October 17, 2003; Jeff Sutton, dated December 14, 2003; and Michael J. Simon, Senior Vice President and General Counsel, ISE, dated December 16, 2003 ("ISE Letter 3").

on January 9, 2004, the BSE filed Amendment No. 4 to the proposed rule change, and a written response to comment letters.[11]

This order approves the BSE's proposed rule change, as amended, publishes notice of Amendment No. 4 to the proposed rule change, and grants accelerated approval to Amendment No. 4.

II. Discussion

After careful review of the proposal and consideration of the comment letters, the Commission finds that the proposed rule change to establish trading rules for the BOX facility is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6 of the Act.[12] Specifically, the Commission finds that the proposal is consistent with section 6(b)(5) of the Act,[13] which requires, in part, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

Overall, the Commission believes that approving the BSE's proposal to establish trading rules for the BOX facility should confer important benefits to the public and provide U.S. market participants with a new market in which to trade standardized options. As a fully electronic options market with relatively lower barriers to access,[14]

[11] *See* letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division, Commission, dated January 9, 2004 ("Amendment No. 4"). As discussed below, in Amendment No. 4, the BSE proposes to clarify its rules to address issues raised by commenters, and to make other technical, non-material changes. *See also* letter from George W. Mann, Executive Vice President and General Counsel, BSE, to Jonathan G. Katz, Secretary, Commission, dated Janaury 9, 2004.

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(5).

[14] *See* Securities Exchange Act Release No. 49066 (January 13, 2004) (SR–BSE–2003–17) (Order approving BOX fee schedule ("BOX Fee Approval")).

BOX's entry into the options marketplace may potentially reduce the costs of trading to investors and market professionals, enhance innovation, and increase competition between and among the options exchanges, resulting in better prices and executions for investors. In addition, the BSE has committed to develop and maintain an appropriate system of surveillance and an audit trail.[15]

This discussion does not review every rule and representation made by the BSE that has been filed as part of its proposed rule change; rather, it focuses on the most prominent rules and policy issues considered in review of the BSE's proposal.

A. BOX Is an Options Trading Facility of the BSE

The BSE proposes to establish BOX as an options trading facility of the BSE, a registered national securities exchange. BOX would be operated by Boston Options Exchange Group LLC ("BOX LLC"). One commenter objects to the characterization of BOX as a "facility" of the BSE and asserts that the Commission should require BOX to file an application to register as a national securities exchange under section 6 of the Act.[16]

The Commission believes that the BSE's proposal to establish BOX as its facility[17] is properly filed under section 19(b)(1) of the Act,[18] and that it is not necessary for BOX to register as a national securities exchange independent of the BSE under section 6(a) of the Act.[19] Section 19(b)(1) of the Act requires that every self-regulatory organization ("SRO") file with the Commission copies of any proposed rule or any proposed change to its rules, accompanied by a concise general statement of the basis and purpose of the proposed rule change. The Commission is required to publish notice of the filing of a proposed rule change and to give interested persons an opportunity to submit written data, views, and arguments. Section 19(b)(2) of the Act[20] provides that the Commission shall approve an SRO's proposed rule change if it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the SRO, or disapprove the proposed rule change if the Commission does not make such a finding. In the Commission's view, the BSE's proposal to establish BOX as an exchange facility is consistent with the Act, as well as with previous proposals of national securities exchanges filed under section 19(b) of the Act[21] to use the personnel and equipment of third parties to operate trading platforms.[22]

In addition, the Commission believes that the proposal discussed herein has provided sufficiently detailed information about the trading rules of BOX and that the public has had ample opportunity to comment on the proposal. The BSE proposal was originally published for comment in January 2003 and an amended proposal was published for further comment in August 2003. In the many months that the proposal has been in the public domain, interested persons, including other SROs, broker-dealers, investors, and other market participants have submitted comments on the proposal.

A couple of commenters request that BOX disclose fully the relationship of the founding members and investors of BOX LLC, including their role in the market and governance, and agreements between and among the members and investors or other parties providing critical services to BOX.[23] The Commission notes that the BSE filed separate proposed rule changes addressing these matters, all of which were published for comment.[24]

The Commission further notes that, as a registered exchange, the BSE is required to file an amendment to its Form 1 to reflect the agreements relating to the operation of BOX and BOXR, including a description of its affiliations with other parties, information describing the reporting, clearance, or settlement of transactions in connection with the operation of the facility, and a copy of existing by-laws or corresponding rules and instruments.[25]

B. BOX Market Structure Generally

1. BOX Options Participants

Unlike the existing options exchanges, which have a specialist or primary market maker driven system, BOX would have only one category of members, known as "Options Participants."[26] Only Options Participants would be permitted to transact business on BOX via the BOX Trading Host.[27] The BSE would authorize any Options Participant who meets certain enumerated qualification requirements to obtain access to BOX.[28] An Order Flow Provider ("OFP") may transact business with Public Customers only if it is a member of another national securities exchange or association with which the BSE has entered into an agreement under Rule 17d–2[29] of the Act.[30]

Among other things, Options Participants must be registered as broker-dealers pursuant to the Act and have as the principal purpose of being an Options Participant the conduct of a securities business.[31] Such a purpose would be deemed to exist if and as long as: (1) The Options Participant has qualified and acts in respect of its business on BOX as either an OFP or a Market Maker, or both; and (2) all transactions effected by the Options Participant are in compliance with section 11(a) of the Act[32] and the rules and regulations thereunder.[33] Options

[15] *See* BOX Proposing Release, *supra* note 6.

[16] 15 U.S.C. 78f. *See* CBOE Letter 1, *supra* note 7, at 2–3.

[17] *See* 15 U.S.C. 78c(a)(2) (definition of "facility").

[18] 15 U.S.C. 78s(b)(1).

[19] 15 U.S.C. 78f(a).

[20] 15 U.S.C. 78s(b)(2).

[21] 15 U.S.C. 78s(b).

[22] *See, e.g.*, Securities Exchange Act Release No. 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999) (approval of Phlx's VWAP Trading System); Securities Exchange Act Release No. 39086 (September 17, 1997), 62 FR 50036 (September 24, 1997) (approval of PCX's Application of the OptiMark System). *See also* Securities Exchange Act Release No. 41967 (September 30, 1999), 64 FR 54704 (October 7, 1999) (approval of Nasdaq Application of OptiMark System); Securities Exchange Act Release No. 35030 (November 30, 1994), 59 FR 63141 (December 7, 1999) (approval of Chicago Match System); Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (approval of Archipelago Exchange).

[23] *See* CBOE Letter 1, *supra* note 7, at 3; *see* Amex Letter 3, *supra* note 10, at 1.

[24] *See* Securities Exchange Act Release No. 48650 (October 17, 2003), 68 FR 60731 (October 23, 2003) (Notice of BOX LLC Operating Agreement). The Commission approved the BOX LLC Agreement filing today. *See* Securities Exchange Act Release No. 49067 (January 13, 2004). In addition, the Commission today approved a filing relating to the BSE's proposed transfer to a new options regulatory subsidiary, Boston Options Exchange Regulation LLC ("BOXR"), a Delaware limited liability company and a wholly-owned subsidiary of the BSE, all of the assets and liabilities that solely support the regulation of the standardized equity options trading business of the BSE. Upon this transfer, however, the BSE would continue to be the self-regulatory organization for BOXR and BOX. *See* Securities Exchange Act Release No. 49065 (January 13, 2004) (SR–BSE 2003–04) ("BOXR Delegation Plan Approval Order").

[25] *See* Rule 6a–2 under the Act, 17 CFR 240.6a–2; *see also* Form 1, 17 CFR 249.1.

[26] *See* proposed BOX Rules, Chapter I, sec. 1(a)(40).

[27] *See* proposed BOX Rules, Chapter II, sec. 1(a).

[28] The BSE would not limit the number of qualifying entities that may become Options Participants. However, approval of qualifying applications for Options Participants may be temporarily deferred due to system constraints or capacity restrictions. *See* proposed BOX Rules, Chapter II, sec. 1(d).

[29] 17 CFR 240.17d–2.

[30] *See* proposed BOX Rules, Chapter XI, sec. 1. *See also infra* notes 299–303 and accompanying text for a discussion of Rule 17d–2.

[31] *See* proposed BOX Rules, Chapter II, sec. 2(b), (h); *see also* Amendment No. 4, *supra* note 11.

[32] 15 U.S.C. 78k(a).

[33] *See* proposed BOX Rules, Chapter II, sec. 2(h)(i) and (ii).

Participants may trade options for their own proprietary accounts or, if authorized to do so under applicable law, may conduct business on behalf of Customers.[34]

a. Order Flow Providers

OFPs would be those Options Participants representing Customer Orders[35] as agent on BOX and those non-market maker Participants conducting proprietary trading.[36] OFPs may also register as Market Makers.[37] OFPs may trade as principal, both as contra party to Customer Orders submitted to BOX by such OFP and as contra party to unrelated orders submitted to BOX by other Options Participants.

One commenter expresses concern that BOX's proposal lacks a provision prohibiting an OFP (non-Market Maker) from entering multiple two-sided bids and offers into the system, as principal or agent for the account of the same beneficial owner, in such a manner that the participant or owner is effectively operating as a Market Maker.[38] In Amendment No. 4, BOX responds directly to this concern by proposing a new rule prohibiting an OFP from entering into BOX, as principal or agent, Limit Orders in the same options series, for the account or accounts of the same or related beneficial owners, in such a manner that the OFP or the beneficial owner(s) effectively is operating as a Market Maker by holding itself out as willing to buy and sell such options contract on a regular or continuous basis. In determining whether an OFP or beneficial owner effectively is operating as a Market Maker, BOXR would consider, among other things: Simultaneous or near-simultaneous entry of Limit Orders to buy and sell the same options contract; the acquisition and liquidation of positions in the same options series during the same day; and the entry of Limit Orders at different prices in the same options series.[39] The Commission believes that this provision is consistent with the Act and should help to prevent OFPs from reaping the benefits of market making activities without having any of the concomitant obligations.[40] The Commission also believes that this provision is designed to prevent Customers from acting as unregistered Market Makers.

b. Market Makers

BOX Market Makers are Options Participants registered with the Exchange as Market Makers and approved by BOXR[41] for an appointment in an options class listed on BOX.[42] Registered BOX Market Makers would be designated as specialists on the BSE for all purposes under the Act.[43]

i. Market Maker Qualifications. To become a Market Maker on BOX, an Options Participant is required to register as a BOX Market Maker by filing a written application with BOXR.[44] BOXR will not place any limit on the number of qualifying entities that may become Market Makers.[45]

In addition to registering as a Market Maker, a Market Maker must obtain an appointment in each options class in which it wishes to make a market on BOX. In approving the Market Maker's appointment in a class, BOXR would consider, among other things: (i) The financial and technical resources available to the Market Maker; (ii) the Market Maker's experience, expertise, and past performances in making markets or options trading; and (iii) the maintenance and enhancement of competition among Market Makers in each class of options to which it is appointed.[46]

BOXR may appoint each Market Maker to any options class listed on BOX for trading. Such an appointment would consist of at least one class and may include all classes traded on the Exchange.[47] BOXR would not list an options class for trading unless at least two Market Makers are appointed to the options class.[48] In addition, before BOXR opens trading for any additional series of an options class, it would require at least two Market Makers to be appointed for trading that particular class. Upon appointment, BOXR would require Market Makers to maintain active markets in that class for a period of at least six months.[49]

However, BOXR would not require a Market Maker in a class to continue trading in that class if BOXR makes an affirmative determination that continued trading in that class by a single Market Maker is to the detriment of that Market Maker, of no adverse consequence to an existing Customer of BOX or an Options Participant, and serves no greater purpose in the fair and orderly functioning of the marketplace.[50] BOXR may continue to allow trading in a class opened for trading that subsequently has only one Market Maker appointed, if it makes an affirmative determination that halting of trading in such class would be detrimental to the remaining Market Maker and that continued trading in such class by one Market Maker would be in the interest of maintaining a fair and orderly marketplace and would not create adverse consequences to an existing Customer of BOX or an Options Participant.[51]

BOXR may suspend or terminate any appointment of a Market Maker, make additional appointments, or change the options classes included in a Market Maker's appointment whenever, in BOXR's judgment, the interests of a fair and orderly market are best served by such action.[52]

The Commission finds that the BOX's Market Maker qualification requirements are consistent with the Act, and notes that they are similar to those adopted by other options exchanges.[53]

ii. Market Maker obligations. Market Makers on BOX would be required to electronically engage in a course of dealing for their own account to enhance liquidity available on BOX and

[34] A "Customer" means either a "Public Customer" or a broker-dealer. *See* proposed BOX Rules, Chapter I, sec. 1(a)(19). A "Public Customer" is a person that is not a broker or dealer in securities. *See* proposed BOX Rules, Chapter I, sec. 1(a)(50).

[35] A "Customer Order" means an agency order for the account of either a Public Customer or a broker-dealer. *See* proposed BOX Rules, Chapter I, sec. 1(a)(20).

[36] *See* proposed BOX Rules, Chapter I, sec. 1(a)(46).

[37] BOX Market Makers are Options Participants registered with the Exchange as Market Makers and approved by BOX Regulation ("BOXR") for an appointment in an options class listed on BOX. *See* proposed BOX Rules, Chapter VI, sec. 4(a).

[38] *See* PCX Letter 2, *supra note* 10, at Appendix at 12.

[39] *See* proposed BOX Rules, Chapter V, sec. 17; *see also* Amendment No. 4, *supra note* 11.

[40] *See* proposed BOX Rules, Chapter VI, sec. 5.

[41] As discussed above, BOXR is a wholly-owned subsidiary of the Exchange. *See* BOXR Delegation Plan Approval Order, *supra* note .

[42] *See* proposed BOX Rules, Chapter VI, sec. 4(a). Subject to certain limitations, a Market Maker may enter all order types permitted to be entered by Customers under the BOX Rules to buy or sell options in classes of options listed on BOX to which the Market Maker is not appointed. *See* proposed BOX Rules, Chapter VI, sec. 6(e).

[43] *See* proposed BOX Rules Chapter I, sec. 1(a)(32) and Chapter VI, sec. 1.

[44] *See* proposed BOX Rules, Chapter VI, sec. 1(a).

[45] However, as noted above, *supra* note 28, based on system constraints, capacity restrictions or other factors relevant to protecting the integrity of the BOX Trading Host, BOXR may limit access to the Trading Host for a period to be determined in its discretion. *See* proposed BOX Rules, Chapter VI, sec. 1(c). The BSE would submit any such limitation on access to the BOX Trading Host as a proposed rule change to the Commission for approval pursuant to section 19(b) of the Act. 15 U.S.C. 78s(b).

[46] *See* proposed BOX Rules, Chapter VI, sec. 4(b).

[47] *See* proposed BOX Rules, Chapter VI, sec. 4(a).

[48] *See* proposed BOX Rules, Chapter IV, sec. 5(a).

[49] *See* proposed BOX Rules, Chapter VI, sec. 5(a)(viii).

[50] *See* proposed BOX Rules, Chapter IV, sec. 5(b).

[51] *See* proposed BOX Rules, Chapter IV, sec. 5(c).

[52] *See* proposed BOX Rules, Chapter VI, sec. 4(c).

[53] *See, e.g.*, CBOE Rule 8.3(a); ISE Rule 802(a).

to assist in the maintenance of fair and orderly markets.[54] Among other things, Market Makers would have to satisfy the following responsibilities and duties during trading: (i) Maintain a two-sided market for at least 10 contracts[55] in at least eighty percent (80%) of the options series, for at least ninety percent (90%) of the classes to which the Market Maker is assigned, provided that a Market Maker is quoting at all times in at least sixty percent (60%) of the options series of any class to which the Market Maker is appointed; [56] (ii) participate in the opening; [57] (iii) maintain minimum net capital in accordance with SEC and BOX Rules; [58] and (iv) within three seconds of receiving any Request for Quote ("RFQ"), post or maintain for at least 30 seconds, a valid two-sided quote in a series in a class to which it is appointed.[59] If BOXR found any substantial or continued failure by a Market Maker to meet any of its obligations and duties, BOXR would subject the Market Maker to disciplinary action, suspension, or revocation of the Market Maker's appointment in one or more options classes.[60]

Market Makers receive certain benefits for carrying out their duties. For example, a lender may extend credit to a broker-dealer without regard to the restrictions in Regulation T of the Board of Governors of the Federal Reserve System if the credit is to be used to finance the broker-dealer's activities as a specialist or market maker on a national securities exchange.[61] The Commission believes that a Market Maker must have an affirmative obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis to justify this favorable treatment. In this regard, the Commission believes that BOX's rules are consistent with the Act, as they impose such affirmative obligations on BOX Market Makers.

One commenter states that the quoting obligations of Market Makers were vague in that there could be no quote in the BOX market for an extended period of time.[62] The Commission agrees that under the BSE's proposal certain series may not have continuous quotes disseminated by BOX. Nevertheless, because the definition of "market maker" includes a dealer who holds himself out as being willing to buy and sell a security for his account on a regular or continuous basis,[63] the Commission believes that the obligations imposed by the BOX Rules on Market Makers are consistent with the Act. The Commission also notes that the CBOE Hybrid trading system has market maker obligations comparable to those proposed for BOX and also does not require market makers to quote all series.[64]

2. The BOX Central Order Book ("BOX Book")

a. Types of Orders

There are three types of orders that may be submitted to the BOX Trading Host: a Limit Order, a Box-Top Order, and a Market-on-Opening Order.[65] Where no order type is specified, the BOX Trading Host will reject the order. In addition, there are several specific designations that can be added to Limit Orders or BOX-Top Orders.[66]

i. Order Types. Limit Orders entered into the BOX Book are executed at the stated limit price or better. Any residual volume left after part of a Limit Order has traded is retained in the BOX Book until it is withdrawn or traded (unless a specific designation is added which prevents the untraded part of a Limit Order from being retained). The BOX Trading Host will automatically withdraw all Limit Orders, except for those with a Good "Til Cancelled ("GTC") designation, at market close.[67]

Market-on-Opening Orders entered into the BOX Book are executed on the market opening at the best price available in the market until all available volume on the opposite side of the market has been traded. Any residual volume left after part of a Market-on-Opening Order has been executed is automatically converted to a Limit Order at the price at which the original Market-on-Opening Order was executed. Market-on-Opening Orders have priority over Limit Orders.[68]

BOX-Top Orders entered into the BOX Book are executed at the best price available in the market for the total quantity available. Any residual volume left after part of a BOX-Top Order has been executed is automatically converted to a Limit Order at the price at which the original BOX-Top Order was executed.[69]

One commenter suggests that BOX-Top Orders should continue through the price discovery process instead of being converted to a Limit Order after being partially executed. In addition, this commenter raises a concern that if a BOX-Top Order is converted to a Limit Order and the market moves away from the limit price, the proposal does not specify whether the BOX system would update the order price to the next limit or whether it would remain at the initial limit price. This commenter believes that if the order remains at the initial limit price, it would be negatively impacted.[70]

The Commission believes that the proposal clearly specifies the procedures regarding the handling of BOX-Top orders. Unlike market orders that trade at successive price levels, BOX-Top Orders would execute at the best price available in the market for the total quantity available from any contra side order. Any remaining volume would be automatically converted to a Limit Order at the price that the original BOX-Top Order was executed. This limit price would not change due to market fluctuations. Thus, the Commission does not believe any clarification is necessary regarding BOX-Top Orders. The Commission also believes that brokers who send a Customer's order to BOX as a BOX-Top Order must be sure that such an order type is consistent with that Customer's expectations.

ii. Order Designations

Among several designations that can be added to BOX-Top or Limit Orders [71]

[54] *See* proposed BOX Rules, Chapter VI, sec. 5(a).

[55] *See* proposed BOX Rules, Chapter VI, sec. 6(a).

[56] *See* proposed BOX Rules, Chapter VI, sec. 6(d)(i).

[57] *See* proposed BOX Rules, Chapter VI, sec. 5(a). These quotes must be consistent with the spread parameters in Chapter VI, section 5(a)(vii) of the proposed BOX Rules.

[58] *See* proposed BOX Rules, Chapter VI, sec. 2 and sec. 9, and Chapter XXII, sec. 2.

[59] The term, "RFQ," refers to a message that may be issued by an Options Participant in order to signal an interest in an options series and request a response from other Participants. *See* proposed BOX Rules, Chapter I, sec. 1(a)(54); Chapter VI, sec. 6(b)(ii). *See also* Amendment No. 4, supra note 11. In Amendment No. 4, the BSE changed the RFQ period from 15 seconds to three seconds, in response to concerns raised by commenters.

[60] *See* proposed BOX Rules, Chapter VI, sec. 5(f).

[61] *See* 12 CFR 221.5(c)(6).

[62] *See* PCX Letter 2, *supra* note 10, at Appendix at 12.

[63] *See* 15 U.S.C. 78c(a)(38) (definition of "market maker").

[64] *See* CBOE Rule 8.7, Interpretation .03A.

[65] *See* proposed BOX Rules, Chapter V, sec. 14.

[66] These include a Good "Til Cancelled designation, Fill and Kill designation, Fill-or-Kill designation, and Minimum Volume designation. A Good "Til Cancelled, Fill and Kill, or Fill-or-Kill designation can be added to Limit Orders. A Minimum Volume designation can be added to both Limit Orders and BOX-Top orders. *See* proposed BOX Rules, Chapter V, sec. 14(d).

[67] *See* proposed BOX Rules, Chapter V. sec. 14(c)(i).

[68] *See* proposed BOX Rules, Chapter V, sec. 14(c)(iii).

[69] *See* proposed BOX Rules, Chapter V, sec. 14(c)(ii).

[70] *See* PCX Letter 2, *supra* note 10, at Appendix at 3.

[71] *See* proposed BOX Rules, Chapter V, sec. 14(d)(i)(1)–(3).

is the Minimum Volume ("MV") designation. MV orders would be executed only if the specified minimum volume were immediately available to trade (at the specified price or better in the case of Limit Orders). If the specified minimum volume were not immediately available, the BOX Trading Host would automatically cancel the order. In the case of Limit Orders, where a volume equal to or greater than the specified minimum volume of an MV order trades, the size remaining in an order would be filtered through the BOX National Best Bid and Offer ("NBBO") filter mechanism[72] and placed on the BOX Book. In the case of BOX-Top Orders, where a volume equal to or greater than the specified minimum volume of an MV order has traded, the size remaining in an order would be converted to a Limit Order at the price at which the BOX-Top Order was executed, filtered through the BOX NBBO filter mechanism, and placed on the BOX Book.[73]

One commenter queries how MV orders would be represented, which Options Participants would be able to view them, and how they might be traded-through when the minimum volume cannot be satisfied.[74] In response, in Amendment No. 4, the BSE explains that MV orders would not "lurk" on the book undisplayed. MV orders would either trade immediately for at least the minimum specified size or immediately be cancelled. As noted above, any size remaining in a Limit Order or BOX-Top Order would be protected against trading through better prices on other markets by being filtered through the BOX NBBO filter mechanism.[75]

b. Order Ranking and Display

The BOX Book is the electronic book of orders maintained by the BOX Trading Host. The BOX Book contains all orders of Options Participants. Limit Orders of Options Participants submitted to BOX would be ranked and maintained in the BOX Book according to price/time priority, such that within each price level, all orders would be organized by the time of entry.[76] No distinction is made to this priority with regard to account designation (Public Customer, Broker/Dealer or Market Maker). An Options Participant must submit a new order if it wishes to refresh its order. This new order would be ranked at the specified limit price according to the time that the new order was entered.

Trades would occur when orders or quotations match on the BOX Book. Orders at the same price would have priority based on the time of order entry, as described above.[77] Limit Orders would trade immediately with any orders already in the BOX Book at or better than the limit price, up to the available size.[78] Any size remaining of the Limit Order would be filtered to ensure that it does not trade at a price outside the NBBO[79] before being placed on the BOX Book.

One commenter expressed concern that BOX participants might have the ability to see market information via BOX's internal network on a timelier basis than that information would be provided to OPRA. In particular, the commenter claims that BOX's marketing documents suggest that BOX Options Participants would have faster access to BOX market information than OPRA.[80] BOX represents, however, that it will not provide information in a more-timely manner on its internal network than it will send that information to OPRA.[81]

3. Opening the Market

The BOX market will conduct a single price opening. Orders may be submitted, modified, and cancelled throughout a pre-opening phase preceding the commencement of trading on the market. During this pre-opening phase, Customers may submit only Market-on-Opening or Limit Orders. BOX would calculate a theoretical opening price and broadcast it to all BOX market participants through the pre-opening phase.[82] Thereafter, BOX would determine a single price at which a particular options series would open.[83] The determination of the opening match price in each series of options would be held promptly following the opening of the underlying security in the primary market where it is traded.[84] However, BOXR may delay the opening match in any class of options in the interests of a fair and orderly market.[85]

If the BOX market is crossed (bids higher than offers) at the market open, BOX would determine the price at which the maximum volume can be traded and automatically execute trades accordingly, pursuant to BOX Rules, Chapter V, Sec. 9 (Opening the Market).[86] Any orders executed in this way would be traded at a price equal to or better than that at which they were entered and any untraded bids and offers would remain on the BOX Book.[87]

One commenter asks that BOX clarify how it intends to treat the opening of trading of Market-on-Opening Orders on BOX. This commenter suggests that the use of Market-on-Opening Orders in the opening process seems to imply that BOX would trade at multiple prices during the opening.[88] In Amendment No. 4, the BSE proposes to correct the typographical error in the definition of Market-on-Opening Order to eliminate any implication that BOX would trade at multiple prices during the market opening.[89] Moreover, the BOX Rules specifically state that BOX would determine a single price at which a particular series would be opened.[90]

However, the Commission believes that the proposed rules do not sufficiently describe the procedures for determining the single opening price for an options series on the BOX market. Accordingly, the Commission's approval of the proposed rule change is on the condition that the proposed rule change is not effective until a proposed rule change to amend the BOX Rules to provide a more detailed description of the market opening procedures becomes

[72] *See infra* section II.C for a discussion of the BOX NBBO Filter process.

[73] *See* proposed BOX Rules, Chapter V, sec. 14(d)(i)(4).

[74] *See* PCX Letter 2, *supra* note 10, at Appendix at 3.

[75] *See* Amendment No. 4, *supra* note 11.

[76] *See* proposed BOX Rules, Chapter V, sec. 16(a)(i).

[77] *See* proposed BOX Rules, Chapter V, sec. 16(a)(iv)(2).

[78] *See* proposed BOX Rules, Chapter V, sec. 16(a)(iv)(3).

[79] *See infra* notes 124–135 and accompanying text.

[80] *See* PCX Letter 2, *supra* note 10, at Appendix at 13.

[81] *See* Amendment No. 4, *supra* note 11.

[82] The theoretical opening price is the price at which the opening trades would occur if the opening were to commence at that given moment. *See* proposed BOX Rules, Chapter V, sec. 9(a).

[83] *See* proposed BOX Rules, Chapter V, sec. 9(b).

[84] *See* proposed BOX Rules, Chapter V, sec. 9(c).

[85] *See* proposed BOX Rules, Chapter V, sec. 9(e).

[86] One commenter, responding to the Amendment No. 3 Notice, *supra* note 9, suggests that the proposed uncrossing algorithm to calculate the price at which the maximum volume could be traded was ambiguous. Specifically, the commenter suspects that the uncrossing mechanism employed could select a price at which customers would pay more (sell for less) at one of the uncrossing algorithm-selected prices to the benefit of professionals. *See* PCX Letter 2, *supra* note 10, at Appendix at 3. The Commission notes, however, that the "uncrossing algorithm" referred to in Chapter V, section 16(a)(v) was actually intended as a cross reference to the BOX "opening match," which is discussed in detail under Chapter V, section 9 of the proposed BOX Rules. Therefore, in Amendment No. 4, BSE proposes to change the reference from "uncrossing algorithm" to "opening match" to remove any confusion. *See* Amendment No. 4, *supra* note 11.

[87] *See* proposed BOX Rules, Chapter V, sec. 16(a)(v); *see also* Amendment No. 4, *supra* note 11.

[88] *See* PCX Letter 2, *supra* note 10, at Appendix at 1–2.

[89] *See* proposed BOX Rules, Chapter V, sec. 14(c)(iii); *see also* Amendment No. 4, *supra* note 11.

[90] *See* proposed BOX Rules, Chapter V, sec. 9(b).

effective under section 19(b) of the Act.[91]

4. Unusual Market Conditions

Rule 11Ac1–1 under the Act, known as the "Quote Rule," requires, among other things, that exchanges collect, process, and make available to quotation vendors the best bids and offers which are communicated on the exchange.[92] In addition, each responsible broker or dealer must execute orders presented to it at a price at least as favorable as its best bid or offer in any amount up to the size of that bid or offer, subject to certain exceptions.[93] The BSE has proposed a rule to relieve responsible brokers or dealers from their obligations under the Quote Rule when the level of trading activities or the existence of unusual market conditions is such that the BSE is incapable of collecting, processing, and making available to quotation vendors the data for the option class in a manner that accurately reflects the current state of the market on BOX.[94] An Options Official would have the authority to determine that the level of trading activities or the existence of unusual market conditions is such that BOX is incapable of collecting, processing, and making available to quotation vendors the data for the option class in a manner that accurately reflects the current state of the market on BOX.[95] In such circumstances, an Options Official, an officer of BOXR, would be permitted to: (i) Suspend the minimum size requirement with respect to Market Maker quotations; (ii) turn off the PIP; [96] or (iii) take such other actions as are deemed in the interest of maintaining a fair and orderly market.[97]

The Commission believes that the proposed rule is consistent with the Act and the Quote Rule, and notes that the BSE is required to enforce compliance by its members with the Federal securities laws and the BOX Rules.[98] Accordingly, the Commission expects that the BSE will ensure that sufficient monitoring procedures are in place to fully implement the requirements of the Quote Rule. One commenter suggests that the BSE automate the process of turning off the PIP, described below, when the exchange is relieved of its obligations under the Quote Rule.[99] The Commission does not believe that such automation is required to make the BSE's proposal consistent with the Act and that an Options Official's discretion to turn off the PIP during unusual market conditions is consistent with an exchange official's authority on other options exchanges to take action during unusual market conditions.[100]

5. Complex Orders

A Complex Order is any order for the same account, that is composed of two or more related orders intended to be executed concurrently as part of a single investment strategy, including, among other things, combination orders with non-equity options legs.[101]

One commenter raises the following questions with respect to Complex Orders: (i) Is there a Complex Order Book; (ii) how will Options Participants know of Complex Orders; (iii) will Complex Orders be separately disseminated; (iv) are OFPs required to monitor and execute complex orders like Public Customer PIP Orders ("CPOs"); and (v) does BOX plan to provide separate Exchange staff to monitor Complex Orders and the Complex Order Book? [102]

In Amendment No. 4, the BSE provides further explanation in response to the commenter's questions. The BSE states that there would be a Complex Order Book on BOX, and that BSE's proposal regarding Complex Orders is consistent with the current trading of Complex Orders by the existing options exchanges.[103] Prior to entry of a Complex Order on the Complex Order Book, a BOX Participant would be required to notify BOX of the legs of the strategy it proposes to submit.[104] If the proposed strategy is valid, BOX would send an "advisory" message notifying all BOX Participants of such proposed strategy and the time at which it would start trading.[105] BOX would maintain a listing, accessible to all BOX Participants, of all Complex Order strategies available for trading on BOX. The BSE's proposed rules do not specify the process for BOX Participants to notify BOX of a proposed strategy or the procedures for sending advisory messages. Accordingly, the Commission's approval of this proposed rule change will not be effective until BSE files a separate proposed rule change with the Commission to include these required procedures in its rules that becomes effective pursuant to section 19(b) of the Act.

The BSE further represents that Complex Orders would be submitted, modified, and cancelled like other orders on BOX.[106] The Complex Orders would be separately disseminated by BOX through a broadcast to all BOX Participants showing the five best limit prices for each strategy. Complex Orders would not be disseminated to OPRA. OFPs would not be required to monitor and execute Complex Orders like CPOs. Complex Orders sent to BOX by OFPs would be maintained on the BOX Book and would be automatically executed on a price and time priority basis when a matching Complex Order is received by BOX.

The BSE does not plan to have separate Exchange staff to monitor Complex Orders and the Complex Order Book. The BSE believes that because of the overall integration of the BOX Trading Host, of which the Complex Order trading system is one element, the same staff which monitors the Trading Host and the BOX Book would have the appropriate resources and expertise to monitor Complex Order trading.[107]

Another commenter asserts that the BOX provision appears contrary to price and time priority rules of other options exchanges because an options leg of a transaction would take priority over other orders at the same price.[108] In response, the BSE, in Amendment No. 4, proposes that the option leg of a stock-option order or a SSF-options order would be executed according to price-time priority as set forth in the proposed BOX Rules, Chapter V, Sec. 16. In addition, the BSE proposes that for combination orders with multiple options legs, if the best bid or offer on BOX is a Customer Limit Order, the Complex Order would have priority over any bid or offer in BOX, regardless of time priority, only if at least one leg of the Complex Order trades at a price better than the best price available on BOX.

A third commenter questions whether Complex Orders would interact in the PIP.[109] In response, BSE proposes to

[91] 15 U.S.C. 78s(b).

[92] 17 CFR 240.11Ac1–1(b)(1).

[93] 17 CFR 240.11Ac1–1(c).

[94] *See* proposed BOX Rules, Chapter VI, sec. 6(c)(ii)(2).

[95] *See* proposed BOX Rules, Chapter V, sec. 13(a).

[96] *See infra* section II.E.1 for a description of the PIP.

[97] *See* proposed BOX Rules, Chapter V, sec. 13(b); *see also* Amendment No. 4, *supra* note 11.

[98] *15 U.S.C. 78f(b)(1).*

[99] *See* Amex Letter 2, *supra* note 10, at 5.

[100] *See, e.g.*, ISE Rule 704(c).

[101] *See* proposed BOX Rules, Chapter V, sec. 27(a)(i)–(ix).

[102] *See* Amex Letter 3, *supra* note 10, at 5.

[103] *See, e.g.*, ISE Rule 722.

[104] Telephone conversations between Will Easley, Business Development Manager, BOX, Wayne Peston, Bingham McCutchen, and Elizabeth King, Deborah Flynn, John Roeser, and Susie Cho, Division, Commission on January 7, 2004.

[105] *Id.*

[106] *See* Amendment No. 4, *supra* note 11.

[107] *See* Amendment No. 4, *supra* note 11.

[108] *See* PCX Letter 2, *supra* note 10, at Appendix at 11.

[109] Telephone call between James Harkness, Christopher Gust, Robert Bellick, Matthew Abraham, and Judy Kula, Wolverine Trading, and

Continued

amend its proposed rules to explicitly prohibit Options Participants from submitting Complex Orders either to BOX as Directed Orders or to the PIP.[110]

The Commission believes that the modifications proposed by the BSE in Amendment No. 4 clarify the priority of Complex Orders relative to the Limit Orders of Customers. Specifically, the BSE's modified proposal is now consistent with the rules of other exchanges, regarding the priority of Complex Orders with multiple options legs. Unlike the other options exchanges, the BSE proposes not to provide Public Customer Orders with priority over Complex Orders at the same price, unless such Public Customer Order had time priority. Despite this difference, the Commission finds the proposed BOX Rules relating to Complex Orders to be consistent with the Act.

6. Obvious Error Rule

The BSE proposes to permit BOXR to either break a transaction or adjust the execution price of a transaction that results from an obvious error. Under the proposed rule, an obvious error would be deemed to have occurred when the execution price of a transaction is higher or lower than the theoretical price for the series by an amount equal to at least: $.25 where the theoretical price is below $2; $.40 where the theoretical price is $2–$5; $.50 where the theoretical price is above $5–$10; $.80 where the theoretical price is above $10–$20; and $1.00 where the theoretical price is above $20.[111] If the series is traded on at least one other options exchange, the theoretical price of an options series would be the last bid price with respect to an erroneous sell transaction, and last offer price with respect to an erroneous buy transaction, just prior to the trade, disseminated by the competing options exchange that has the most liquidity in the option. If there were no quotes for comparison purposes, the theoretical price would be determined by the BSE Market Control Center ("MRC").[112] The proposed obvious error rule provides for a procedure whereby an Options Participant may notify the MRC if it believes an order it executed on BOX was the result of an obvious error.[113] A party to the trade that disagrees with the determination of the MRC can appeal the determination to the BOXR Chief Regulatory Officer.[114]

One commenter suggests that BOX should define what it means when it refers to the exchange with the "most liquidity" under the obvious error rule.[115] In response, BOX proposes to amend the rule to describe specifically how it would determine which is the options exchange with the most liquidity.[116]

The Commission believes that, in most circumstances, trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates an "obvious error" may exist, suggesting that it may be unrealistic to conclude that the parties to the trade had come to a meeting of the minds regarding the terms of the transaction. In the Commission's view, the determination of whether such an "obvious error" has occurred should be based on specific and objective criteria and subject to specific and objective procedures. The Commission believes that the BSE's proposed obvious error rule establishes specific and objective criteria for determining when a trade is an "obvious error." The Commission also believes that the proposal establishes specific and objective procedures governing the adjustment or nullification of such trade. The Commission further notes that several provisions of the BOX obvious error rule are substantially the same as the obvious error rule of another options exchange, which was recently approved by the Commission.[117]

7. Cabinet Trading

As originally proposed, the BOX Rules did not contain any provisions with regard to cabinet trades (also known as accommodation liquidations), generally transacted at the expiration of worthless options for tax purposes. One commenter suggests that the BOX proposal should include provisions relating to cabinet trading and how the BSE intends to regulate cabinet trading.[118]

In response, the BSE proposes, in Amendment No. 4, to permit cabinet trading in each series of options contracts open for trading on BOX.[119] The proposed cabinet trading rules are substantially similar to the cabinet trading rules of the other options exchanges [120] and the Commission believes they are consistent with the Act.

8. Anticipatory Hedge Rule

The BSE has not proposed a rule that would prohibit what is known as "anticipatory hedging." All of the options exchanges have anticipatory hedging rules, which generally prohibit a member that has knowledge of all material terms of a solicited order, an order being facilitated, or orders being crossed, the execution of which is imminent, from buying or selling (1) an option on the same underlying security as the option that is the subject of the order, (2) the underlying security itself, or (3) any related instrument until either the terms of the order are disclosed to the trading crowd or the options order can no longer be considered imminent in view of the passage of time since the order was received.[121] The Commission believes that the options exchanges' anticipatory hedging rules prevent the misuse of non-public information and afford trading crowds a full and fair opportunity to make informed trading decisions.[122] In addition, the Commission believes that anticipatory hedging could threaten the integrity of the auction market or disadvantage other market participants.[123] Accordingly, the Commission's approval of this proposed rule change will not be effective until BSE files a separate proposed rule change with the Commission to adopt an anticipatory hedging rule comparable to those of the other options exchanges that becomes effective pursuant to section 19(b) of the Act.

Bob Colby, Elizabeth King, Deborah Flynn, John Roeser, and Susie Cho, Division, Commission, on November 12, 2003.

[110] Proposed BOX Rules, Chapter V, section 27(b)(v); *see also* Amendment No. 4, *supra* note 11.

[111] *See* proposed BOX Rules, Chapter V, sec. 20(b); *see also* Amendment No. 4, *supra* note 11.

[112] *See* proposed BOX Rules, Chapter V, sec. 20(c); *see also* Amendment No. 4, *supra* note 11.

[113] *See* proposed BOX Rules, Chapter V, sec. 20(d); *see also* Amendment No. 4, *supra* note 11.

[114] *See* proposed BOX Rules, Chapter V, sec. 20(e); *see also* Amendment No. 4, *supra* note 11.

[115] *See* PCX Letter 2, *supra* note 10, at Appendix at 10.

[116] *See* proposed BOX Rules, Chapter V, sec. 20, Supp. Mat. .03; *see also* Amendment No. 4, *supra* note 11.

[117] *See* ISE Rule 720; *see also* Securities Exchange Act Release No. 48097 (June 26, 2003), 68 FR 39604 (July 2, 2003) (SR–ISE–2003–10) (order approving amendments to ISE's obvious error rule).

[118] *See* PCX Letter 2, Appendix at 13.

[119] *See* proposed BOX Rules, Chapter V, sec. 28; *see also* Amendment No. 4, *supra* note 11.

[120] *See, e.g.*, ISE Rule 718; CBOE Rule 6.54; and PCX Rule 6.80.

[121] *See* Amex Rule 950(d), Commentary .04; CBOE Rule 6.9(e); ISE Rule 400, Supplementary Material .02; PCX Rule 6.49(b); and Phlx Rule 1064(d).

[122] *See* Securities Exchange Act Release No. 44208 (April 20, 2001), 66 FR 21423 (April 30, 2001) (SR–ISE–01–02).

[123] *See* Securities Exchange Act Release Nos. 42894 (June 2, 2000), 65 FR 36850 (June 12, 2000) (SR–Amex–99–36); and 34959 (November 9, 1994), 59 FR 59446 (November 17, 1994) (SR–CBOE–94–15).

C. Filtering of BOX In-Bound Orders To Prevent Trade-Throughs

All in-bound agency orders to BOX (whether on behalf of Customers, non-BOX Participant broker-dealer proprietary accounts or market makers at other exchanges) as well as inbound Principal ("P") and Principal as Agent ("P/A") orders received via the intermarket linkage [124] would be filtered by BOX prior to entry on the BOX Book to ensure that these orders do not trade at a price outside the current NBBO ("trade-throughs"). The filter would operate by analyzing all such orders as follows:

Step 1: If the order were a BOX-Top Order, BOX would handle the order in the following manner:

Where the best price on the BOX Book on the opposite side of the market from the BOX-Top Order is equal to the NBBO, the BOX-Top Order would be executed for all the quantity available on the BOX Book at this price. Any remaining quantity would be converted to a Limit Order at this execution price and filtered as described in steps 2 through 4 below.[125]

If the best bid (offer) disseminated by BOX were not equal to the NBBO, the BOX-Top Order to sell (buy) would be converted to a Limit Order for its total quantity at a price equal to the NBBO and filtered as described in steps 2 through 4 below.[126]

Step 2: The filter would determine whether the order is executable against the NBBO.[127] If the order were not executable against the NBBO, the order would be placed on the BOX Book at its limit price, unless the order were a P or P/A Order, in which case it would be immediately cancelled.[128] If the order were executable against the NBBO, the filter would determine whether there is a quote on BOX that is equal to the NBBO.

Step 3: If there were a quote on BOX that is equal to the NBBO, then the order would be executed against that quote. Any remaining quantity of the order would be exposed on the BOX Book at the price the order was partially executed for a period of three seconds. During the exposure period, any Options Participant may trade with the order. If the order were not executed during the three-second exposure period, then the order would be handled by BOX pursuant to Step 4 below.[129]

With respect to P and P/A Orders in which the size of a P/A Order is larger than the Firm Customer Quote Size or the size of a P Order is larger than the Firm Principal Quote Size, and any quantity remains after trading against the BOX quote at the NBBO, then such remaining quantity would be exposed on the BOX Book at the price the order was partially executed for a period of three seconds. During the exposure period, any Options Participant may trade with the order. Any quantity remaining on the BOX Book after the three-second exposure period would be cancelled. BOX would inform the sending Participant exchange of the amount of the order that was executed and the amount, if any, cancelled.[130]

If there were not a quote on BOX that is equal to the NBBO, then the order, unless such order is a P or P/A Order, would be exposed on the BOX Book at the NBBO for a period of three seconds. During the exposure period, any Options Participant may trade with the order. If the order were not executed during the three-second exposure period, then the order would be handled by BOX pursuant to Step 4 below.[131] However, if the order were a P or P/A Order, it would not be exposed for the three-second period and, instead, would be immediately cancelled.

Step 4: At the end of the three-second exposure period, any unexecuted quantity of an order would be handled by BOX in one of the following ways:

(1) If the best BOX price were now equal to the NBBO, the remaining unexecuted quantity would immediately trade with that quote or order. Any remaining quantity would be (i) in the case of a Public Customer Order, sent as a P/A Order to an exchange displaying the NBBO; or (ii) in the case of a market maker or proprietary broker-dealer order, returned to the submitting Options Participant; [132]

or

(2) If the best BOX price is not equal to the NBBO, then any remaining unexecuted quantity would be (i) in the case of a Public Customer Order, sent as a P/A Order to an exchange displaying the NBBO; or (ii) in the case of a market maker or proprietary broker-dealer order, returned to the submitting Options Participant.[133]

One commenter asks for more clarity regarding which BOX participants will be able to view the internal message disseminating the in-bound order in the BOX filter.[134] The Commission does not agree with the commenter that the BOX Rules are unclear with respect to order exposure on the BOX book during the filter process, as the proposed rules state that the order would be exposed on the BOX Book.[135]

The Commission believes that the proposed rules regarding the NBBO filter process are in accordance with Section 6(b)(5) of the Act [136] because they are designed to facilitate transactions in securities, and remove impediments to and perfect the mechanism of a free and open market and national market system. The NBBO filter is designed to protect against incoming agency orders trading at prices that trade through better prices on other markets as required under the Linkage Plan.[137] In addition, the Commission believes that the BOX NBBO filter rules outlined above should allow Market Makers and OFPs to provide efficient and competitive executions for in-bound agency orders, subject to priority and allocation principles.

D. Directed Orders Process

Under BSE's proposal, a "Directed Order" refers to a Customer Order that an OFP directs to a particular Market Maker.[138] A Market Maker who wishes to accept Directed Orders must systemically indicate that it wishes to receive Directed Orders each day, must be willing to accept Directed Orders from all OFPs, may receive Directed

[124] Plan for the Purpose of Creating and Operating an Intermarket Options Linkage (the "Linkage Plan"). *See* Securities Exchange Act Release Nos. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (order approving the Linkage Plan submitted by the Amex, CBOE, and ISE); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000) (order approving PCX as participant in Options Intermarket Linkage Plan); and 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) (order approving Phlx as participant in the Linkage Plan).

[125] *See* proposed BOX Rules, Chapter V, sec. 16(b)(ii)(1).

[126] *See* proposed BOX Rules, Chapter V, sec. 16(b)(ii)(2).

[127] The BSE has clarified in Amendment No. 4 that an order would be deemed "executable against the NBBO" when, in the case of an order to sell (buy), its limit price is equal to or lower (higher) than the best bid (offer) across all options exchanges. All BOX-Top Orders are deemed to be executable against the NBBO. *See* Amendment No. 4, *supra* note 11.

[128] *See* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(1); *see also* Amendment No. 4, *supra* note 11.

[129] *See* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(2)(a); *see also* Amendment No. 4, *supra* note 11.

[130] *Id.*

[131] *See* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(b); *see also* Amendment No. 4, *supra* note 11.

[132] *See* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(c)(1); *see also* Amendment No. 4, *supra* note 11.

[133] *See* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(c)(2); *see also* Amendment No. 4, *supra* note .

[134] *See* PCX Letter 2, *supra* note, at Appendix at 4.

[135] *See* proposed BOX Rules, Chapter V, sec. 16(b); *see also* Amendment No. 4, *supra* note 11.

[136] 15 U.S.C. 78f(b)(5).

[137] *See infra* notes 282–289 and accompanying text.

[138] *See* proposed BOX Rules, Chapter I, sec. 1(a)(21); *see also* Amendment No. 4, *supra* note 11.

Orders only through the BOX Trading Host, and may not reject Directed Orders.[139]

A Market Maker receiving a Directed Order would have to, within three seconds of receipt of the order, either submit the Directed Order to the PIP, discussed below,[140] or send the order to the BOX Book.[141] If the Market Maker submits the order to the PIP and is quoting at the NBBO on the opposite side of the Directed Order, it would be prohibited from changing its quotation prior to submitting the Directed Order to the PIP.[142] If the Market Maker sends the Directed Order to the BOX Book (or BOX releases the order to the book) the following rules would apply.

First, the Market Maker sending the Directed Order to the BOX Book would be prohibited for three seconds from submitting to BOX a contra order to the Directed Order for its proprietary account.[143] This requirement would allow the Directed Order to be exposed to other market participants to give them the opportunity to trade with the Directed Order.

Second, if the Market Maker's quotation on the opposite side of the market from the Directed Order is not equal to the NBBO, immediately upon the submission of the Directed Order to BOX, the Trading Host would determine if the Directed Order is executable against the NBBO according to the NBBO filter process discussed above.[144] If the Market Maker's quotation on the opposite side of the market from the Directed Order were equal to the NBBO, then prior to submitting the Directed Order to the BOX Book, the Market Maker would determine whether the Directed Order is executable against the NBBO.[145]

Third, if the Directed Order were not executable against the NBBO, it would be placed on the BOX Book to be treated as any other order.[146] If the Directed Order were executable against the NBBO, and the Market Maker sending the Directed Order to the BOX Book has a quote on the opposite side of the Directed Order equal to the NBBO, then the Market Maker must guarantee execution of the Directed Order at the current NBBO for at least the size of its current quote.[147] This guarantee would be defined as a Guaranteed Directed Order ("GDO").[148] The Market Maker must then immediately send the Directed Order and the GDO to the BOX Book. If the Directed Order were executable against the NBBO and the Market Maker sending the Directed Order to the BOX Book does not have a quote on the opposite side of the market equal to the NBBO, the Trading Host would execute the Directed Order against any quotes or orders on the BOX Book equal to the NBBO and then filter the order against trading through the NBBO and, if applicable, then place the Directed Order on the BOX Book.[149] The Directed Order would trade against any quotes or orders on the BOX Book, except the GDO,[150] and any quantity remaining would be exposed to all BOX Participants at the GDO price for three seconds. During this period, any BOX Participant, except the Market Maker who submitted the Directed Order, could trade with the Directed Order.[151] After three seconds of exposure, BOX would release the GDO, which would trade with any remaining quantity of the Directed Order.[152] If there were still any quantity remaining of the Directed Order, it would be filtered against trading through the NBBO according to the procedures described above. If the Directed Order were not executed or routed to another exchange through the filter process, it would then be placed on the BOX Book.[153]

Some commenters argue that the Directed Order process amounts to preferencing or internalization by the Market Makers, which would threaten market integrity.[154] In addition, some commenters contend that Directed Orders would allow payment for order flow, an arrangement where a Market Maker would offer an order entry firm cash or other economic inducement to route its Directed Orders to that firm.[155]

The Commission believes, however, that the proposed restrictions on Market Makers receiving Directed Orders described above should limit the Market Maker's ability to internalize these orders without undermining competitive markets. In particular, the Commission believes that the Directed Order process will not jeopardize market integrity or the incentive for market participants to post competitive quotes because Market Makers receiving Directed Orders must accept all orders directed to them and must send such orders only to the PIP or to the BOX Book, and because a Market Maker is prohibited from interacting with a Directed Order it receives for three seconds, regardless of the price at which the Market Maker was quoting when the Directed Order was received.

One commenter suggests that the BSE's proposal would penalize Market Makers that quote at the NBBO because, if the Market Maker that receives the Directed Order were quoting at the NBBO at the time it receives the Directed Order, it would be required to couple the Directed Order with a GDO, guaranteeing the execution of the Directed Order at the then-current NBBO for at least the size of the Market Maker's quotation.[156] Moreover, the Market Maker's quotation loses any priority it may have had at the NBBO because its GDO is not released for the three-second exposure period, and the Market Maker would trade only when all other trading interest is exhausted.[157] Also, this commenter argues that the proposed BOX market would provide a strong incentive to maintain wide quotations and to quote in small size because, among other things, Market

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[139] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(i); *see also* Amendment No. 4, *supra* note 11. If a Market Maker does not systemically indicate that it will receive Directed Orders, the BOX Trading Host will not forward any Directed Orders to that Market Maker.

[140] *See infra* notes 169–252 and accompanying text.

[141] If, three seconds after receipt of a Directed Order, a Market Maker has not taken any action on the Directed Order, BOX will automatically release the Directed Order to the BOX Book. *See* proposed BOX Rules, Chapter VI, sec. 5(c)(ii)(2); *see also* Amendment No. 4, *supra* note 11.

[142] *See* proposed Box Rules, Chapter VI, sec. 5(c)(ii)(1); *see also* Amendment No. 4, *supra* note 11.

[143] *See* proposed BOX Rules, Chapter VI, secs. 5(c)(iii)(2)(a) and 5(c)(iii)(1)(a); *see also* Amendment No. 4, *supra* note 11. According to the BSE, BOX surveillance systems would detect violations of the three-second requirement. *See* Amendment No. 4, *supra* note 11.

[144] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(1). See also *supra* notes 124–137 and accompanying text.

[145] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2).

[146] *See* proposed BOX Rules, Chapter VI, secs. 5(c)(iii)(1)(b) and 5(c)(iii)(2)(a).

[147] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2)(b).

[148] The Market Maker would be prohibited from trading from its proprietary account against the Directed Order for at least three seconds. During that time the Market Maker would not be allowed to decrement the size or worsen the price of its GDO, but could increase the size of its GDO. If the Market Maker received a subsequent Directed Order during this three-second period it would be able to either submit it to the PIP or send it to the BOX Book, following the same process as for the first Directed Order. *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2)(b).

[149] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(1)(c).

[150] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2)(b)(2).

[151] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2)(b)(3).

[152] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2)(b)(4). Unless modified by the Market Maker, BOX would reestablish the quote of the Market Maker decremented by any executed portion of the GDO. *Id.*

[153] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(2)(b)(5).

[154] *See* Amex Letter 3, *supra* note 10, at 4–5; ISE Letter 2, *supra* note 10, at 10.

[155] *See* Amex Letter 3, *supra* note 10, at p. 4; CBOE Letter 2, *supra* note 10, at p.9; and ISE Letter 2, *supra* note 10, at p. 9.

[156] *See* ISE Letter 2, *supra* note 10, at 12.

[157] *Id.*

Makers could receive Directed Orders from small Customers—the most attractive order flow available—regardless of the quality of their quotations.[158] Finally, the commenter argues that the Commission should permit Directed Orders only if the proposal would: (1) Prohibit sending Directed Orders to a Market Maker not quoting at the inside market; and (2) prohibit an OFP from sending Directed Orders to a Market Maker for a size larger than the Market Maker's then-current quotation.[159]

The Commission, however, does not believe that it is necessary for these restrictions to be included in the BOX Rules to be consistent with the Act. In response to the other comments raised by this commenter, the BSE has changed its proposal to clarify that a Market Maker, who receives a Directed Order when not quoting at the NBBO, as well as when quoting at the NBBO, would have to wait three seconds before trading with the Directed Order.[160] This provision would allow the Directed Order to be exposed to other market participants to give them the first opportunity to trade with the Directed Order. Accordingly, the Commission believes that the Directed Order process would not provide any disincentive for Market Makers who receive Directed Orders to quote competitively, and may, in fact, provide some incentive for other Market Makers to quote competitively because it will give them priority with respect to all other orders entered onto the BOX Book, including orders directed to other Market Makers.

Currently, the rules of several of the SROs impose certain restrictions on the business activities of a member or member organization that is affiliated with a specialist or member organization. The requirements in the BOX Rules regarding Directed Orders are intended to address any concerns regarding informational barriers and the transfer of information (intended or not) between Options Participants. To this effect, as noted above, under the BOX Rules, a BOX Market Maker who decides to accept Directed Orders, must agree to accept them from all sources. Upon receipt of a Directed Order, a Market Maker has only two choices—either submit the order into the PIP, or send the order back to the BOX Book.

The BSE has proposed a number of safeguards designed to limit the disclosure of market information, the description of which follows in section II.E. These proposed measures should help to ensure that information is not used inappropriately for the benefit of the Market Maker receiving the Directed Order.

E. Rules To Limit Internalization

Following the widespread multiple listing of options in the fall of 1999, a number of broker-dealers handling customer orders pressured the options exchanges to allow them to trade with their customer orders. In addition, some specialists began paying broker-dealers to send them their customer orders, and sought greater guarantees that specialists could trade with these and other orders. In response to these pressures, member firms have been given increased opportunities (both by exchange rule and floor practice) to trade with (or internalize) the customer orders they bring to an exchange. While all of these practices were a response to greater competition between markets, they also raise structural issues because of their potential to decrease quote competition. As more customer orders are retained by a specialist or the firm that brought the order to the exchange, and therefore are unavailable to other members who are competing for orders based on price, these other members could have less incentive to compete by offering better prices on an exchange, and price competition may suffer. Eventually, if particular exchange members lock up too great a share of customer orders, the number of competing market makers within the market could diminish, and with them, active or potential intramarket price competition.

As a result, the disseminated quotations, and the prices available on a market, could deteriorate ultimately harming investors. Moreover, because a firm can profit by internalizing its customers' orders while matching the best displayed quotes, rules that guarantee firms a right to trade with some or all of their own customers' orders may interfere with a broker-dealer seeking better prices that might be available in the market. For this reason, the Commission has closely scrutinized proposals by exchanges to guarantee specialists a proportion of orders traded on an exchange[161] and to guarantee that firms bringing their customers' orders to an exchange can trade with a certain proportion of those orders.

Several commenters express concern that the BOX proposal would encourage internalization[162] more than any other exchange[163] and would lead to a "slippery slope" or "race to the bottom" as other exchanges modify their market models to compete with BOX.[164] The Commission is keenly concerned about the issues raised by internalization in the options markets, and has been particularly vigilant with respect to proposed rule changes that would permit broker-dealers to internalize their customers' orders in a manner that could interfere with order interaction and discourage the display of aggressively-priced quotations. Indeed, the Commission is disinclined to approve not only those proposals by options exchanges that would guarantee broker-dealers the ability to internalize a significant portion of their own customers' orders, but also those proposed rule changes that would guarantee a large percentage of each customer order to *any* market participant. The Commission is concerned that such proposals may lock

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[158] *Id.*

[159] *See* ISE Letter 2, *supra* note 10, at 6, 10.

[160] *See* proposed BOX Rules, Chapter VI, sec. 5(c)(iii)(1)(a); *see also* Amendment No. 4, *supra* note 11.

[161] All five existing options exchanges have rules that guarantee a specialist a proportion of each order when its quote is equal to the best price on the exchange. *See, e.g.*, Amex Rule 933(h); CBOE Rule 8.87; ISE Rule 713, Supplementary Material .01; Phlx Rule 1014(g), and PCX Rule 6.75(f)(4). These guarantees are special allocation provisions that differ from the general rules of the exchanges that assign executions based on priority, parity, nad precedence. Specialist guarantees reward market making firms willing to perform the obligations of a specialist by ensuring them that they will be able to interact as principal with a certain percentage of incoming orders. The Commission has generally found specialist guarantees to be consistent with the Act as a reasonable means for an exchange to attract and retain well-capitalized specialists that are responsible for assuring fair and orderly markets and fulfilling other responsibilities. The Commissioner has more closely scrutinized proposals, however, where the percentage of specialist participation would rise to a level that could have a material adverse impact on quote competition within a particular exchange. *See, e.g.*, Exchange Act Release No. 4311 (July 31, 2000), 65 FR 48778 (August 9, 2000) (Phlx's "80/20" proposal, which the exchange ultimately withdrew, would have increased its enhanced specialist participation to 80% for certain options orders) ("Phlx 80/20 Note"). In particular, the Commission is concerned that large specialist guarantees could significantly discourage intramarket price competition by "locking up" such a large proportion of each order that market makers in the crowd would be seriously hindered in their ability to compete with the specialist. Over the long-term, the decrease in intraexchange competition could widen spreads and diminish the quality of prices available to investors. *Id.*

[162] "Internalization" is generally known as the direction of order flow by a broker-dealer to an affiliated specialist or order flow executed by that broker-dealer as principal. *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) at n.22 (File No. S7–30–95).

[163] *See* Amex Letter 3, *supra* note 10, at 2; CBOE Letter 2, *supra* note 10, at 1; ISE Letter 2, *supra* note 10, at 1; PCX Letter 2, *supra* note 10, at 2; and Phlx Letter 2, *supra* note 10, at 2.

[164] *See* CBOE Letter 2, *supra* note 10, at 2–3; ISE Letter 2, *supra* note 10, at 1–3, and PCX Letter 2, *supra* note 10, at 2.

away so much of each order that crowd members will no longer have an incentive to compete. To evaluate those comments contending that the BSE's proposal would encourage internalization more than existing options exchanges, it is necessary to first consider the level of internalization permitted on the other options exchanges.

As the options markets began to more aggressively list multiply list the most active options, the options exchanges adopted rules that allowed upstairs firms more rights to participate in certain customer orders they bring to the exchanges. For example, the ISE adopted a rule that permits upstairs firms to interact as principal with up to 40% of orders of 50 contracts or more that the firm presents to the exchange after an auction and other conditions are satisfied.[165]

In response to the ISE's "facilitation" rule, each of the other options exchanges adopted similar rules.[166] While certain provisions of the exchanges' facilitation guarantees vary,[167] to qualify for the guarantee all require the facilitation orders to be at least 50 contracts and the guarantee is limited to 40% of the contracts in each order. In addition, the options exchanges' rules permit a firm to trade with its own customer only after an auction in which other members of that market have an opportunity to participate in the trade at the proposed price or to improve the price. An auction prior to permitting a firm to internalize any portion of its customer's order gives some assurance that the price at which the trade takes place is the best price then available in the market. Moreover, if both a specialist and an upstairs firm would be entitled to a guarantee with respect to the same trade, the exchanges' rules do not permit the combined guarantee of the two firms to exceed 40% of the contracts to be traded, thereby allowing the trading crowd to compete for at least 60% of any order.[168] Of course, if members of the trading crowd are unwilling to trade with a particular order, the upstairs firm may internalize the entire order.

1. PIP Auction

The BOX Rules provide for an auction process, known as the PIP, which can be used by Options Participants seeking to execute their agency orders as principal. With certain exceptions, an Options Participant is not otherwise permitted to trade with its agency orders.[169] In addition, prior to submitting an order to the PIP, an OFP cannot inform an Options Participant or any other third party of any of the terms of the order, except as provided for in the BOX Rules regarding Directed Orders.[170]

The PIP features these key aspects:

- An Options Participant may submit any size Customer Order[171] for price improvement into the PIP, along with a matching contra order for the Options Participant's proprietary account at a price of at least one penny better than the prevailing NBBO at the commencement of the PIP (the "Primary Improvement Order").[172] The Primary Improvement Order may not be cancelled or modified, except by improving its price. Thus, the Customer Order is guaranteed an execution at a price at least one penny better than the NBBO.
- Market Makers assigned to the class, Options Participants with proprietary orders at the BOX inside bid or offer for the particular series ("PPOs"),[173] CPO[174] and the Options Participant who submitted the Primary Improvement Order may compete to trade with the Customer Order in one-penny increments during a three-second auction. These market participants can enter competing Improvement Orders[175] at penny increments to match or improve the price of the Primary Improvement Order. All other BOX Participants are informed of each PIP and may submit competing orders at standard price increments.
- The trade is allocated based on price and time priority at the end of the PIP, with certain exceptions. Specifically, Public Customer Orders and non-BOX Participant broker-dealer orders would have priority over any order of an OFP at the same price. In addition, Public Customer Orders would have priority over an unmodified Primary Improvement Order for the account of a Market Maker at the same price, and would have priority over a modified Primary Improvement Order for the account of a Market Maker that matches such Public Customer Orders.
- Because the execution of the Customer Order is guaranteed at the start of the PIP, the Customer Order has priority over all other orders on its side of the market that are entered on the BOX Book during the PIP.

The Commission finds that the PIP, as part of the BOX facility, is consistent with section 6(b)(5) of the Act. In general, the Commission believes that the proposed BOX Rules provide comparable limitations on internalization as the other exchange's rules that guarantee members the right to internalize their customers' orders. In particular, the BSE's proposal would require a firm to expose its customer order in the PIP before trading with that order.

As discussed below, the Commission believes that the three-second electronic auction proposed by the BSE should provide sufficient time for an electronic crowd to compete for a Customer Order. Moreover, the Commission believes that the access to the PIP by those who may wish to compete for a Customer Order is sufficient to provide opportunities for a meaningful, competitive auction. In fact, the Commission believes, as discussed below, that the BSE's proposal provides an opportunity for a

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[165] *See* Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (Order approving registration of the ISE as a national securities exchange) (ISE Exchange Approval Release"). ISE's rules permit upstairs firms to enter orders of 50 contracts or more into the facilitation mechanism. Upon entry of an order into the facilitation mechanism, ISE sends a broadcast to crowd participants informing them of the proposed transaction, and the crowd is given ten seconds to respond. The upstairs firm entering the facilitation order will be allocated 40% of the original size of the facilitation order, but only after better-priced orders, quotes, and public customer orders at the facilitation price are executed. *See* ISE Rule 716(d).

[166] *See* Securities Exchange Act Release Nos. 42835 (May 26, 2000), 65 FR 35683 (June 5, 2000); 42848 (May 26, 2000), 65 FR 36206 (June 7, 2000); 42894 (June 2, 2000), 65 FR 36850 (June 12, 2000); and 47819 (May 8, 2003), 68 FR 25924 (May 14, 2003) (orders approving, respectively, File Nos. SR–CBOE–99–10; SR–PCX–99–18; SR–AMEX–99–36; and SR–PHLX–2002–17).

[167] For example, some of the exchanges' rules allow an upstairs firm to participate in an order even when it does not improve upon the price offered by the trading crowd. CBOE's Rule 6.74(d) is illustrative. If an upstairs firm chooses a facilitation price that matches the price offered by the trading crowd, the firm can participate in up to 20% of the facilitated order, whereas if it improves the trading crowd's price, its participation right rises to 40%. In either case, public customer orders must first be satisfied prior to the upstairs firm's participation in the facilitated order. *See* Exchange Act Release No. 42835, 65 FR 35683 (May 26, 2000) (order approving SR–CBOE–99–10).

[168] See Phlx 80/20 Notice, *supra* note , 65 FR at 48786.

[169] *See* infra notes 253–259—and accompanying text; proposed BOX Rules, Chapter V, sec. 17, Supplementary Material .03. *See* also Amendment No. 4, *supra* note 11.

[170] *See* proposed BOX Rules, Chapter V, sec. 17, Supplementary Material .04; see also Amendment No. 3, *supra* note 8.

[171] There would be no minimum size requirement for orders entered into the PIP, for a pilot period to extend eighteen months from the day trading commences on BOX. See proposed BOX Rules, Chapter V, sec. 18, Supplementary Material .01.

[172] *See* BOX Rules, Chapter V, sec. 18(e).

[173] See infra notes 199–201—and accompanying text.

[174] *See* infra notes 189–198—and accompanying text.

[175] An Improvement Order is any order entered by a Market Maker assigned to the class, a CPO, or a PPO priced at or better than the Options Participant's Primary Improvement Order. *See* proposed BOX Rules, Chapter V, sec.18(e)(i)–(ii).

greater number of market participants to compete in a PIP than current exchanges provide. The Commission believes that the only significant distinctions between the BSE's proposed PIP auction and the rules of other options exchanges that guarantee members the right to internalize customers' orders, is that orders of fewer than fifty contracts could be entered into the BOX PIP[176] and trades could take place in pennies,[177] whereas other exchanges' rules do not guarantee that members will be able to trade with such small-sized customer orders and require that trades all be in standard increments. The Commission discusses below the features of the BSE's proposal that it believes make these distinctions consistent with the Act.

a. Three Market Maker Requirement

There must be at least three Market Makers quoting in a relevant series at the time an Options Participant submits its Customer Order and Primary Improvement Order to initiate a PIP.[178] The Commission believes that this requirement will improve the opportunity for a Customer Order to be exposed to a competitive auction, and represents an improvement over current exchange auction rules. Specifically, current exchange rules that permit members to internalize their customers' orders do not require any market makers (other than a specialist) to be quoting in a series before a member trades with its customer.

b. Three-Second PIP

The BSE proposes that the duration of each PIP be 3 seconds, unless it concludes sooner due to the receipt on BOX of an unrelated order on the same side of the market as the Customer Order (such that it would cause an execution to occur).[179] In cases where an executable unrelated order on the same side as the Customer Order is submitted to BOX during a PIP, such that it would cause an execution to occur before the end of the three-second PIP, the PIP would conclude and the Customer Order would be matched with the Improvement Order(s) to the fullest extent possible.[180]

Some commenters criticize the proposed time period of the auction, arguing that the three-second PIP would favor highly capitalized firms with faster technology over smaller market participants.[181] Critics also argue that the three-second PIP would permit more internalization because orders are exposed to the market for only a very short period of time and many market participants, including CPOs, would be unable to assess their risks and market conditions in 3 seconds.[182] Another commenter contends that the PIP would afford the initiating Options Participant a "last look" to match the last price and take priority.[183]

The Commission believes that a three-second PIP should afford electronic crowds sufficient time to compete for Customer Orders submitted by an Options Participant. In reaching this conclusion, the Commission believes that the timeframes necessary for exposure and execution of orders be adjudged in light of the BOX market structure. The Commission believes that the critical issue is determining whether the three-second timeframe gives participants in a fully automated marketplace sufficient time to respond to a PIP broadcast to compete and provide price improvement for Customer Orders, and that electronic systems are available to BOX Options Participants that would allow them to respond to PIP broadcasts in a meaningful way within the proposed timeframe. The Commission notes that Market Makers and OFPs can either develop their own software to manage trading on BOX, or utilize one of the many front-end solutions that have been written to connect with electronic-based exchanges. All Options Participants should have the opportunity to develop or avail themselves of such systems, and although these automated systems will entail additional costs, the markets for derivative products are by their nature automation-intensive, and require a higher capital base than for other simpler financial products.

With respect to the comments that BSE's proposal would permit greater internalization due to the relatively short duration of the PIP, the Commission believes that the ability of Market Makers and other Options Participants on BOX to electronically monitor for PIP broadcasts, and to program competitive responses based on pre-set parameters, should provide a fair opportunity and incentive to compete for Customer Orders submitted to the PIP. Moreover, the Commission believes that one important difference between the BSE's proposed PIP and floor-based markets is that the BOX Options Participants do not know the identity of the Options Participant that submitted the Customer Order to the PIP. Accordingly, like the ISE's Facilitation Mechanism, the automated, non-personal nature of BOX's PIP provides no opportunity for agreements between the facilitating firm and the trading crowd whereby, for example, the trading crowd agrees not to break up a firm's proposed facilitation in exchange for that firm's agreement to bring order flow to the exchange.[184] Moreover, the PIP provides for price priority and competing Market Makers are entitled to an execution of some portion of the Customer Order even when the facilitating firm matches the Market Maker at the best quote at the conclusion of the PIP. In addition, the Options Participant who has submitted its Customer Order into the PIP does not have an opportunity for a "last look" to match the prices bid or offered during the PIP. The Commission believes that these features should limit internalization, while encouraging Options Participants to submit their most competitive orders/quotes first, before the PIP ends. Accordingly, the Commission believes that a three-second PIP is consistent with the Act.

c. Competition in the PIP

In addition to the Options Participant that submitted the Customer Order and Primary Improvement Order, all Market Makers assigned to a class would be permitted to compete in penny increments for orders in that class entered into a PIP.[185] Public Customers may also participate in a PIP through the use of CPOs.[186] In addition, Options Participants not assigned to a class as a Market Maker may submit PIP Proprietary Orders ("PPOs") to compete for Customer Orders, if they meet certain requirements to submit a PPO.[187] Other market participants may submit orders to the BOX Book during the PIP. These "unrelated orders" would participate in a trade at the

[176] *See* Discussion *infra* at section II.E.1.g.

[177] *See* Discussion *infra* at section II.E.1.d.

[178] *See* proposed BOX Rules, Chapter V, sec. 18(e).

[179] *See* proposed BOX Rules, Chapter V, sec. 18(i). With respect to the same series, no PIP will run simultaneously with another PIP, nor will PIPs be permitted to queue or overlap in any manner. *See* proposed BOX Rules, sec. 18, Supplementary Material .02; *see also* Amendment No. 4, *supra* note 11.

[180] *See* proposed BOX Rules, Chapter V, sec. 18(i).

[181] *See* Phlx Letter 2, *supra* note 10, at 3; CBOE Letter 2, *supra* note 10, at 9.

[182] *See* Amex Letter 3, *supra* note 10, at 3; PCX Letter 2, *supra* note 10, at 3; and ISE Letter 2, *supra* note 10, at 5.

[183] *See* ISE Letter 1, *supra* note 7, at 6.

[184] *See* Securities Exchange Act Release No. 46514 (September 18, 2002), 67 FR 60267 (September 25, 2002).

[185] *See* proposed BOX Rules, Chapter V, sec. 18(e)(i).

[186] *See infra* notes 189–195 and accompanying text; proposed BOX Rules, Chapter V, sec. 18(g).

[187] *See infra* notes 199–201 and accompanying text; proposed BOX Rules, Chapter V, sec. 18(e)(i).

conclusion of the PIP at the standard minimum price increments.[188]

i. Customer PIP Order. Public Customers may participate in a PIP through the use of CPOs.[189] A CPO states a price in standard increments (five or 10 cents) at which the order would be placed on the BOX Book, as well as a price in pennies at which the Public Customer wishes to participate in any PIPs that might occur while its order is on the BOX Book ("CPO PIP Reference Price"). In addition, the terms of each CPO must include a specific order size ("CPO Total Size"). The number of contracts that may be entered into a PIP must be no greater than the lesser of (a) the CPO Total Size remaining on the BOX Book, or (b) the size of the Primary Improvement Order submitted to the PIP.[190] A CPO would be eligible to participate in a PIP, if the CPO is priced at or better than the best BOX price ("BOX BBO"),[191] and may participate in the PIP only on the same side of the market as the Primary Improvement Order. CPOs eligible to participate in a PIP may be submitted on behalf of Public Customers by OFPs. At any time during the PIP, the OFP may modify the price of the CPO submitted to the PIP to any price level up to the CPO PIP Reference Price.[192]

One commenter believes that the CPO procedures would not provide significant opportunities for Public Customer participation in PIP auctions because, while Market Makers would be able to decide at the time a PIP commences whether to compete, Public Customers would have to make that determination in advance.[193] The same commenter also criticizes the requirement that the CPO be on the BOX Book at the NBBO, while Market Makers have no similar requirement.[194] The Commission notes that in Amendment No. 4, the BSE proposes to change its proposed rules to permit a CPO to participate in a PIP when it is on the BOX Book at the BOX BBO, which would expand the opportunities for Public Customers to participate in the PIP. Moreover, the Commission believes that Public Customer access to the PIP is comparable to customers' access to open outcry auctions on the current floor-based exchange and potentially greater than their access to the ISE's Facilitation Mechanism. Specifically, customers must rely on floor brokers to represent any interest they may have in open outcry auctions. Also, the ISE does not currently broadcast notice of orders in its Facilitation Mechanism to members representing public customer orders, unless that member happens to have a proprietary order at the best ISE bid or offer, and permits customer orders to trade with orders in its Facilitation Mechanism if the customer order is displayed on the ISE at a price equal to or better than the facilitation price.[195]

Another commenter points out that the OFP may but is not required to submit a CPO to the PIP and surmised that, as a result, BOX could not guarantee customer access to the PIP.[196] Consequently, because many OFPs will not have technology to be able to submit CPOs to the PIP, the BOX trading system should be required to perform this function.[197] Alternatively, one commenter asserts that the BSE should require that OFPs be subject to a certification process, whereby they would demonstrate that they have the ability and capacity to support CPO order types.[198]

The Commission believes that permitting Public Customer Orders to participate in the PIP through the use of CPOs is an adequate means of Public Customer access to the PIP. The Commission also believes that an OFP need not be required to submit a CPO to the PIP. In this regard, the Commission notes that none of the current options exchanges' rules obligate their members to bring agency orders to an auction, but give them the discretion about how best to execute their customers' orders.

ii. PIP Proprietary Order ("PPO"). In response to concerns regarding access to the PIP auction, the BSE, in Amendment No. 4, proposes also to permit Options Participants to submit proprietary orders in penny increments into the PIP ("PPO"). Options Participants may enter a PPO for their proprietary accounts, provided that, at the commencement of the PIP, they already have a proprietary order or quote on the BOX Book at the inside bid or offer.[199] The size of the PPO must be no greater than the lesser of: (1) The total size remaining on the BOX Book for the proprietary order; or (2) the size of the Primary Improvement Order submitted to the PIP. At any time during the PIP, the Options Participant may improve the price of its PPO.[200]

The Commission believes that this change should allow for greater competition in the PIP auction and should, therefore, benefit Customers by providing them with greater opportunities for better prices. The Commission notes that the BSE's proposal is similar to the rules of other options exchanges, including the ISE's facilitation mechanism in which members with proprietary orders at the inside bid or offer for a particular series can participate in the facilitation mechanism.[201]

iii. Unrelated Orders. Under the BSE's proposal, unrelated orders could compete in standard increments to trade with the Customer Order in the PIP. Such unrelated orders could include agency orders on behalf of Public Customers, market makers on other exchanges, and non-BOX Options Participant broker-dealers, as well as non-PPO orders submitted by Options Participants.[202] Unrelated orders would be permitted to compete in the PIP only in standard increments.

d. Price Improvement in Penny Increments

As discussed above, during the PIP, Market Makers may submit Improvement Orders for those classes within their appointment. Improvement Orders would be submitted in penny increments and are valid only in the PIP process.

Several commenters argue that permitting penny increments in the PIP is likely to save the internalizing firm money while bringing little price improvement to customers. Specifically, commenters criticize the BSE proposal that an OFP would need to offer only penny price improvement in the PIP to internalize the order, while on other exchanges, the internalizing firm would have to offer improvement in standard

[188] An "unrelated order" is a non-Improvement Order entered into the BOX market during a PIP. *See infra* note 202 and accompanying text; proposed BOX Rules, Chapter V, sec. 18(e), (f), (g).

[189] *See* Amendment No. 3 Notice, *supra* note 9. One commenter objected to the original BOX Proposing Release, stating that the BSE discriminated among its Participants by not permitting Public Customers to participate in the PIP at penny increments. *See* CBOE Letter 1, *supra* note 7, at 5. In response to comments, the BSE proposed in Amendment No. 3 to introduce the CPO.

[190] *See* proposed BOX Rules, Chapter V, sec. 18(g)(ii); *see also* Amendment No. 4, *supra* note 11.

[191] In response to comments, the BSE changed its proposal to permit a CPO to participate in a PIP if the CPO is priced at or better than the BOX BBO, rather than the NBBO. *See* proposed BOX Rules, Chapter V, sec. 18(g)(iii); *see also* Amendment No. 4, *supra* note 11.

[192] *See* proposed BOX Rules, Chapter V, sec. 18(g)(v); *see also* Amendment No. 4, *supra* note 11.

[193] *See* ISE Letter 2, *supra* note 10, at 4.

[194] *Id.*

[195] *See* ISE Rule 716(d).

[196] *See* Amex Letter 3, *supra* note 10, at 4.

[197] *See* Amex Letter 3, *supra* note 10, at 4; ISE Letter 2, *supra* note 10, at 4–5.

[198] *See* PCX Letter 2, *supra* note 10, at Appendix at 5.

[199] *See* proposed BOX Rules, Chapter V, sec. 18(h); *see also* Amendment No. 4, *supra* note 11.

[200] *See* proposed BOX Rules, Chapter V, sec. 18(h)(iii); *see also* Amendment No. 4, *supra* note 11.

[201] *See* ISE Rule 716(d).

[202] *See* proposed BOX Rules, Chapter V, sec. 18(e)(iii); *see also* Amendment No. 4, *supra* note 11.

increments.[203] One of these commenters further predicts that all exchanges would have to quote in pennies to compete and OPRA may not be able to handle the increased message traffic that would result.[204]

The Commission believes that, because the PIP is designed to guarantee Customers a price at least a penny better than the NBBO, Customer Orders should benefit. At this point, the Commission has no reason to believe that the PIP auction would not be active and competitive.[205] BSE proposes relatively low barriers to Market Maker registration, as the fees are relatively low[206] and there are no limits on the number of qualifying entities that may become Market Makers.[207] In addition, execution in the PIP is, for the most part, based on price/time priority; thus, Market Makers would have an incentive to post their best prices quickly. Furthermore, the PIP is open to a wide variety of participants: BOX Market Makers assigned to the class, CPOs, and Options Participants with proprietary orders at the inside bid or offer. Also, the Commission notes that a firm can trade with its own customers' orders at the NBBO pursuant to the rules of the other options exchanges.

With respect to the commenter's prediction that Commission approval of the BOX market, with its PIP auction, would result in quoting in pennies by all markets, the Commission does not believe this to be a foregone conclusion. The PIP uses pennies in an auction, not in public quotations. Given the implications of penny quoting for OPRA, penny quoting would require very careful review by the Commission. Moreover, the approval of any proposed rule change is based upon the Commission's determination that the proposal is consistent with the Act, not that the proposal mimics one feature of the market structure of a competing exchange.

e. PIP Trade Allocation and Priority

At the conclusion of the PIP, the Customer Order would be matched against the best priced orders, whether Improvement Orders, or orders unrelated to the PIP that were received by BOX during the PIP process.[208] Orders would have priority at the same price based on time, with the following exceptions:

- The Options Participant who submitted the Customer Order into the PIP would have priority for 40% of the Customer Order, and would be allocated additional contracts only after all other competing orders have been filled at that price level.[209] Such Options Participant would yield this special priority under the following circumstances: (1) If such Options Participant were a Market Maker that had modified its Primary Improvement Order, it would yield this special priority to a Public Customer Order or an order of a non-BOX Participant broker-dealer that had time priority over the modified Primary Improvement Order;[210] (2) if such Options Participant were a Market Maker that had not modified its Primary Improvement Order (*i.e.*, at the initial PIP price level), would yield this special priority to a Public Customer Order or an order of a non-BOX Participant broker-dealer;[211] and (3) if such Options Participant were not a Market Maker, it would yield this special priority to a Public Customer Order or an order of a non-BOX Participant broker-dealer.[212]
- After the Options Participant who submitted the Customer Order to the PIP receives its allocation, a Market Maker designated as the Market Maker Prime[213] would have priority over all other Improvement Orders, including CPOs and PPOs, and unrelated orders up to one-third of the portion of the Customer Order remaining at that price level.[214] This special priority, however, would apply only if the Market Maker Prime enters an Improvement Order during the PIP.[215]
- All non-Market Maker Options Participants, including an Options Participant that submitted the Customer Order to the PIP, would yield priority to non-BOX member orders.[216]

i. Trade Participation Right. The Commission finds that the BSE's proposal to grant participation rights, under certain conditions, to the Options Participant that submitted a Customer Order to the PIP is reasonable and consistent with the Act. As discussed previously, the Commission is concerned that proposals by options exchanges that guarantee a significant portion of orders to any market participant could erode the incentive to display aggressively priced quotes.[217] Thus, the Commission must weigh whether the proposed participation right would so substantially reduce the ability of other market participants to trade with an order that it would reduce price competition. As the Commission has noted previously:

It is difficult to assess the precise level at which guarantees may begin to erode competitive market maker participation and potential price competition within a given market. In the future, after the Commission has studied the impact of guarantees, the Commission may need to reassess the level of these guarantees. For the immediate term, the Commission believes that 40% is not clearly inconsistent with the statutory standards of competition and free and open markets.[218]

The Commission believes that the BSE's proposal, which entitles (subject to certain exceptions) an Options Participant who submits the Primary Improvement Order to 40% of the Customer Order, is not inconsistent with the Act.[219] In addition, the

[203] *See* CBOE Letter 2, *supra* note 10, at 3–4; and PCX Letter 2, *supra* note 10, at 5.

[204] *See* CBOE Letter 2, *supra* note 10, at 7.

[205] The Commission notes that BSE would have no minimum size requirement for orders entered into the PIP, for at least a pilot period to extend 18 months from the day trading commences on BOX. *See* Section II.E.h. If the Commission believed that the PIP had eroded Market Maker incentives to quote competitively, the Commission has the ability not to extend the pilot period beyond the 18 months.

[206] *See* BOX Fee Approval, *supra* note 14.

[207] *But see supra* notes 28 and 45.

[208] Such unrelated orders may include agency orders on behalf of Public Customers, market makers at other exchanges, and non-BOX Participant broker-dealers, as well as non-PIP proprietary orders submitted by Options Participants. *See* proposed BOX Rules, Chapter V, sec. 18(e)(iii); *see also* Amendment No. 4, *supra* note 11.

[209] *See* proposed BOX Rules, Chapter V, sec. 18(f)(i).

[210] *See* proposed BOX Rules, Chapter V, sec. 18(f)(ii)(C).

[211] *See* proposed BOX Rules, Chapter V, sec. 18(f)(ii)(2); *see also* Amendment No. 4, *supra* note 11.

[212] *See* proposed BOX Rules, Chapter V, sec. 18(e)(iv) and 18(f)(ii)(1).

[213] A Market Maker Prime is a Market Maker who has a quote that is equal to the NBBO on the same side of the market as the Primary Improvement Order at the initiation of the PIP. If more than one Market Maker meets this criterion, the Market Maker whose quote has time priority would be the Market Maker Prime for that PIP. However, an Options Participant initiating a PIP on behalf of an agency order may not be the Market Maker Prime for that PIP. At the conclusion of that PIP, the Market Maker loses its status as Market Maker Prime. A Market Maker Prime would be determined each time a new PIP is initiated. *See* proposed BOX Rules, Chapter V, sec. 19.

[214] *See* proposed BOX Rules, Chapter V, sec. 19(b) and (c); *see also* Amendment No. 4, *supra* note 11.

[215] If the Market Maker Prime modifies its quote during the PIP to meet the best limit price instead of entering an Improvement Order into the PIP process, the Market Maker Prime allocation would not apply to the modified quote. Instead, the Market Maker Prime's modified quote would be treated as an unrelated order. *See* proposed BOX Rules, Chapter V, sec. 19(e).

[216] *See* proposed BOX Rules, Chapter V, sec. 18(e)(iv)(1) and 18 (f)(ii)(1).

[217] *See, e.g.*, Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000).

[218] *See* Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (order approving registration of the ISE as a national securities exchange).

[219] *See* proposed BOX Rules, Chapter V, sec. 19.

Commission notes that, except for BSE's proposal to permit orders of any size to be submitted to the PIP, the facilitation guarantee for the Options Participant bringing a Customer Order to the PIP is consistent with the facilitation guarantees in place at the existing options exchanges.[220] One commenter argues that the BSE should require its Options Participants to post the best price at which they are willing to trade against a Customer Order at the start of the PIP.[221] Although the BSE proposes to permit Market Makers to initiate a PIP and be eligible for the 40% guarantee without being at the BOX BBO at the time the PIP commences, this proposal is analogous to floor-based exchange rules that permit market makers to participate in open outcry auctions without quoting at the BBO before the order is presented to the crowd.[222]

The Commission believes that the BSE Rules should promote price competition within BOX by providing Options Participants with a reasonable opportunity to compete for a significant percentage of the incoming order and, therefore, should protect investors and the public interest. For the immediate term, the Commission continues to believe that a 40% allocation is consistent with the statutory standards for competition and free and open markets.

ii. Market Maker Prime The BSE's proposal would give priority to a Market Maker designated as a Market Maker Prime over other competing orders in the PIP. This priority is designed to provide an incentive for Market Makers to quote aggressively. A couple of commenters state that it is unfair that a Market Maker Prime has priority in the PIP, while CPOs also at the NBBO at the start of the PIP do not.[223] The Commission believes that the BSE's proposal to give priority to a Market Maker who quotes aggressively before a PIP is initiated, is consistent with the Act and may provide a further incentive for Market Makers to publicly display their best quotes, which would benefit all options market participants.

iii. Section 11(a) of the Act. Section 11(a) of the Exchange Act[224] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, "covered accounts") unless an exception applies. Transactions by dealers acting in the capacity of market makers, however, are excepted from these prohibitions.[225] Accordingly, the Commission believes that the BSE's proposal to give a Market Maker Prime priority over CPOs and other non-member broker-dealers is consistent with the Act. In addition, the Commission does not believe that section 11(a) requires other Market Makers to yield priority to non-members.

One commenter asserts that the lack of customer priority on BOX is inconsistent with section 11(a) of the Act with regard to OFPs.[226] This commenter argues that the BSE proposal is not consistent with section 11(a) because such Options Participants would not be required to yield priority to Public Customer Orders and non-BOX Participant broker-dealer orders in the PIP.[227]

In response to the commenter's concerns, the BSE proposes to amend its proposal to prohibit any orders for the accounts of non-Marker Maker Options Participants to be executed prior to the execution of Public Customer Orders, both CPO and unrelated Customer Orders, and non-BOX-Participant broker-dealer orders at the same price.[228] Section 11(a)(1)(G) and Rule 11a1–1(T) under the Act provide an exception to the general prohibition in section 11(a) on an exchange member effecting transactions for its own account. Specifically, a member that "is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, and acting as broker, or any one or more of such activities, and whose gross income normally is derived principally from such business and related activities" [229] and effects a transaction in compliance with the requirements in Rule 11a1–1(T)(a)[230] may effect a transaction for its own account. Among other things, Rule 11a1–1(T)(a) requires that an exchange member presenting a bid or offer for its own account or the account of another member shall grant priority to any bid or offer at the same price for the account of a non-member of the exchange.[231] Because BSE's proposed rules would now require Options Participants that are not Market Makers to yield priority in the PIP to all non-member orders, the Commission believes that the proposal is consistent with the requirements in section 11(a) and Rule 11a1–1(T) under the Act. The Commission also reminds exchanges and their members that, in addition to yielding priority to non-member orders at the same price, members must also meet the other requirements under section 11(a)(1)(G) and Rule 11a1–1(T) (or satisfy the requirements of another exception) to effect transactions for their own accounts.[232]

iv. Section 11(b) of the Act. Section 11(b) of the Act[233] and Rule 11b–1 thereunder[234] permit national securities exchanges to, by rule, permit their members registered as specialists to act as both brokers and dealers, consistent with certain negative and affirmative obligations to maintain a fair and orderly market. Like the other options exchanges, BSE proposes to deem all of its Marker Makers to be specialists,[235] which provides a Marker Maker with certain benefits, such as the ability under Regulation M to continue to trade an option on a security when the market making firm is involved in the underwriting of the security underlying the option. However, as specialists, Marker Makers would be subject to section 11(b) under the Act[236] and Rule 11b–1 thereunder.[237]

One commenter asserts that the BSE's proposal to provide a BOX Marker Maker that submits a Directed Order to the PIP, and is at the best price at the conclusion of the PIP, with an allocation of 40% of the Directed Order ahead of Customer Orders at that price, would be inconsistent with a specialist's negative obligations as required by Rule 11b–1 under of the Act.[238]

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[220] *See supra* note 161.

[221] *See* ISE Letter 2, *supra* note 10, at 3, 10–11.

[222] *See, e.g.*, CBOE Rules 6.43 and 8.50.

[223] *See* Amex Letter 3, *supra* note 10, at 4; PCX Letter 2, *supra* note 10, at 3–4.

[224] 15 U.S.C. 78k(a).

[225] 15 U.S.C. 78k(a)(1)(A).

[226] *See* Amex Letter 3, *supra* note 10, at 3; *see also* PCX Letter 2, *supra* note 10, at Appendix, at 8.

[227] *See* Amex Letter 3, *supra* note 10, at 3.

[228] See proposed BOX Rules, Chapter V, sec. 18(e)(iv) and (f)(ii)(1); *see also*, Amendment No. 4, supra note 11.

[229] 15 U.S.C. 78k(a)(1)(G)(i). Paragraph (b) of Rule 11a1–1(T) under the Act provides that the requirements of section 11(a)(1)(G)(i) of the Act if during its preceding fiscal year more than 50% of its gross revenues was derived from one or more of the sources specified in that section. In addition to any revenue which independently meets the requirements of section 11(a)(1)(G)(i), revenue derived from any transaction specified in paragraph (A), (B), or (D) of section 11(a)(1) of the Act or specified in Rule 11a1–4(T) shall be deemed to be revenue derived from one or more of the sources specified in section 11(a)(1)(G)(i).

[230] 15 U.S.C. 78k(a)(1)(G)(ii).

[231] 17 CFR 240.11a1–1(T)(a)(3).

[232] For a discussion of the application of section 11(a) of the Act to trades that take place on BOX other than through the PIP, *see* notes—and accompanying text.

[233] 15 U.S.C. 78k(b).

[234] 17 CFR 240.11b–1.

[235] *See* proposed BOX Rules, Chapter I, sec. 1(32).

[236] 15 U.S.C. 78k(b).

[237] 17 CFR 240.11b–1.

[238] *See* ISE Letter 2, *supra* note 10, at 15.

As described above, an OFP or Market Maker that submits a Customer Order to the PIP will be allocated 40% of that order, if at the end of the PIP, its Primary Improvement Order is at the best price and it was first in time at that price.[239] In response to the commenter's concern, the BSE proposes to modify its proposal to provide that a BOX Marker Maker that submitted an order to the PIP would yield priority, including its 40% allocation, to Public Customer Orders, unless the Market Maker modifies its Primary Improvement Order and has time priority over the Public Customer Order. The Commission believes it is appropriate for customer orders to have priority over a specialist's trade participation right,[240] and that such priority is consistent with section 11(b) of the Act. The Commission does not, however, believe that customers who may electronically generate orders must be accorded priority over market makers who are not acting as agent with respect to those customers.[241] BSE's proposal, as amended by Amendment No. 4, would give Public Customer Orders priority over a Market Maker who submitted a Directed Order to the PIP, if the trade took place at the initial price level. However, a Marker Maker submitting a Directed Order to the PIP would not be required to yield priority to Public Customer Orders if the Market Maker has time priority at subsequent price levels. Accordingly, the Commission finds that BSE's proposal is consistent with the Act.

f. Private Auction

Under the BSE's proposal, Customer Orders submitted to the PIP and the responding Improvement Orders would not be displayed or disseminated outside the BOX market. Several commenters argue that the PIP lacks transparency and amounts to a shadow or hidden market, in violation of the Commission's Quote Rule.[242] One commenter says that the disseminated quote from the BOX market would be meaningless, because the real market would be the non-public quoting in pennies in the PIP.[243] Under the Commission's Quote Rule, an exchange is required to collect, process, and make available to quotation vendors the best bids and offers that are communicated on the exchange.[244] The BSE proposes that Improvement Orders, including CPOs and PPOs, would be displayed to BOX Options Participants, but would not be disseminated to OPRA.[245] Commenters assert that the PIP would violate the Quote Rule because BSE proposes to limit the dissemination of Improvement Orders to BOX participants and to not make them available to quotation vendors.[246] The Commission believes that, for purposes of Quote Rule analysis, because the PIP is only three seconds in length, it is analogous to the open outcry auctions currently conducted on the floor-based exchanges, where auction prices are not widely disseminated and are available only for the order that initiated the auction and other orders in the crowd at that particular time. On the floor-based exchanges, a floor broker walks into a trading crowd and requests a market. The prices in the auction that then ensue are not disseminated outside of the floor and are not provided to other orders simultaneously executed at the disseminated quotation through the exchanges' automatic execution systems.

In addition, another commenter argues that the PIP would violate the Quote Rule[247] because unrelated Customer Orders on the same side of the market as the Customer Order being internalized would not trade with the liquidity in the PIP.[248] When an unrelated order concludes the PIP prior to the end of the three-second auction, the Customer Order submitted to the PIP is executed at the best price available in the PIP at that point in time. Neither an unrelated Customer Order at a better price on the same side of the market nor an unrelated BOX-Top Order on the same side of the market would be permitted to interact with Improvement Orders. The Commission does not agree that the proposed PIP would violate the Quote Rule. Instead, the Commission notes that the BOX proposal is consistent with the way in which the floor-based options exchanges operate today, where an incoming electronic order is automatically executed at the disseminated quote, even when an auction on the floor is underway at a better price. In addition, orders that are routed to the New York Stock Exchange ("NYSE") through DirectPlus do not receive the benefit of any better prices available through the open outcry auction on the NYSE.

g. No Minimum Size Requirement for PIP

As stated above, the Commission believes that one of the principal differences between the BSE's proposed PIP and other exchanges' rules that guarantee members the right to trade with their customer orders is that the BOX PIP would be available for orders of fewer than 50 contracts. Under the BSE's proposal, BOX would have no minimum size requirement for orders entered into the PIP, for a pilot period to extend eighteen months from the day trading commences on BOX.

One commenter objects to the inclusion of orders of fewer than 50 contracts into the PIP,[249] because it would allow OFPs to internalize smaller customer orders, leaving only undesirable, unprofitable order flow for the regular auction, resulting in wider quotations overall.[250] The commenter asserts that small customer orders are the foundation for the auction pricing mechanism in the options market—*i.e.*, that Market Makers' posted prices take into account their ability to trade with these customer orders.[251] The commenter is therefore concerned that removing small customer orders from the public market could adversely affect the pricing mechanisms, because Market Makers on BOX and on other markets would be less willing to quote aggressively.[252]

The Commission believes, however, that the BSE's proposal provides small customer orders with benefits not available under the rules of other exchanges, and is consistent with the Act. In particular, any order entered into the PIP is guaranteed an execution at the end of the auction at a price at least a penny better than the NBBO. In addition, the Commission believes that BSE's proposal provides the opportunity for more market participants to compete. For example, the BSE has not limited the number of Market Makers assigned to each class, and would permit Public Customers and Options Participants that were not Market Makers to participate in the PIP through the use of CPOs and PPOs.

The Commission, however, understands the concern of commenters who fear that including orders of fewer than 50 contracts in the PIP may result in less competitive quotes. Therefore,

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[239] *See* proposed BOX Rules, Chapter V, sec. 18(f)(i).

[240] *See* Securities Exchange Act Release No. 47628 (April 3, 2003), 68 FR 17697 (April 10, 2003) (Order approving CBOEdirect trading system).

[241] *Id.*

[242] *See* PCX Letter 2, *supra* note 10, at 2–3; Phlx Letter 2, *supra* note 10, at 4.

[243] *See* CBOE Letter 2, *supra* note 10, at 6.

[244] Rule 11Ac1–1(b)(1)(i) under the Act, 17 CFR 240.11Ac1–1(b)(1)(i).

[245] *See* proposed BOX Rules, Chapter V, sec. 18(j).

[246] *See* ISE Letter 2, *supra* note 10, at 5.

[247] 17 CFR 240.11Ac1–1.

[248] *See* CBOE Letter 2, *supra* note 10, at 8.

[249] *See* ISE Letter 1, *supra* note 7, at 7.

[250] *See* ISE Letter 2, *supra* note 10, at 1–2.

[251] *Id.* at 3.

[252] *Id.* at 3.

BSE has represented that it will provide the following information each month:

(1) The number of orders of fewer than 50 contracts entered into BOX's PIP, including the number of orders submitted by OFPs and the number of orders submitted by Market Makers;

(2) The percentage of all orders of fewer than 50 contracts sent to BOX that are entered into BOX's PIP;

(3) The percentage of all BOX trades represented by orders of fewer than 50 contracts;

(4) The percentage of all BOX trades effected through the PIP represented by orders of fewer than 50 contracts;

(5) The percentage of all contracts traded on BOX represented by orders of fewer than 50 contracts;

(6) The percentage of all contracts effected through the PIP represented by orders of fewer than 50 contracts;

(7) The spread in the option, at the time an order of fewer than 50 contracts is submitted to the PIP;

(8) Of PIP trades, the percentage done at the NBBO plus $.01, plus $.02, plus $.03, *etc.*;

(9) The number of orders submitted by OFPs when the spread was $.05, $.10, $.15, etc. For each spread, specify the percentage of contracts in orders of fewer than 50 contracts submitted to BOX's PIP that were traded by: (a) The OFP that submitted the order to the PIP; (b) BOX Market Makers assigned to the class; (c) PPOs (other BOX Participants who were at the BBO at the time the PIP started); (d) CPOs (customers at the BBO at the time the PIP started); and (e) unrelated orders (orders in standard increments entered during PIP); and

(10) The number of orders submitted by Market Makers when the spread was $.05, $.10, $.15, *etc.* For each spread, specify the percentage of contracts in orders of fewer than 50 contracts submitted to BOX's PIP that were traded by: (a) The Market Maker that submitted the order to the PIP; (b) BOX Market Makers assigned to the class, other than a Marker Maker who submitted the order to the PIP; (c) PPOs (other BOX Participants who were at the BBO at the time the PIP started); (d) CPOs (customers at the BBO at the time the PIP started); and (e) unrelated orders (orders in standard increments entered during PIP). The Commission will evaluate the PIP during the pilot period to determine whether it would be beneficial to customers and to the options market as a whole to approve any proposal requesting permanent approval to permit orders of fewer than 50 contracts to be submitted to the PIP.

2. Other BOX Rules to Limit Internalization Outside the PIP

The BOX Rules contain certain provisions restricting internalization by Options Participants outside of the PIP process, described below.[253] The Commission believes that the proposed rules regarding the limitations on principal transactions and solicited orders are consistent with the Act in that they should adequately protect against the internalization of Customer Order flow by a firm representing an order as agent.

a. Principal Transactions

The BSE proposes to limit an Options Participant's ability to trade as principal with an order it represents as agent, unless the order is first given the opportunity to interact with other trading interest on the Exchange. Specifically, OFPs may not execute as principal an order it represents as agent unless: (i) The agency order is first exposed on the BOX Book for at least 30 seconds; (ii) the OFP has been bidding or offering on BOX for at least 30 seconds prior to receiving an agency order that is executable against such bid or offer; or (iii) the OFP submits the agency order to the PIP, described above.[254] In addition, the BOX Rules would preclude an Options Participant from executing agency orders to increase its economic gain from trading with the order without first giving other trading interest on BOX an opportunity to trade with the agency order pursuant to the PIP rules. Specifically, it would be a violation of the BOX Rules for an Options Participant to provide an opportunity for a Customer to execute against agency orders handled by the Options Participant immediately upon their entry into the Trading Host.[255] The Commission believes that these restrictions on Options Participants trading as principal with orders they represent as agent, including the prohibition on doing indirectly what they are prohibited from doing directly, should protect against the internalization of order flow.

The BSE proposes to prohibit the disclosure of information about agency orders to third parties. Specifically, an Options Participant, prior to submitting an order to BOX, including submitting an order to the PIP, cannot disclose to another Options Participant or any other third party of any of the terms of the order, except as provided for in the Directed Order process.[256] The Commission believes that this rule should help to prevent Options Participants from doing indirectly what they are prohibited from doing directly, to prevent "gaming." An Options Participant generally must expose orders it represents as agent before it may execute them as principal. Absent the prohibition on the disclosure of this type of information, an Options Participant and a third party could potentially use BOX to execute their orders with each other without exposing these orders to other trading interest. The Commission believes this rule will do much to prevent a firm from trading as principal with orders it represents as agent with a third party with whom it shares a beneficial interest.

b. Solicited Orders

The BSE proposes, in Amendment No. 4, to require Options Participants to expose orders they represent as agent on BOX for at least thirty seconds before such orders may be executed in whole or in part by orders solicited from other Options Participants and non-member broker-dealers to transact with such orders.[257] In addition, it would also be a violation of the BOX Rules for an Options Participant to cause the execution of an order it represents as agent on BOX by orders it solicited, if the Options Participant fails to expose those orders on BOX as required above.[258] As with Options Participant principal transactions, the purpose of the order exposure requirement is to assure that agency orders have an opportunity to interact on BOX before they are executed either by the broker representing the order or by another order solicited by the broker.

F. Application of the "Effect versus Execute" Exemption From Section 11(a) of the Act

Section 11(a) of the Exchange Act[259] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively,

[253] See Amendment No. 4, *supra* note 11.

[254] See proposed BOX Rules, Chapter V, sec. 17, Supplementary Material .03; *see also* Amendment No. 4, *supra* note 11. The proposed BOX Rule is substantially similar to ISE Rule 717(d).

[255] See proposed BOX Rules, Chapter V, sec. 17, Supplementary Material .01. This interpretation is substantially similar to ISE Rule 717, Supplemental Material .01.

[256] See proposed BOX Rules, Chapter V, sec. 17, Supplementary Material .04. This provision is comparable to ISE Rule 400, Supplemental Material .01.

[257] See proposed BOX Rules, Chapter V, sec. 17, Supplementary Material .02; *see also* Amendment No. 4, *supra* note 11.

[258] *Id.*

[259] 15 U.S.C. 78k(a).

"covered accounts") unless an exception applies. In addition to the exceptions set forth in the statute, Rule 11a2–2(T)[260] provides exchange members with an exemption from this prohibition. Known as the "effect versus execute" rule, Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with the rule's conditions, a member (i) must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;[261] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in the connection with effecting the transaction except as provided in the Rule.

In Amendment No. 4, the BSE represents that transactions effected on BOX, excluding those transactions effected through the PIP process, satisfy the conditions of Rule 11a2–2(T). Based on these representations, the Commission finds that the order execution algorithm of BOX complies with the requirements of section 11(a) of the Exchange and Rule 11a2–2(T) thereunder.

In particular, the BSE states that "BOX will place all of its participants on the 'same footing'" and that "no participant will enjoy any special control over the timing of execution or special order handling advantages, as all orders will be centrally processed for execution by computer." Specifically, orders sent to BOX will be transmitted from remote terminals directly to the system by electronic means. Once an order is submitted to BOX, the order is executed against another order based on an established matching algorithm. As the BSE explains, the execution does not depend on the Options Participant but rather upon what other orders are entered into BOX at or around the same time as the subject order, what orders are on the BOX Book and where the order is ranked based on the strict price-time priority ranking algorithm. Accordingly, Options Participants do not control or influence the result or timing of orders submitted to BOX.

Based on these representations, the Commission finds that BOX's electronic order submission and execution process satisfies the four conditions of Rule 11a2–2(T).[262] First, all orders are electronically submitted through remote terminals. Second, because a member relinquishes control of its order after it is submitted to BOX, the member does not receive special or unique trading advantages. Third, although the rule contemplates having an order executed by an exchange member who is not affiliated with the member initiating the order, the Commission recognizes that this requirement is satisfied when automated exchange facilities are used.[263] Fourth, the BSE states that BOX Options Participants that rely on Rule 11a2–2(T) for a managed account transaction must comply with the limitations on compensation set forth in the rule.

G. Best Execution of Customer Limit Orders

As discussed above, customer Limit Orders would not have priority over professional trading interest in the BOX market. Thus, if a broker-dealer sends a non-marketable Public Customer Limit Order to BOX, and professional trading interest already is on the book at the same price, the professional interest would have priority. One commenter notes that, in contrast, if the broker-dealer sends that Public Customer Order to any other options exchange, the Public Customer would have priority over any pre-existing professional interest on the book.[264] Because a broker-dealer would be aware of this difference when it makes its order-routing decisions, this commenter contends that a broker-dealer would violate its best execution responsibility to its customers any time the broker-dealer sends a customer order to BOX without first confirming that there is no professional orders on the BOX book at the same price.[265]

The Commission disagrees that a broker sending its customer orders to BOX would be *per se* violating its best execution obligation. The Commission has long held the view that in satisfying its duty of best execution,[266] which requires a broker to seek the most favorable terms reasonably available under the circumstances for a customer's transaction, a broker must periodically assess the quality of competing markets to assure that order flow is directed to markets providing the most beneficial terms for their customers' orders.[267] Moreover, the contention that all existing options exchanges provide strict customer priority is an overstatement. In fact, several options exchanges currently have rules that permit market makers to be on parity with customer orders in certain circumstances.[268] The Commission continues to believe that best execution requires the broker, in evaluating its procedures for handling customer orders, to take into account any material differences in execution quality among the various markets to which such orders may be routed.[269] These differences could arise from different priority rules, as the commenter suggests, or from a different frequency of execution. If a market gave less preferential treatment to customer orders, yet customer orders still received faster executions at comparable prices in that market, a broker could conclude that that market offered the possibility of best execution. Of course, a broker could not, consistent with its best execution obligations, permit the

[260] 17 CFR 240.11a2–2(T).

[261] The member, however, may participate in clearing and settling the transaction.

[262] The Commission and its staff, on numerous occasions, have considered the application of Rule 11a2–2(T) to electronic trading and order routing systems. *See, e.g.*, Securities Exchange Act Release Nos. 44983 (October 25, 2001) (Order approving the Archipelago Exchange as the equities trading facility of PCX Equities Inc.); and 29237 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); 15533 (January 29, 1979) (regarding the Amex Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX's Communications and Execution System, and the Phlx's Automated Communications and Execution System); and 14563 (March 14, 1978) (regarding the NYSE's Designated Order Turnaround System). *See also* Letter from Larry E. Bergmann, Senior Associate Director, Division, SEC to Edith Hallahan, Associate General Counsel, Phlx (March 24, 1999) (regarding Phlx's VWAP Trading System); letter from Catherine McGuire, Chief Counsel, Division, SEC, to David E. Rosedahl, PCX (November 30, 1998) (regarding Optimark); and Letter from Brandon Becker, Director, Division, SEC, to George T. Simon, Foley & Lardner (November 30, 1994) (regarding Chicago Match).

[263] In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into the systems. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* Securities Exchange Act Release No. 15533 (January 29, 1979).

[264] *See* ISE Letter 2, *supra* note 10, at 11–12.

[265] *Id.*

[266] A broker-dealer's duty of best execution derives from common law agency principals and fiduciary obligations and is incorporated both in SRO rules, and through judicial and Commission decisions, in the antifraud provisions of the federal securities laws. *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) ("Order Handling Rules Release"), n.348 and accompanying text.

[267] Order Handling Rules Release, *supra* note 266.

[268] *See* Amex Rule 111, Commentary .07 and Phlx Rule 1014(d)(ii); *see also* CBOE Rule 43.1.

[269] Order Handling Rules Release, *supra* note .

opportunity either to internalize a portion of its customer order or to obtain payment-for-order flow to color its view of the execution quality afforded its customer orders.

The same commenter noted that when an Options Participant initiates a PIP, it does not have to initiate the PIP at the best price it is willing to trade. Instead, the Options Participant may improve the price it is willing to offer its customer during the three-second auction in response to higher prices offered by others. The commenter argues that this is a clear violation of an Options Participant's fiduciary obligations, because an Options Participant who does not put forward its best price in initiating a PIP auction would not provide the best opportunity for price improvement to its customer. This commenter believes that there is a similar violation of fiduciary obligations when an OFP directs the order to a preferenced Marker Maker.[270]

The Commission does not agree with the commenter's assertion that that an Options Participant's duty of best execution requires the Options Participant to submit its best price when initiating a PIP. The Primary Improvement Order is entered into the PIP at the guaranteed price, which, by definition, is at least one penny better than the best price available on any other options exchange at that time. The OFP or Marker Maker guarantees to execute its Customer's order at this price and ensures that the Customer will receive an execution at a price no worse, and possibly better, than the guaranteed price. After the order is guaranteed, the three-second auction begins. At that point, all those entitled to participate in the PIP have an equal opportunity to match or improve the guaranteed price. The OFP or Marker Maker that initiated the PIP will receive its 40% guarantee only if it is at the best price at the conclusion of the PIP auction.

Moreover, the vast majority of customer orders are executed at the disseminated NBBO in automatic execution systems on each of the floor-based options exchanges, which do not provide any opportunity for price improvement. Despite the fact that if such orders were instead directed to the exchange floors, such orders might receive price improvement, the Commission has never taken the position that best execution requires that brokers bring each and every customer order to the floor of the exchanges for the possibility of price improvement over the disseminated NBBO.

[270] *See* ISE Letter 2, *supra* note 10, at 10–11.

The proposed BOX Rules also contain a number of requirements to guide Options Participants that facilitate customer orders as principal towards fulfilling their best execution duty to their customers. These rules supplement the broker's best execution obligation. For example, Options Participants must ensure that when executing a Customer Order in the PIP, they act with due skill, care, and diligence, and that the interests of their Customers are not prejudiced.[271] Further, an Options Participant must not use the PIP to create a misleading impression of market activity.[272]

In addition, certain features of the BOX PIP help ensure that Options Participants comply with their duty of best execution. For example, no Options Participant is permitted to cancel or to modify the size of its Primary Improvement Order or the Customer Order at any time during the PIP, and the Options Participant may modify the price of its Primary Improvement Order only by improving it.[273]

H. Linkage Plan Rules

BSE represents that it intends to participate in the Options Intermarket Linkage Plan ("Linkage Plan."). In order to do so, BSE would be required to comply with the obligations of Participants under the Linkage Plan and, therefore, proposes certain rules relating to the Linkage as part of the proposed BOX Rules.[274] These proposed rules are substantially similar to the rules in place on all of the options exchanges that are Participant to the Linkage Plan.[275]

In general, the proposed BOX Rules contain relevant definitions, establish the conditions pursuant to which Market Makers may enter Linkage orders, impose obligations on the Exchange regarding how it must process incoming Linkage orders, and establish a general standard that Options Participants should avoid trade-throughs. The proposed BOX Rules establish potential regulatory liability for Options Participants who engage in a pattern or practice of trading through other exchanges, establish obligations with respect to locked and crossed markets, and restrict a market maker on an Exchange from sending principal orders (other than P/A orders, which reflect unexecuted customer orders) through the Linkage if the market maker affects less than 80 percent of specified order flow on the Exchange.

In addition to these Linkage Rules, as part of its proposed trading rules, BSE proposes several rules that affect order handling through the linkage. Further, certain of the BOX Linkage Rules are unique to BOX and thus warrant further description.

1. Role of the BOX InterMarket Linkage Market Market and Eligible Market Makers

In Amendment No. 3 to the proposed rule change, BSE proposed rules that were intended to bring the BOX Rules into conformity with the requirements of the Linkage Plan so that BSE would be eligible to become a Participant in the Linkage Plan. Under the Linkage Plan, an "Eligible Market Maker," defined as, among other things, a market maker who is assigned to, and provides two-sided quotations in an option class eligible for trading through the Linkage,[276] undertakes several agency responsibilities, including the handling of P/A orders and Satisfaction ("S") orders if a trade-through has occurred.[277]

Two commenters express concern that the BOX's order handling process would be inconsistent with the Linkage Plan because it would permit BOX Market Makers to send orders through the Linkage with the agency responsibilities that the Linkage Plan requires for Eligible Market Makers.[278] The commenters note that it would be the BOX System and not an Eligible Market Maker who would handle certain aspects of the P/A order and S order process.[279] Another commenter states that the proposal did not address how BSE would determine which BOX Market Maker would be designated as the BOX Eligible Market Maker for each Eligible Options Class.[280]

To ensure that there is an Eligible Market Maker per Eligible Class (as those terms are defined in the Linkage

[271] *See* proposed BOX Rules, Chapter V, sec. 18(b).

[272] *See* proposed BOX Rules, Chapter V, sec. 18(d).

[273] *See* proposed BOX Rules, Chapter V, sec. 18(e)(ii). The ISE's Supplementary Material to ISE Rule 716 states that it will be violation of a member's duty of best execution to its customer if it were to cancel a facilitation order to avoid execution of the order at a better price. The BOX PIP goes one step further by prohibiting cancellation of the OFP's facilitation order.

[274] *See* proposed BOX Rules, Chapter XII, secs. 1–6.

[275] *See* Amex Rules 940–945, CBOE Rules 6.80–6.85, ISE Rules 1900–1905, PCX Rules 6.92–6.96, and Phlx Rules 1083–87.

[276] *See* section 2(7) of the Linkage Plan.

[277] *See* section 7(a)(ii) of the Linkage Plan.

[278] *See* ISE Letter 2, *supra* note 10, at 13; and PCX Letter 2, *supra* note 10, at 7; *See also* section 2(16)(a) (defining "P/A Order"), section 7(a)(ii) of the Plan (providing that market makers may send P/A Orders through Linkage).

[279] *See* ISE Letter 2, *supra* note 10, at 13; and PCX Letter 2, *supra* note 10, at 7.

[280] *See* Amex Letter 3, *supra* note 10, at 6.

Plan and the proposed BOX Rules) for the submission of P/A and S orders to away markets, and in response to commenters' concerns, in Amendment No. 4, the BSE proposes to amend its rules to specifically define a BOX InterMarket Linkage Market Maker ("BIMM") as the BOX Eligible Market Maker ("BEMM") designated with the responsibility for settling P/A and S orders that would be sent to away markets through the Linkage for a given class on BOX.[281] A BIMM responsible for such orders would be specifically designated in each Eligible Class traded on BOX. The BIMM would adhere to the responsibilities of an Eligible Market Maker, as set forth in the Linkage Plan.

Further, the BIMM would be required to act with due diligence with regard to the interests of orders entrusted to it and fulfill other duties of an agent, including, but not limited to, ensuring that such orders, regardless of their size or source, receive proper representation and timely execution in accordance with the terms of the orders and the rules of the Exchange. To enable the BIMM to carry out its agency responsibilities with respect to P/A orders submitted through the Linkage, the BSE would require that a BIMM submit prior written instructions to BOX regarding the routing of any P/A orders that the Market Maker would send through the Linkage. BOX would immediately route all P/A orders on behalf of the Market Maker according to these instructions. The order would be generated automatically by BOX and routed to the away exchange with the required BIMM clearing and valid-clearing-firm ("VCF") information included. Each execution received from an away exchange would result in the automatic generation of a trade execution on BOX between the original Public Customer Order and the BIMM.

The addition of a BIMM should ensure that a Market Maker on BOX is ultimately responsible for decisions regarding the routing of P/A and S orders and exercises appropriate discretion over such orders. While BOX may carry out the mechanics of routing such orders, a BIMM will be responsible for providing BOX with instructions on how and where to route order. Further, all P/A orders routed from BOX will carry a BIMM's clearing and VCF information and any execution received from an away exchange will result in a trade execution on BOX between the original Public Customer Order and the BIMM. The Commission believes that the proposed use of a BIMM addresses the concerns of commenters and should ensure that P/A and S orders will be handled in accordance with the Linkage Plan.

2. Use of the Trade-Through Filter

As discussed above, under the proposed BOX Rules, all in-bound agency orders received by BOX, including P orders and P/A orders, would be checked against the NBBO using BOX's trade-through filter mechanism as set forth in Chapter V, section 16(b).[282] Accordingly, the Trading Host would not permit the execution of an order submitted by an Options Participant on behalf of a Public Customer or broker-dealer that is not registered with BOX as an Options Participant, as well as an incoming P or P/A Order, unless BOX was disseminating the NBBO.

As proposed in Amendment No. 3, if BOX were not quoting at the NBBO, an incoming P or P/A Order would be exposed on the BOX Book for three seconds at the NBBO price, during which time any Options Participant would be able to execute against the order. At the end of this three-second period, if the order were not fully executed and a better price existed at an away exchange(s), a P/A order would be generated automatically by the BOX, and routed to the away exchange. In the event that BOX was no longer quoting at the best price when it received the P or P/A Order, the BSE proposed that these orders also would be processed through the filter. Any unexecuted quantity that remained on the book after the three-second exposure period would be returned to the originating exchange.

Commenters express concern that BSE's proposal to expose incoming P and P/A orders from away markets to the three-second exposure when BOX was no longer disseminating the NBBO would be inconsistent with the Linkage Plan[283] and would permit BOX Options Participants an impermissible "second-look" at incoming Linkage Orders when BOX was no longer quoting at the best price.[284]

BSE responded to commenters' concerns in Amendment No. 4 by proposing to amend its proposed rules to exclude incoming P and P/A Orders from exposure for three seconds when BOX was no longer disseminating the NBBO at the time it receives an incoming P or P/A Order.[285] Therefore, in the event that BOX is no longer quoting at the Linkage Reference Price, as that term is defined in the Linkage Plan, at the time it receives a P or P/A order from an away market, BOX would immediately reject the order. The Commission believes that these provisions, which require BOX to immediately reject a P or P/A order in the event that BOX is no longer quoting at the Reference Price, are appropriate and should ensure that these orders are handled in compliance with the Linkage Plan.

The Commission believes that the proposed use of the filter for agency orders submitted by a BOX Participant should provide an effective means for avoiding trade-throughs.[286] The filter should ensure that in the event that BOX is not quoting at the best price, a P/A order is automatically generated and routed in accordance with instructions from the responsible BIMM, or the order is rejected. The Linkage Plan requires that, absent reasonable justification and during normal market conditions, exchange members should not effect trade-throughs.[287] In addition, Chapter XII, section 3(a) of the BOX Rules would require members to avoid initiating trade-throughs when purchasing or selling either as principal or agent, any options series. Accordingly, the Commission believes that BOX Participants must avoid initiating trade-throughs when they effect transactions for their own accounts, as well as when they submit agency orders. Therefore, the Commission believes that there is nothing in the BOX Rules that is inconsistent with the Linkage Plan. Nevertheless, the Commission's approval of the proposed rule change will not be effective until the BSE can demonstrate to the Commission staff that BOX Options Participants can comply with the trade-through requirements of the Linkage Plan with regard to all trades effected through BOX or any exemption from such Linkage Plan requirements.

Another commenter questions why BOX proposes to expose the unexecuted portion of incoming P orders to BOX

[281] *See* proposed BOX Rules, Chapter VI, sec. 5(a)(ix).

[282] *See supra* notes 124–137—and accompanying text.

[283] *See* section 2(16) of the Linkage Plan (defining "Linkage Order").

[284] *See* Phlx Letter 2, *supra* note 10, at 5–6 and ISE Letter 2, *supra* note 10, at 14 (*citing* section 7(a)(ii)(A) of the Linkage Plan, providing that an exchange receiving a P/A order must execute the P/A Order in its automatic execution system, if available, if its disseminated quotation is equal to or better than the Reference Price when that order arrives. The ISE argues that implicit in this requirement is that the receiving exchange reject the order if it is not then at the NBBO). *See also* section 7(a)(ii)(C) of the Linkage Plan (providing similar obligations for Eligible Market Makers who receive P Orders).

[285] *See* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(2)(b).

[286] *See supra* note 124.

[287] *See* section 8(c) of the Linkage Plan.

Options Participants for only three seconds, when the Linkage Plan and another part of BOX's proposed rules provide BOX Options Participants 15 seconds to respond to incoming P and P/A orders larger than the Firm Principal Quote Size or the Firm Customer Quote size, respectively.[288]

The Linkage Plan permits Linkage Orders that are larger than the Firm Principal Quote Size or the Firm Customer Quote Size to be handled outside of the automatic execution systems of the Linkage Participants and and provides Participants with up to 15 seconds to reply to a sending Participant.[289] Therefore, the Commission believes that the BOX's proposal to expose the unexecuted portion of any P-or P/A orders that are larger than the Firm Principal Quote Size or Firm Customer Quote Size for only three seconds is consistent with the Linkage Plan.

3. PIP and Trade-Throughs

As described in more detail above, the proposed BOX Rules provide for a PIP during which an OFP or Market Maker may submit a Customer Order for price improvement at a price of at least one cent better than the prevailing NBBO. Upon entering the Customer Order into the PIP, the OFP or Market Maker "guarantees" the Customer Order at that better price. Thus, the Customer Order is guaranteed at the end of the PIP an execution of at least one penny better than the NBBO was at the commencement of the PIP.

One commenter argues that use of the PIP may result in a pattern or practice of trade-throughs in violation of the Linkage Plan [290] if the NBBO moves to a price more favorable to the Customer Order during the PIP.[291] The Commission disagrees with this commenter that use of the PIP would result in a pattern or practice of trade-throughs in the scenario that that commenter describes. Because the BSE proposes to require that a Customer Order be "guaranteed" at a better price than the NBBO at the initiation of the PIP, the Commission believes that the trade should be considered to have occurred at the time the order is provided the guarantee.[292] Accordingly, the Commission does not believe that it should be considered a trade-through if a trade is executed through the PIP at a price that is better than the NBBO at the commencement of the PIP, but—because of a change in the NBBO—inferior to the NBBO at the conclusion of the PIP. The Commission reminds brokers, however, that they must always consider their best execution obligations.

Finally, two commenters also contend that the PIP would result in trade-throughs because orders on the BOX Book would not be able to trade against the price at which a CPO is willing to buy or sell in a PIP, the CPO PIP Reference Price.[293] Similarly, one commenter questions how a BIMM would handle a Satisfaction Order that it receives as a result of its execution of a block-size order in penny increments at a price inferior to the NBBO given that other Linkage Participants only trade at minimum price increments of $.05 or $.10.[294] Under the Linkage Plan, when an Exchange executes a "block trade" of 500 contracts at a price that trades through a price on another exchange, the other exchange can submit through the Linkage a Satisfaction Order at the price of the block trade.[295] The commenter believes that if the block order execution occurred between intervals of $.05 (*i.e.*, $1.17, $1.18, etc.), an exchange whose system cannot format Satisfaction Orders in penny increments would not be able to use the Linkage to send the Satisfaction Order.

The Commission notes that only orders executed during BOX's PIP may be priced in penny increments and that the OFP who represents the CPO would be the only Options Participant aware of the price at which a CPO is willing to buy or sell (the CPO PIP Reference Price.) As described above, all orders executed in the PIP are "guaranteed" at a better price than the NBBO at the initiation of the PIP.

Because the CPO PIP Reference Price is not a displayed interest, the requirement to avoid trading through that price would not apply. The Commission believes that the trade should be considered to have occurred at the time the order is guaranteed at a price at least a penny better than the NBBO. Accordingly, the Commission believes that no trade-through could result from an execution during a PIP. Therefore, the Commission finds that BSE's proposed PIP is appropriate and is consistent with the Linkage Plan.

4. BOX-Top Orders and Locked and Crossed Markets

As described above, BSE proposes to have "BOX-Top Orders" in lieu of market orders. BOX-Top Orders entered into the BOX Book are executed at the best price available in the BOX market for the total quantity available from any contra bid (offer). Any residual volume would be automatically converted to a Limit Order at the price at which part of the original BOX-Top Order was executed.

One commenter states that the process of automatically converting the unexecuted portion of a BOX-Top Order into a Limit Order is inconsistent with the Linkage Plan because the unexecuted remaining portion of a BOX-Top Order could lock or cross other markets, which the Linkage Plan requires Participants to avoid.[296]

The commenter correctly states that the Linkage Plan provides that dissemination of locked or crossed markets shall be avoided.[297] The Commission, however, does not believe that the process proposed by BSE for converting the unexecuted portion of a BOX-Top Order into a Limit Order would result in locked or crossed markets. In making this determination, the Commission notes that before any portion of a BOX-Top Order is placed on the BOX book following a partial execution at the market price, the remainder of the order would be processed through the BOX filter.[298] The filter would expose the remainder of the order for three seconds at the NBBO for execution. If there were any unexecuted quantity at the end of the three seconds, this quantity would be sent as a P/A Order to the away market displaying the NBBO if the order is marketable at the NBBO displayed by another market. If the order cannot be routed to another exchange for execution because the limit price is better than the NBBO, the unexecuted quantity would then be booked at the limit price. The Commission believes that this process should ensure that BOX-Top Orders would not result in locked or crossed market in violation of the Linkage Plan.

I. Rule 17d–2 Agreements

Section 17 of the Act [299] and Rule 17d–2 thereunder [300] permit SROs,

[288] *See* Amex Letter 3, *supra* note 10, at p. 6. *Compare* proposed BOX Rules, Chapter V, sec. 16(b)(iii)(2) (describing the BOX filtering mechanism) *to* sections 7(a)(ii)(B) and 7(a)(ii)(C) of the Linkage Plan and proposed BOX Rules, Chapter XII, sec. 2(f).

[289] *See* section 7(a)(ii)(B)(1) of the Linkage Plan.

[290] *See* section 8(c)(i)(C) of the Linkage Plan.

[291] *See* CBOE Letter 2, *supra* note 10, at 9.

[292] *See* Division of Market Regulation, Staff Legal Bulletin 12R, "Frequently Asked Questions About Rule 11Ac1–5," June 22, 2001.

[293] *See* CBOE Letter 2, *supra* note 10, at 8, and Amex Letter 3, *supra* note 10, at 4.

[294] *See* PCX Letter 2, *supra* note 10, Appendix at 13.

[295] *See* sections 8(c)(ii)(B)(1) and 2(26) of the Linkage Plan.

[296] *See* Phlx Letter 2, *supra* note 10, at 5.

[297] *See* section 7(a)(i)(C) of the Linkage Plan.

[298] *See* Discussion section II.C., *supra*.

[299] 15 U.S.C. 78q.

[300] 17 CFR 240.17d–2.

through so-called Rule 17d–2 agreements, to allocate certain regulatory responsibilities. Specifically, Rule 17d–2 under the Act[301] permits SROs to file with the Commission plans under which the SROs allocate among each other the responsibility to receive regulatory reports from, and examine and enforce compliance with specified provisions of the Act and rules thereunder and SRO rules by firms that are members of more than one SRO ("common members"). If such a plan is declared effective by the Commission, an SRO that is a party to the plan is relieved of regulatory responsibility as to any common member for whom responsibility is allocated under the plan to another SRO. These agreements help to avoid duplicative oversight and regulation. In this regard, the Commission approved a 17d–2 agreement ("Agreement") among the Amex, CBOE, ISE, the National Association of Securities Dealers, the NYSE, PCX, and Phlx that allocates the regulatory responsibilities among these SROs for common members relating to the conduct of broker-dealers of accounts for listed options or index warrants.[302]

The BSE plans to become a participant in this Agreement. Under this Agreement, the examining SROs will examine firms that are common members of the BSE and the particular examining SRO for compliance with certain provisions of the Act, certain of the rules and regulations adopted thereunder, certain examining SRO rules, and certain BOX Rules. In addition, the BOX Rules contemplate participation in this Agreement by requiring that any OFP be a member of at least one of the examining SROs.[303] Accordingly, the Commission's approval of the BSE's proposed rule change will not be effective until the BSE enters into the Agreement and the Agreement has been filed with, and approved by, the Commission.

J. National Market System ("NMS") Plans and the Options Clearing Corporation

The Commission's approval of the BSE's proposed rule change will not be effective until the BSE has become a participant in several NMS plans. Specifically, the BSE must join the Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (known as the Options Price Reporting Authority ("OPRA")), the Linkage Plan, and the Options Listing Procedures Plan ("OLPP"). In addition, the BSE will need to become a participant in the Options Clearing Corporation.

IV. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

In reviewing the BSE's proposal, the Commission is required under section 3(f) of the Act,[304] to consider whether the proposal will promote competition, efficiency, and capital formation. In addition, section 6(b)(8) requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[305]

As noted above, the proposed BOX facility would provide a new fully automatic electronic trading market for options. In the Commission's view, if the BOX market is successful in attracting new market participants and order flow, the facility could serve as a new source of liquidity for options investors and promote greater competition among options market centers. In particular, the BOX system, in contrast to the other options exchanges, would have multiple and competing market makers rather than a specialist-driven system. There would be no designated specialists, primary market makers, or lead market makers with authority to control trading in a particular options class. Market making in an options class on BOX would be open to all qualified Options Participants who are approved by the Exchange as Market Makers.

Additionally, BOX's trading rules are designed to establish an anonymous central order book with price/time priority, which may result in better pricing because trading participants have an incentive to post their very best prices rapidly. Moreover, the BOX PIP presents the opportunity for increased competition for Customer Orders and will guarantee the Customer Order that initiates the PIP receives price improvement of at least $.01 over the current NBBO.

If BOX succeeds in attracting order flow, it may serve as a great source of liquidity for investors, and this, in turn, could promote greater efficiency of executions. Similarly, the availability of novel features should provide investors and issuers with new opportunities to interact, thereby encouraging capital formation.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 4, including whether the proposed amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–BSE–2002–15. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should be submitted by February 10, 2004.

VI. Accelerated Approval of Amendment No. 4

Pursuant to section 19(b)(2) of the Act,[306] the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving Amendment No. 4 to the proposal, prior to the 30th day after publishing notice of Amendment No. 4 in the **Federal Register**. Many of the revisions made to the proposal in the BSE's Amendment No. 4 are modeled on existing rules of the other options exchanges. The Commission previously approved these rules and, therefore, believes that accelerating such rules for the BOX market is appropriate because these revisions do not raise new regulatory issues. Other revisions, although not based on existing SRO rules, were not

[301] 17 CFR 240.17d–2.

[302] *See* Securities Exchange Act Release No. 46590 (October 2, 2002), 67 FR 63474 (October 11, 2003).

[303] *See* proposed BOX Rules, Chapter XI, sec. 1.

[304] 15 U.S.C. 78c(f).

[305] 15 U.S.C. 78f(b)(8).

[306] 15 U.S.C. 78s(b)(2).

material to the overall proposal. The Commission believes that little purpose would be served by delaying approval of the proposal until those additional revisions had been published for comment. The Commission believes that it has received and fully considered substantial, meaningful comments with respect to the BSE's proposal, as amended, and that Amendment No. 4 does not raise issues that warrant further delay. Accordingly, pursuant to section 19(b)(2) of the Act,[307] the Commission finds good cause to approve Amendment No. 4 prior to the 30th day after notice of the Amendment is published in the **Federal Register**.

VII. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with section 6(b)(5) of the Act.[308]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[309] that the proposed rule change (SR–BSE–2002–15), as amended, is hereby finally approved, and Amendment No. 4 to the proposed rule change is hereby granted accelerated approval.

Although, the Commission's approval of the BSE's proposed rule change to establish trading rules for the BOX facility is final, it will not be effective until the BSE takes the following actions:

(1) *Participation in the Options Self-Regulatory Council ("OSRC").* The BSE must become a signatory to the 17d–2 agreement administered by the OSRC, which is a plan for the allocation of regulatory responsibility approved by the Commission under Rule 17d–2 of the Exchange Act.

(2) *Participation in the National Market System Plans relating to options trading.* The BSE must join the Options Price Reporting Authority, the Options Listing Procedures Plan, and the Options Linkage Authority.

(3) *Examination by the Commission.* The BSE must demonstrate to the satisfaction of Commission staff in the Office of Compliance Inspections and Examinations ("OCIE") that it has adequate surveillance programs and procedures in place to monitor trading on BOX and that BOX Options Participants can comply with the trade-through requirements of the Linkage Plan with regard to all trades effected through BOX or any exemption from such Linkage Plan requirements. OCIE shall evidence its satisfaction by issuing a letter to the BSE.

(4) The BSE must file a separate proposed rule change with the Commission pursuant to section 19(b) of the Act,[310] to amend the BOX Rules as follows:[311]

- *Market Opening.* As noted above, the BSE must amend Chapter V, section 9 of the proposed BOX Rules relating to the market opening to provide a more detailed description of the market opening procedures. Among other things, the BSE must clarify the proposed procedures for determining an opening price, including the pre-opening and the Theoretical Opening Price. In addition, the BSE must add a provision relating to the interaction of Customer Orders during the market opening.

- *Anticipatory Hedging.* As noted above, the BSE must amend the proposed BOX Rules to prohibit any person associated with an Options Participant who has knowledge of all material terms and conditions of (i) an order and a solicited order, (ii) an order being facilitated, or (iii) orders being crossed, the execution of which are imminent, to enter, based on such knowledge, an order to buy/sell the option, the underlying security, or any related instrument until the terms are disclosed to the trading crowd or the trade can no longer be considered imminent.

- *Exercise of Options Contracts.* The BSE must amend Chapter VII, section 1 of the proposed BOX Rules to clarify the provisions relating to contrary exercise advice.

- *Complex Orders.* As noted above, the BSE must amend the proposed BOX rules to specify the process for BOX Participants to notify BOX of a proposed strategy and the procedure for sending advisory messages.

Each of these conditions to file proposed rule changes will be satisfied upon effectiveness under section 19(b) of the Act.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1117 Filed 1–16?–04; 8:45 am]

BILLING CODE 8010–01–P

[307] 15 U.S.C. 78s(b)(2).

[308] 15 U.S.C. 78f(b)(5). In connection with the issuance of this approval order, neither the Commission nor the staff is granting any exemptive or no-action relief from the requirements of Rule 10b–10 under the Act. 17 CFR 240.10b–10. Accordingly, a broker-dealer executing a customer order through BOX will need to comply with all applicable requirements of this Rule.

[309] 15 U.S.C. 78s(b)(2).

[310] 15 U.S.C. 78s(b).

[311] The Commission is requiring these amendments so that the BOX Rules are comparable with the rules of the other options exchanges.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49056; File No. SR–ISE–2003–07]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by International Securities Exchange, Inc., Relating to Pricing of Block and Facilitation Trades

January 12, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 25, 2003, the International Securities Exchange, Inc. ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by the self-regulatory organization. On December 18, 2003, the Exchange amended the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to provide for the entry and execution of block and facilitation trades at the midpoint between the standard trading increments. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Rule 716. Block Trades

* * * * *

(a) Block-Size Orders. Block-size orders are orders for fifty (50) contracts or more.

(b) For purposes of this Rule, *a "broadcast message" means an electronic message that is sent by the Exchange to all Members, and a "Response" means an electronic message that is sent by Members in response to a broadcast message* [the term "Crowd Participants" means the market makers appointed to an options class under Rule 803, as well as other

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Members with proprietary orders at the inside bid or offer for a particular series].

(c) Block Order Mechanism. The Block Order Mechanism is a process by which a Member can obtain liquidity for the execution of block-size orders.

(1) Upon the entry of an order into the Block Order Mechanism, a broadcast message will be sent *and Members* [to the Crowd Participants, which] will be given an opportunity to *enter Responses* [respond to the broadcast message (a "Response")] with [indications of] the prices and sizes at which they would be willing to trade with a block-size order.

(2) At the conclusion of the time given [Crowd Participants] *Members* to enter Responses, either an execution will occur automatically, or the order will be cancelled.

(i) No change.

(ii) No change.

(iii) No change.

(d) Facilitation Mechanism. The Facilitation Mechanism is a process by which an Electronic Access Member can facilitate block-size Public Customer Orders. Electronic Access Members must be willing to facilitate the entire size of orders entered into the Facilitation Mechanism.

(1) Upon the entry of an order into the Facilitation Mechanism, a broadcast message will be sent [to the crowd Participants, which] *and Members* will be given an opportunity to *enter Responses with the prices and sizes at which* [indicate whether] they want to participate in the facilitation of the [Public Customer] order [at the facilitation price (an "Indication")].

(2) [Indications] *Responses* may be priced at the price of the order to be facilitated or at a better price[, so long as such better price is to buy (sell) at a price that is below (above) the ISE best bid (offer),] and must not exceed the size of the order to be facilitated.

[(3) Crowd Participants may indicate a willingness to facilitate an order at an improved price that is equal to or higher (lower) than the best bid (offer) on the Exchange by entering orders or changing their quotes, as applicable.]

[(4)] *(3)* At the end of the period given for the entry of *Responses* [Indications], the facilitation order will be automatically executed in full.

(i) Unless there is sufficient size to execute the entire facilitation order at a better price, Public Customer bids (offers) [on the Exchange] at the time the facilitation order is executed that are priced higher (lower) than the facilitation price will be executed at the facilitation price. Non-Customer bids (offers) [on the Exchange] at the time the facilitation order is executed that are priced higher (lower) than the facilitation price will be executed at their stated price, thereby providing the order being facilitated a better price for the number of contracts associated with such higher bids (lower offers).

(ii) The facilitating Electronic Access Member will execute at least forty percent (40%) of the original size of the facilitation order, but only after better-priced orders and quotes, as well as Public Customer Orders at the facilitation price are executed. [Indications] Responses, quotes and Non-Customer Orders at the facilitation price will participate in the execution of the facilitation order based upon the percentage of the total number of contracts available at the best price that is represented by the size of the Non-Customer Order or quote.

Supplementary Material to Rule 716

.01 It will be a violation of a Member's duty of best execution to its customer if it were to cancel a facilitation order to avoid execution of the order at a better price. The availability of the Facilitation Mechanism does not alter a Member's best execution duty to get the best price for its customer. Accordingly, while facilitation orders can be canceled during the time period given for the entry of [Indications] *Responses,* if a Member were to cancel a facilitation order when there was a superior price available on the Exchange and subsequently re-enter the facilitation order at the same facilitation price after the better price was no longer available without attempting to obtain that better price for its customer, there would be a presumption that the Member did so to avoid execution of its customer order in whole or in part by other brokers at the better price.

.02 Responses represent non-firm interest that can be canceled at any time prior to execution. Responses are not displayed to any market participants.

.03 Responses may not be entered for the account of an options market maker from another options exchange.

.04 The time given to [Crowd Participants] *Members* to enter Responses under paragraph (c)(1) shall be thirty (30) seconds, and for [Indications] *Responses* entered under paragraph (d)(1) shall be ten (10) seconds.

.05 Split Prices. Orders and Responses may be entered into the Block, Solicited Order and Facilitation Mechanisms and receive executions at the mid-price between the standard minimum trading increments for the options series ("Split Prices"). This means that orders and Responses for options with a minimum increment of 5 cents may be entered into the Block, Solicited Order and Facilitation Mechanisms and receive executions in 2.5 cent increments (e.g., $1.025, $1.05, $1.075, etc.), and that orders and Responses for options with a minimum increment of 10 cents may be entered into the Block, Solicited Order and Facilitation Mechanism and receive executions at 5 cent increments (e.g., $4.05, $4.10, $4.15, etc.). Orders and quotes in the market that receive the benefit of the block execution price under paragraph (c)(2)(i) and facilitation price under paragraph (d)(2)(i) may also receive executions at Split Prices.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to permit the ISE to execute and report block and facilitation trades at prices that are priced at the midpoint between the standard $.05 and $.10 trading increments (a "Split Price"). The ISE believes that this would provide ISE members with greater flexibility in the pricing of their block-size trades and allow a greater opportunity for price improvement for large-size orders. The ISE also believes that the proposed rule change also would provide a mechanism to allow the ISE to be competitive with the floor-based exchanges where there are informal procedures that permit trades to effectively receive Split Prices.

Specifically, the Exchange proposes to allow orders to be entered into the Block and Facilitation Mechanisms in $.025 increments for options with a standard minimum trading increment of $.05 (*e.g.*, $1.025, $1.05, $1.075, etc.) and in $.05 increments for options with a standard minimum trading increment of

$.10 (*e.g.*, $4.05, $4.10, $4.15, etc.). In addition, Exchange members would be able to respond to a Block or Facilitation broadcast message in $.025 increments for options with a minimum trading increment of $.05 and in $.05 increments for options with minimum trading increment of $.10, whether or not the order is entered at a standard increment. For example, if an order to sell 500 contracts were to be entered into the Facilitation Mechanism at a price of $4.00, members would be able to respond with a price of $4.05. If an order were to be executed at a Split Price, the Exchange would report the trade with the Split Price to the Options Price Reporting Authority ("OPRA"). The trade would be cleared by The Options Clearing Corporation ("OCC") at the Split Price as well.

In connection with the proposal to allow Split Prices in the Block and Facilitation Mechanism, the Exchange also proposes to expand participation in the Block and Facilitation Mechanisms. Currently, when an order is entered into either Mechanism, a message is sent to "Crowd Participants," who are given a certain amount of time to respond if they are interested in participating in the block-size trade. "Crowd Participants" are ISE market makers appointed to the options class and other ISE members with proprietary orders at the inside bid or offer for a particular series. Instead of limiting the broadcast message to the Crowd Participants, the Exchange proposes to send a broadcast message to all members and permit all members to respond if they wish to participate in the block-size transaction. The Exchange proposes, however, to prohibit the entry of a response that is for the account of an options market maker from another options exchange. The Exchange believes that this narrow limitation is necessary because ISE market makers are not given an opportunity to participate in trades executed on the floors of the other options exchanges. As a result, ISE believes that its market makers would be at a competitive disadvantage if options market makers from other exchanges were given such opportunity at the ISE.

The ISE also proposes to eliminate a restriction on the price at which members are permitted to respond to an order entered into the Facilitation Mechanism. Under the current rule, Crowd Participants are only permitted to respond at the proposed facilitation price. If a Crowd Participant wants to provide a better price to the order being facilitated, it must enter an order or quote into the market. As the ISE is only proposing to allow Split Pricing for block-size orders executed through the Block and Facilitation Mechanisms, it would be necessary to remove this limitation in order to allow members to respond at Split Prices.

Finally, the Exchange proposes to clarify the rule by providing definitions of a "broadcast message" and a "Response" and using those terms consistently throughout the rule. In addition, the proposal would add language to indicate that the Responses would represent non-firm interest that would be able to be canceled at any time prior to execution, and that Responses would not be displayed to any market participants. The ISE states that this has always been the case, but was not previously included in the text of the rule.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(5)[3] that an exchange have rules that are designed to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change would provide investors with greater flexibility to execute options orders in the ISE's electronic system at the same Split Prices they are able to obtain on the other options exchanges. The ISE believes the proposed rule change would also provide greater opportunity for price improvement of block-size orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition. Rather, it will allow the ISE to better compete with the other options exchanges for block-size orders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change; or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–ISE–2003–07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of such filing will also be available for inspection and copying at the principal office of the ISE. All submissions should refer to File No. SR–ISE–2003–07 and should be submitted by February 10, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1080 Filed 1–16–04; 8:45 am]

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[3] 15 U.S.C. 78f(b)(5).

[4] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49055; File No. SR–NASD–2003–131]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Relating to Proposed Amendments to NASD's Telemarketing Rules to Require Members To Participate in the National Do-Not-Call Registry

January 12, 2004.

I. Introduction

On August, 18, 2003, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to the NASD's adoption of telemarketing rules to require its members to participate in the national do-not-call registry. The proposed rule change was published for comment in the **Federal Register** on August 27, 2003.[3] On December 18, 2003, the NASD submitted Amendment No. 1 to the proposed rule change.[4]

The Commission received five comment letters on the proposed rule change.[5] The text of proposed Amendment No. 1 is below. Additions from the original filing are in *italics*; deletions are in [brackets].

* * * * *

2200. Communications With the Public

* * * * *

221[1]2. Telemarketing

(a)–(f) (No Change).

(g) Definitions

(1) Established business relationship

(A) An established business relationship exists between a member and a person if:

(i) the person has made a financial transaction *or has a security position, a money balance, or account activity* with the member or *at a clearing firm that provides clearing services to such member* within the previous 18 months immediately preceding the date of the telemarketing call; [or]

(ii) *the member is the broker/dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or;*

[(ii)]*(iii)* the person has contacted the member to inquire about a product or service offered by the member within the previous three months immediately preceding the date of the telemarketing call.

(B) A person's established business relationship with a member does not extend to the member's affiliated entities unless the person would reasonably expect them to be included. Similarly, a person's established business relationship with a member's affiliate does not extend to the member unless the person would reasonably expect the member to be included.

(2)–(3) (No Change).

(4) the term "account activity" shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member.

(5) the term "broker/dealer of record" refers to the broker/dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer.

* * * * *

II. Description

A. General

The Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC") established requirements for sellers and telemarketers to participate in a national do-not-call registry.[6] Since June 2003, consumers have been able to enter their home and mobile telephone numbers into the national do-not-call registry, which is maintained by the FTC. Under rules of the FTC and FCC, sellers and telemarketers generally are prohibited from making telephone solicitations to consumers whose numbers are listed in the national do-not-call registry.

On July 2, 2003, the SEC requested that the NASD amend its telemarketing rules to include a requirement for its members to participate in the national do-not-call registry.[7] Because broker/dealers and banks are subject to the FCC's jurisdiction, the NASD modeled its rules after the FCC, specifically tailoring the rules to broker/dealers and the securities industry.[8]

The NASD submitted a proposed rule change to amend NASD Rule 2211,[9] to implement rules that prohibit its members from making telemarketing calls to people who have registered on the FTC's national do-not-call registry.[10] The proposal retains the requirement that members make their a telemarketing calls only during certain times of day (8 a.m. to 9 p.m. local time at the called party's location) and a restriction against making calls to persons who have requested to be on a firm-specific do-not-call list.[11]

B. Exceptions

The NASD currently provides its members with an "existing customer" exception to its requirement that members make their a telemarketing calls only during certain times of day (8 a.m. to 9 p.m. local time at the called party's location) and to its requirement that members provide certain information about the caller during the course of the telephone conversation.[12] The proposed rule change would replace the "existing customer" exception with an "established business relationship" exception, a "prior

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission published the proposed rule changes filed by the NASD and the MSRB simultaneously. *See* Securities Exchange Act Release Nos. 48390 (August 22, 2003), 68 FR 51613 (August 27, 2003) (SR–NASD–2003–131); 48389 (August 22, 2003), 68 FR 51609 (August 27, 2003) (SR–MSRB–2003–07).

[4] *See* letter from Brian J. Woldow, Attorney, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 17, 2003 ("Amendment No. 1").

[5] *See* letters from Ted F. Angus, V.P. and Senior Corporate Counsel for Retail Brokerage, Charles Schwab, to Mr. Jonathan G. Katz, Secretary, Commission, dated September 17, 2003, ("Schwab Letter"); James Y. Chin, A.V.P., Director and Counsel, State Government Affairs & Staff Advisor to the State Telemarketing Subcommittee, Securities Industry Association, to Mr. Jonathan G. Katz, Secretary, Commission, dated September 17, 2003, ("SIA Letter"); Carl B. Wilkerson, Chief Counsel, Securities & Litigation, American Council of Life Insurers, to Jonathan G. Katz, Secretary, Commission, dated September 17, 2003, ("ACLI Letter"); Kevin S. Thompson, V.P., Deputy General Counsel, CUNA Mutual Group, to Jonathan G. Katz, Secretary, Commission, dated September 23, 2003, ("CUNA Letter"); Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable, to Mr. Jonathan G. Katz, Secretary, Commission, dated September 25, 2003, ("FSR Letter").

[6] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), FCC 03–153, adopted June 26, 2003.

[7] The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 requires the Commission to promulgate telemarketing rules substantially similar to those of the FTC or direct self-regulatory organizations to do so, unless the Commission determines that such rules are not in the interest of investor protection. 15 U.S.C. 6102(d) (2003).

[8] *See* The Do-Not-Call Implementation Act, 108 Pub. L. 10, 117 Stat. 557 (Mar. 11, 2003).

[9] The Commission notes that, in Amendment No. 1, the NASD changed the numbering of NASD Rule 2211 to NASD Rule 2212. Accordingly, unless otherwise specified, this notice generally references proposed NASD Rule 2212, as amended.

[10] *See* proposed NASD Rule 2212(a)(3).

[11] *See* proposed NASD Rule 2212(a)(1)&(2).

[12] *See* NASD Rule 2211(c)&(d).

express invitation or permission" exception and a "personal relationship exception."[13]

As originally proposed, the established business relationship exception would have enabled NASD members to make a telephone solicitation as long as the call's recipient had made a financial transaction with the member within 18 months preceding the date of the telemarketing call, or if the recipient had contacted the member to inquire about a product or service offered by the member within the three months preceding the date of the telemarketing call.[14] The proposed established business relationship exception would not provide an exception for those individuals who have requested to be put on a member's firm-specific do-not-call list or from the time-of-day restrictions.

The second exception to the national do-not-call rules pertains to those persons from whom the member has obtained prior express written invitation or permission to make a telemarketing call.[15] The final exception pertains to those persons with whom an associated person of a member has a "personal relationship."[16]

C. Telemarketing Procedures

The NASD also proposed that its members must institute certain procedures related to do-not-call lists. As proposed, these procedures must include requirements to: have a written policy for maintaining a do-not-call list, train personnel engaged in telemarketing in the existence and use of the do-not-call list, record and disclose requests from a person to be added to the member's do-not-call list, and have the member provide the called party with the name of the individual caller, the name of the member, a telephone number or address at which the member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services.[17] The proposed rules clarify that, absent a specific request, a person's do-not-call request would apply to the member making a call, but not an affiliated entity of such a member unless the person would expect such an affiliated entity to be included, given the identification of the caller and the product being advertised.[18] Further, the NASD proposed that members must maintain a record of a caller's request to receive no further telemarketing calls and must honor that request for a period of five years.[19]

D. Safe Harbor

In addition to proposing certain baseline procedures that members must follow, the NASD proposed a "safe harbor" under which a member would not be liable for calling a person on the national do-not-call registry if that call is the result of an error and if the telemarketer's routine business practice meets certain specified standards.[20] In order to benefit from this safe harbor the member must establish and implement written procedures to comply with the national do-not-call rules, train its personnel in those procedures, maintain a list of telephone numbers that the member may not contact, and use a process to prevent telephone solicitations to any telephone number that appears on any national do-not-call registry, including a version of the list obtained from the administrator.

E. Miscellaneous

The NASD proposed that the applicability of the telemarketing and telephone solicitation restrictions and exceptions would extend to wireless telephone subscribers.[21] Further, the NASD proposed that if a member uses another entity to perform telemarketing services on its behalf, the member remains responsible for ensuring compliance with all provisions contained in proposed NASD Rule 2212.[22]

III. Summary of Comments

The commission received five comment letters addressing the proposed rule change.[23] All five letters expressed concerns with the NASD's proposed amendments to NASD Rule 2212.

A. Established Business Relationship

In general, the five commenters believe that the proposed rule change, as proposed in the original filing, would restrict the ability of member firms to contact their existing customers.[24] The commenters' primary concern relates to the NASD's proposed definition of an "established business relationship" exception.[25] The commenters generally stated the NASD's proposed version of the established business relationship exception, which is created when a customer has "effected a securities transaction or deposited funds or securities with the member" is too limited in scope and appears inconsistent with the TCPA and FCC Rules.

The established business relationship exclusion, under the FCC's amendment to the TCPA, provides that formation of an existing relationship involves a voluntary two-way communication "with or without an exchange of consideration."[26] By limiting the scope of the established business relationship exclusion, the commenters believe that the proposed rule change restricts opportunities for both broker-dealers and customers and may preclude member firms from fulfilling their account monitoring responsibilities.[27]

In addition, commenters expressed concerns that changing the interpretation from a customer that "carries an account" to requiring a "financial transaction" within the previous eighteen months imposes difficult compliance issues, increases confusion, and generally restricts the ability of broker-dealers to contact their customers. These commenters believe the change undermines the broker-client relationship. In addition, some commenters claimed that narrowing the scope of existing customers for the established business relationship exception would force broker-dealers to implement costly system changes that distinguish among their account holders.[28] As a whole, the commenters assert that the NASD is setting forth a new concept that was not included in the FCC Rules under the amended TCPA.[29]

All five commenters believe that the NASD's definition of an established business relationship is too narrow and omits various situations under which a broker/dealer may need to contact its customers.[30] For example, one commenter believes that the definition of established business relationship does not properly accommodate the interests of broker/dealers distributing variable life insurance and variable annuities.[31] The same commenter states that variable life insurance and annuity contracts are long term accumulation

[13] *See* proposed NASD Rule 2212(b).

[14] *See* original proposed NASD Rule 2211(g)(1)(A).

[15] *See* proposed NASD Rule 2212(b)(2).

[16] *See* proposed NASD Rule 2212(b)(3).

[17] *See* proposed NASD Rule 2212(d)(1)–(d)(4).

[18] *See* proposed NASD Rule 2212(d)(5).

[19] *See* proposed NASD Rule 2212(d)(6).

[20] *See* proposed NASD Rule 2212(c).

[21] *See* proposed NASD Rule 2212(e).

[22] *See* proposed NASD Rule 2212(f).

[23] *See supra* note 5.

[24] *See* ACLI Letter, at 3–4; Charles Schwab Letter, at 4; CUNA Letter, at 2; FSR Letter, at 2–3; SIA Letter, at 4.

[25] *Id.*

[26] 47 CFR 64.1200(f)(3).

[27] *See* FSR Letter, at 2.

[28] FSR Letter at 4; Schwab Letter, at 5; SIA Letter, at 2.

[29] *See* Schwab Letter; SIA Letter; ACLI Letter; CUNA Letter; FSR Letter.

[30] *See* ACLI Letter, at 3–4; Schwab Letter, at 4; CUNA Letter, at 2; FSR Letter, at 2–3; and SIA Letter, at 4.

[31] ACLI Letter, at 2–4.

products necessitating long-term business relationships with customers.[32] Three commenters state that the proposed definition of an established business relationship is significantly narrower than the NASD's definition of existing customer, which is used for NASD's existing telemarketing rules and the FCC's and FTC's definition of established business relationship.[33] Two commenters also believe that an established business relationship generally should exist when a customer is an account holder at a member firm.[34] Charles Schwab states that the proposed rule should permit a member to win back a customer's account.[35]

The commenters request a review of the proposal with consideration of the wide array of business activities of all member firms. One commenter stated that the statutory 21-day comment period was insufficient to address the issues raised by this proposed rule change.[36] Most commenters urged the NASD to revise the proposed rule change by expanding the definition of "established business relationship" to accommodate an effective means for member firms to deliver products and services to customers.[37]

B. Networking Agreements

One commenter stated that the proposed definition of established business relationship does not properly provide for networking relationships between different entities.[38] That commenter believes that if a person maintains an account at a bank, the person should be viewed as having an established business relationship with that bank's networking broker/dealer.

C. The Prior Express Written Consent Exception

As described above, NASD's proposed rule contains an exemption from the do-not-call provisions if a consumer has provided consent in writing to be called by the firm.[39] One commenter believes that NASD's rule is inconsistent with the FTC and FCC rules in that it requires "written" consent.[40]

IV. Amendment No. 1

A. Established Business Relationship

In its letter included within Amendment No. 1, NASD noted that proposed NASD Rule 2212 would restrict only "telephone solicitations," which would be defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." Accordingly, under the original proposed definition, the NASD interpreted a telephone call to a customer concerning a margin call or similar administrative event would not constitute a telephone solicitation.

In response to commenters' concerns about the narrow scope of the established business relationship exception, the NASD stated that a member may, at times, be compelled to contact a customer to satisfy the member's attendant agency obligations, including situations where market swings, interest rate changes, new tax laws, or specific industry or company news may necessitate a broker contacting his or her customer.

In addition, the NASD proposed two changes to the definition of an "established business relationship." The first change to the definition would encompass situations where the person has a security position, a money balance, or account activity at a clearing firm on behalf of such member within the previous 18 months. The second change to the definition would include situations where a member was the "broker/dealer of record" for an account of a person within the 18 months immediately preceding the date of the telemarketing call. Both definitions of established business relationship continue for 18 months after a triggering event, thus providing an opportunity for a firm to win back a customer.

Moreover, the NASD noted that the proposed rule change cannot assure members that compliance with the proposed NASD Rule 2212 ensures compliance with FCC rules because members also must comply with the telemarketing rules of the FCC and any FCC interpretations of those rules.

B. Networking Agreements

In response to one commenter's concerns with respect to networking agreements, the NASD stated that it did not agree with the commenter's view on the scope of a member's established business relationship with banks' networking broker/dealer. The NASD stated that it believed that the FCC and FTC rules concerning "related parties" were clear in that a person's established business relationship with a member does not extend to the member's affiliated entities unless the person would reasonably expect them to be included. The NASD stated that it similarly designed its established business relationship exception to not extend to the member unless the person receiving the call would reasonably expect the member to be included as a related party. The NASD stated that it does believe that a networking arrangement, which is formed by contract and that also may be terminated by a bank under such contract, meets the threshold intended by the FCC and FTC rules. In addition, it stated that it does not believe that a customer of the bank that has not made a financial transaction with a broker/dealer would reasonably expect to be contacted by such broker/dealer.

C. Prior Express Written Consent Exception

In response to one commenter's concern about the need for the prior express consent to be in writing, the NASD stated that it interpreted the FCC and FTC rules to require prior written consent in order for an exception to the prohibition against calling the registrants on the national do-not-call registry to apply. The NASD noted that the FCC rule states that a person or entity shall not be held liable for violating the national do-not-call registry prohibition if "[i]t has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a *signed, written agreement* between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed."[41] The NASD stated that the FTC rule also requires prior express written notice.[42] Moreover, the NASD believes the potential for misuse of this exception is

[32] ACLI Letter, at 3.

[33] *See* SIA Letter, at 3–4; Charles Schwab Letter at 2–4; and FSR Letter at 2–3.

[34] *See* SIA Letter at 3; and Schwab Letter at 3.

[35] *See* Schwab Letter, at 5. The FCC has stated, "a consumer who once had telephone service with a particular carrier or a subscription with a particular newspaper could expect to receive a call from those entities in an effort to 'win back' or 'renew' that consumer's business within eighteen (18) months." 68 FR 44144, 44158 (July 25, 2003).

[36] *See* ACLI Letter, at 5.

[37] *See* ACLI Letter, at 5; SIA Letter, at 4; CUNA Letter, at 2; and FSR Letter, at 3.

[38] *See* CUNA Letter at 2.

[39] *See* proposed NASD Rule 2212(b)(2).

[40] *See* FSR Letter at 4–5.

[41] 68 FR 44144, 44177 (July 25, 2003) (codified at 47 CFR 64.1200(c)(2)(*ii*)) (emphasis added).

[42] The FTC rule states that a seller or telemarketer may call a person on the national do-not-call registry if the seller or telemarketer "has obtained the express agreement, *in writing*, of such person to place calls to that person. Such *written* agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person." 68 FR 4580, 4672 (January 29, 2003) (codified at 16 CFR 310.4(b)(iii)(B)(*ii*)) (emphasis added).

heightened if it can be based on verbal consent. Based on the foregoing, the NASD declined to amend the prior consent provisions to accommodate verbal requests.

V. Discussion and Commission Findings

After careful review of the proposed rule change and the related comments, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder which govern the NASD [43] and, in particular, the requirements of Section 15A(b)(6) of the Act and the rules and regulations thereunder.[44] Section 15A(b)(6) of the Act requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

A. General

The Commission believes that the investing public's participation in the do-not-call registry, as described in the proposed rule change, creates an expectation among national do-not-call registrants that they will not receive unwanted telephone solicitations from NASD members. The Commission believes that the NASD's proposal generally prohibits its members from making telemarketing calls to people who have registered on the national do-not-call registry, while retaining time-of-day and firm-specific do-not-call list restrictions.[45] The Commission believes that the proposed rule change, as amended establishes adequate procedures to prevent members from making telephone solicitations to do-not-call registrants which should have the effect of protecting investors, while providing appropriate exception to the rule for certain enumerated situations, which should promote just and equitable principles of trade.

B. Exceptions

The Commission recognizes the importance of having certain exceptions to the general prohibition of NASD members from soliciting persons who have signed up on the FCC's national do-not-call registry. The Commission believes that the "established business relationship" exception, "prior express invitation or permission" exception, and a "personal relationship" exception provide appropriate scenarios where an NASD member should not be precluded from making a telemarketing call to do-not-call registrants.

The Commission further believes that the NASD's expansion of "established business relationship" is appropriate. As originally drafted, an established business relationship would exist between the customer and an NASD member as long as the call's recipient had made a financial transaction with the member within 18 months preceding the date of the telemarketing call, or if the recipient had contacted the member to inquire about a product or service offered by the member within the three months preceding the date of the telemarketing call.[46] In response to commenters concerns about the narrowness of the exception, the NASD expanded the definition of "established business relationship" to include situations where the telemarketing call recipient has a security position, a money balance, or account activity at a clearing firm on behalf of such member within the previous 18 months, and where a member was the "broker/dealer of record" for an account of a person within the 18 months immediately preceding the date of the telemarketing call.

The Commission believes that an NASD member should be able to discuss the purchase or sale of a security with a customer who has registered on the national do-not-call registry without fear of violating an NASD rule when there is some development that could materially impact the investment decision of a reasonable investor. As originally proposed, an established business relationship did not exist unless an account holder had made a financial transaction within the previous eighteen months or affirmatively contacted the member to make an account inquiry within the past three months. The Commission believes that the definition, as originally proposed, would have restricted a member from making a telemarketing call to its customer in many situations where a prudent investor would ordinarily desire to be contacted, such as the existence of market swings, interest rate changes, new tax laws, or specific industry or company news. The Commission believes that the expansion of the definition of "established business relationship" exception to include persons that have a security position, money balance or account activity with a member or at a clearing firm that provides clearing services on behalf of a member will, among other things, assist NASD members in upholding their agency obligations to customers. In addition, the Commission believes that broker/dealers of record who have served as such for a customer within the eighteen months preceding the date of the telemarketing call should be allowed to contact a customer whose account is held directly at a mutual fund or variable insurance product issuer.

Moreover, the Commission believes that the proposed established business relationship exception adequately protects customers who are most interested in not being contacted by a member by specifying that the exception does not apply to those individuals who have specifically requested to be put on a member's do-not-call list. The Commission further believes a member should not generally be restricted from contacting those do-not-call registrants from whom the member has received express written consent to contact and those registrants who have a personal relationship with the associated person making the call.

C. Telemarketing Procedures

As described above, the NASD also proposed that its members must institute certain procedures related to do-not-call lists. [47] The Commission believes that the procedures that the NASD has proposed provide adequate guidelines for a member to establish education and training of its affiliated persons and adequately provides that a member will incorporate the names of persons who request to be put on a firm's do-not-call list among the list of names that a member may not contact. Further, the Commission believes that the identification procedure that a member or associated person must follow when making a telemarketing call should enhance the ability of consumers to hold members and associated persons accountable for adhering to firm-specific and national do-not-call registry restrictions.

D. Safe Harbor

As described above, the NASD proposed "safe harbor" procedures that a member could follow to avoid liability for do-not-call list violations that arise out of errors if the telemarketer's routine business practice meets certain specified standards.[48] The Commission believes that the safe harbor that the NASD has proposed should ensure that a member incorporates national do-not-call registrants in its own list of telephone numbers that it may not

[43] Additionally, in approving this rule the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[44] 15 U.S.C. 78o–3(b)(6).

[45] *See* proposed NASD Rule 2212(a)(1) and (2).

[46] *See* original proposed NASD Rule 2211(g)(1)(A).

[47] *See* proposed NASD Rule 2212(d)(1)–(d)(6).

[48] *See* proposed NASD Rule 2212(c).

contact, and that members and associated persons follow procedures to refrain from contacting such persons. Accordingly, the Commission believes it is appropriate to grant members who have established the appropriate routine business practices a safe harbor exemption from liability for calls made out of genuine error.

E. Miscellaneous

The Commission believes that the NASD's proposal to apply the telemarketing and telephone solicitation restrictions to wireless telephone numbers is appropriate, given that consumers can register wireless telephone numbers in the national do-not-call registry. Further, the Commission believes that a member should not be able to avoid accountability for complying with telemarketing restrictions and regulations by employing another entity to perform telemarketing services on behalf of the member. Accordingly, the Commission finds proposed NASD Rule 2212(f), relating to outsourcing telemarketing, to be appropriate.

F. Accelerated Approval of Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, for approving Amendment No. 1 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. As discussed above, in Amendment No. 1, the NASD expanded the breadth the established business relationship exception. The Commission believes that the proposed Amendment No. 1 will, among other things, facilitate members' ability to uphold their agency obligations by enabling them to make a telemarketing call under certain circumstances to customers who have not actively traded or made deposits to their brokerage accounts. In making the determination to accelerate approval of Amendment No. 1, the Commission notes that all five commenters supported a broader definition of "established business relationship."[49]

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NASD–2003–131. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–131 and should be submitted by February 10, 2004.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[50] that the proposed rule change, as amended (File No. SR–NASD–2003–131) is approved, and Amendment No. 1 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[51]

Margaret H. McFarland,

Deputy Secretary.

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[49] *See* ACLI Letter, at 3–4; Schwab Letter, at 4; CUNA Letter, at 2; FSR Letter, at 2–3; SIA Letter, at 4.

[50] *Id.*

[51] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49059; File No. SR–NASD–2003–200]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to an Amendment to NASD Rule 2130

January 12, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on December 30, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as "non-controversial" under Section 19(b)(3)(A) of the Act[3] and Rule 19b-4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD Rule 2130 to correct a typographical error in Rule 2130(c). The text of the proposed rule change is set forth below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

2130. Obtaining an Order of Expungement of Customer Dispute Information From the Central Registration Depository (CRD System)

(a) and (b) No change.

(c) For purposes of this rule, the terms "sales practice violation," "investment-related," and "involved" shall have the meanings set forth in the Uniform Application for Securities Industry Registration [of] *or* Transfer ("Form U4") in effect at the time of issuance of the subject expungement order.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would correct a typographical error in NASD

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b-4(f)(6).

Rule 2130(c) to change "Uniform Application for Securities Industry Registration of Transfer" to "Uniform Application for Securities Industry Registration or Transfer."[5]

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[6] which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general to protect investors and the public interest. NASD believes that correcting the typographical error in NASD Rule 2130(c) to change "Uniform Application for Securities Industry Registration of Transfer" to the correct title "Uniform Application for Securities Industry Registration or Transfer" is consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

NASD has requested that the Commission waive the usual five-business-day notice period and the usual 30-day pre-operative period. The Commission notes that the proposal merely corrects a typographical error in NASD Rule 2130(c) and raises no new regulatory issues. As a result, the Commission believes that it is consistent with the protection of investors and the public interest to waive the five-business-day notice period and accelerate the operative date so that the typographical error can be corrected without delay. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[9]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rulecomments@sec.gov*. All comment letters should refer to File No. SR–NASD–2003–200. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–200 and should be submitted by February 10, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1083 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* Securities Exchange Act Release No. 48933 (December 16, 2003), 68 FR 74667 (December 24, 2003) (SR–NASD–2002–168).

[6] 15 U.S.C. 78*o*–3(b)(6).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] For purposes only of accelerating the operative date of the proposed rule change the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49054; File No. SR–NFA–2003–04]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Futures Association Regarding Proficiency Requirements for Security Futures Products

January 12, 2004.

Pursuant to section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on December 15, 2003, the National Futures Association ("NFA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule changes described in items I, II, and III below, which items have been prepared by the NFA. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

NFA, on December 12, 2003, submitted the proposed rule change to the Commodity Futures Trading Commission ("CFTC") for approval and invoked the "ten-day" provision of section 21(j) of the Commodity Exchange Act ("CEA")[3]. On December 18, 2003, the CFTC determined not to review the proposed rule change and permitted NFA to make the proposed rule change effective on December 24, 2003.[4]

I. Self-Regulatory Organization's Description of the Proposed Rule Change

NFA's proficiency requirements for persons engaged in security futures activities allow current registrants to qualify to engage in these activities by taking an appropriate training program rather than a test. NFA anticipated updating the Series 3 examination[5] and

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] 7 U.S.C. 21(j).

[4] *See* Letter from Lawrence B. Patent, Deputy Director, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, CFTC to Thomas W. Sexton, III, Esq., General Counsel, NFA, dated December 18, 2003.

[5] The Series 3 is a comprehensive examination that qualifies registered associated persons to

Series 30 examination[6] to include security futures questions, after which future registrants would qualify by testing. At the present time, however, testing is an inefficient option due to the low trading volume in these products and the relatively small number of individuals who are interested in qualifying to engage in security futures activities. Therefore, NFA proposes to postpone updating the tests until trading activity picks up.

Section 15A(k) of the Exchange Act[7] makes NFA a national securities association for the limited purpose of regulating the activities of NFA members ("Members") who are registered as brokers or dealers in security futures products under section 15(b)(11) of the Exchange Act.[8] The proficiency requirements for security futures products apply to these Members and their registered employees.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

NFA has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

An NFA Interpretive Notice titled "NFA Compliance Rules 2–7 and 2–24 and Registration Rule 401: Proficiency Requirements for Security Futures Products" provides that new registrants can satisfy their proficiency requirements for security futures by taking an appropriate training program if they take the Series 3 examination and apply for registration before the Series 3 examination is updated to include security futures questions. The Interpretive Notice also provides that new branch office managers and current supervisory personnel can satisfy the proficiency requirements for designated security futures principals through training before the Series 30 examination is updated. Current registrants and branch office managers can also satisfy their proficiency requirements by training.

Although the Interpretive Notice does not include a deadline for updating the Series 3 and Series 30 examinations, NFA anticipated updating these examinations by January 2004.[9] In fact, NFA has already prepared the necessary questions and could easily add them to the question banks for the Series 3 and Series 30 examinations. Given the low trading volume in these products and the relatively small number of individuals who are interested in qualifying to engage in security futures activities, however, testing is an inefficient option at this time. Furthermore, the existing training program is an effective way to ensure that individuals who solicit accounts and orders from and manage accounts for customers trading in these markets have the necessary knowledge. Therefore, NFA proposes postponing the updated Series 3 and Series 30 examinations until activity increases to a point where a test becomes more practical.

Security futures account for a very small amount of U.S. futures volume. Extrapolating from current volume figures, we estimate that annual trading volume on U.S. futures exchanges will be approximately 1.3 billion contracts for calendar year 2003, while security futures volume will be approximately 2.5 million contracts.[10]

The number of individuals qualifying to engage in security futures activities is also a small percentage of those eligible to qualify. From January through November 2003, 1054 futures-only registrants have completed the web-based proficiency training offered by NFA and NASD. In the last four months, the number of individuals who completed the proficiency training has dropped significantly, averaging just under 50 futures-only registrants per month.[11] Since the proficiency training is used by existing registrants as well as new registrants, the number of new registrants taking the training should be considerably lower.

Looking at the same period, 2459 individuals took the Series 3 examination from January through November. Unlike the training figures, however, the number of people taking the exam has remained relatively steady, with a monthly average of 241 for the last four months.[12] These figures demonstrate that most individuals who take the Series 3 exam are not interested in security futures at this time.

The regulatory scheme for security futures is different from and more complex than the regulatory scheme for other futures contracts. As a result, when NFA adds security futures products questions to the Series 3 examination, the exam will be significantly longer and will require applicants to learn additional material. NFA does not believe it is cost-effective to impose a burden on all new entrants to learn this information when the vast majority of them do not appear to be interested in selling or trading these products. Similar considerations apply to updating the Series 30 examination.

We have been coordinating with NASD and are aware that it has requested similar relief. NFA and NASD have the same regulatory aims and, in fact, the regulatory scheme for security futures products anticipates that the two entities will have comparable regulatory requirements. Postponing the testing requirement for both NFA and NASD promotes regulatory comparability and reduces the potential for regulatory arbitrage.

For the reasons discussed above, NFA proposes to postpone the use of the revised exams indefinitely. In the meantime, we will continue to coordinate with NASD and will monitor the level of activity and the amount of interest in security futures products. In particular, we will review the following security futures information on an ongoing basis:

- Volume,
- Who is trading these products,
- Number of associated persons completing the training program,
- Number of accounts approved for trading,
- Nature of those customers,
- Customer complaints, and
- Audit findings that indicate potential regulatory concerns.

engage in all types of non-supervisory activities requiring registration. NFA has other examinations that qualify individuals to engage in more limited activities, but these examinations are all subsets of the Series 3 examination.

[6] The Series 30 examination is NFA's supervisory examination.

[7] 15 U.S.C. 78*o*–3(k).

[8] 15 U.S.C. 78*o*(b)(11).

[9] The Interpretive Notice originally included a deadline of six months after the first security futures contract began trading, but the notice was previously amended, effective May 5, 2003, to eliminate that deadline. *See* Securities Exchange Act Release No. 47825 (May 9, 2003); 68 FR 27128 (May 19, 2003) (SR–NFA–2003–03).

[10] Total volume is based on information reported by the individual futures exchanges and compiled by the Futures Industry Association, and the security futures volume is based on information reported by the Options Clearing Corporation.

[11] NFA's audits of notice-registered broker-dealers show that they are all using the Web-based training program to qualify their employees.

[12] Dual registrants take the training through NASD, and these registrants are not reflected in the futures-only figures discussed in the text. Even when combining futures and securities registrants, however, fewer than 100 individuals have completed the proficiency training in each of the last four months.

As noted above, we have already prepared test questions and can add them to the Series 3 and Series 30 question banks with a minimum of effort. We will be able to update the Series 3 and Series 30 examinations quickly if our review indicates that it is either necessary or cost-effective or if either the SEC or the CFTC so requests. We will, of course, need enough lead-time for test preparation services to update their course materials so that new applicants can study the appropriate material before taking the examination, but the entire process should not take more than four months.

2. Statutory Basis

The rule change is authorized by, and consistent with, section 15A(k) of the Act.[13]

B. Self-Regulatory Organization's Statement on Burden on Competition

The rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act and the Commodity Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NFA did not publish the rule changes to the membership for comment. NFA did not receive comment letters concerning the rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change became effective on December 24, 2003.

Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of section 19(b)(1) of the Exchange Act.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change conflicts with the Act. Persons making written submissions should file nine copies of the submission with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NFA–2003–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of these filings also will be available for inspection and copying at the principal office of NFA. All submissions should refer to File No. SR–NFA–2003–04 and should be submitted by February 10, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1078 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

[13] 15 U.S.C. 78o–3(k).

[14] 15 U.S.C. 78s(b)(1).

[15] 17 CFR 200.30–3(a)(75).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49057; File No. SR–Phlx–2003–83]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Equity Floor Brokerage Assessment Fees

January 12, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. On January 9, 2004, the Phlx submitted an amendment to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend its schedule of dues, fees, and charges by: (1) Permanently adopting a monthly fee of $250 for each member who derives his/her primary income from floor brokerage business conducted on the *equity floor* of the Exchange; (2) eliminating the *equity floor* brokerage assessment fee of 5 percent of net floor brokerage income, which had been waived through December 31, 2003; and (3) clarifying that the $250 monthly charge is assessed on members who derive their primary income from brokerage business conducted on the equity floor of the Exchange, as opposed to the options or foreign currency floors of the Exchange.[3]

The Exchange previously suspended its equity floor brokerage assessment fee of 5 percent of net floor brokerage income through December 31, 2003 and adopted a monthly fee of $250 for each member who derives his/her primary income from equity floor brokerage business.[4] The Exchange intends to adopt permanently the $250 monthly fee beginning on January 2004 and to eliminate the equity floor brokerage fee of 5 percent beginning on January 1, 2004.

The text of the proposed rule change is available at the Office of the Secretary, the Phlx, and the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any

[3] For purposes of this proposed rule change, floor brokerage business conducted on the Exchange includes orders that are received on the equity floor of the Phlx, even if those orders are executed on an exchange other than the Phlx. For purposes of the $250 monthly fee, "primary income" means that the member derives at least 80 percent of gross income generated from Phlx floor-based activities from his/her brokerage business conducted on the equity floor of the Exchange.

[4] *See* Securities Exchange Act Release No. 46875 (November 21, 2002), 67 FR 72014 (December 3, 2002) (SR–Phlx–2002–70). While the reference to the floor brokerage was updated on the Exchange's summary of equity charges, the additional reference on the QQQ schedule was not similarly updated. Therefore, the QQQ equity fee schedule will also be updated with the proposed changes described herein.

comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to attract business to the Exchange. Specifically, the Exchange believes that permanently waiving the equity floor brokerage fee of 5 percent of net floor brokerage income and implementing a modest monthly fee of $250 should encourage floor brokers to send additional order flow to the Exchange and enhance the competitiveness of the Exchange. Charging a flat $250 monthly charge would also simplify Phlx accounting procedures and billing. In addition, specifying that the $250 monthly charge would be assessed on members who derive their primary income from brokerage business conducted on the equity floor of the Exchange should help to avoid any member confusion with respect to the billing of the floor brokerage assessment.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of dues, fees, and charges is consistent with Section 6(b) of the Act [5] in general, and furthers the objectives of Section 6(b)(4) of the Act [6] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change, as amended, has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act [7] and Rule 19b–4(f)(2) [8] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, as amended, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[9]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Phlx–2003–83. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, your comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–2003–83 and should be submitted by February 10, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1081 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on January 9, 2004, the date on which the Exchange filed Amendment No. 1.

[10] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Dallas and Ellis Counties, Texas

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Supplemental notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public of a change in the study limits of an Environmental Impact Statement being prepared for a proposed transportation project in Dallas and Ellis Counties, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Salvador Deocampo, District Engineer, Federal Highway Administration, 300 East 8th Street, Room 826, Austin, Texas 78701, Telephone 512–536–5950.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Texas Department of Transportation (TXDOT) and the Dallas County Department of Public Works, is preparing an Environmental Impact Statement (EIS) on the proposal to build Loop 9, a new location highway, from US 287 to IH 20 in Southern Dallas and Northern Ellis Counties. A previous notice, published in the Federal and State Registers identified the study limits as SH 360 to IH 20. Due to changes in the proposed alignment location in the vicinity of SH 360, the study limits have been changed from "SH 360 to IH 20" to "US 287 to IH 20". The study corridor is still approximately 40 miles.

From a regional perspective, there is still a great demand for additional east-west transportation capacity and access throughout the limits of the corridor. Over the last 30 years, this area has experienced tremendous growth and has more than quadrupled in population. A Major Investment Study (MIS) will be integrated with the EIS. The Loop 9 facility is included in the Mobility 2025 Update: The Metropolitan Transportation Plan as a new location staged parkway calling for the preservation of right-of-way through this corridor. The environmental study will examine viable alternatives and potential transportation modes including the No-Build; Transportation

Systems Management/Congestion Management Systems; controlled access freeway and other potential options. It will also include extensive and continuous public involvement to address the long-term mobility needs of both the region and local communities. The environmental study will include the determination of the number of lanes (four to six are anticipated), roadway configuration and operational characteristics. It will also include a discussion of the effects on the social, economic, and natural environments and of other known and reasonably foreseeable agency actions proposed within the Loop 9 study corridor.

A public scoping meeting was held in June of 2003. This was the first in a series of meetings to solicit public comments on the proposed action during the National Environmental Policy Act (NEPA) process. In addition, a public hearing will be held following the approval of the Draft EIS. Public notice will be given of the time and place of the meetings and the hearing. The Draft EIS will be available for public and agency review and comment before the public hearing.

To ensure that the full range of issues related to this proposed section are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Dated: January 7, 2004.

Salvador Deocampo,

District Engineer, Austin, Texas.

[FR Doc. 04–1131 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2003–15690; Notice 2]

General Motors North America, Inc.; Grant of Application for Decision of Inconsequential Noncompliance

General Motors North America, Inc. (GM) has determined that certain 2001–2003 Oldsmobile Silhouettes and 2003 Pontiac Azteks did not meet requirement S5.2 of Federal Motor Vehicle Safety Standard (FMVSS) No. 120—"Tire Selection and Rims for Motor Vehicles Other Than Passenger Cars."

Pursuant to 49 U.S.C. 30118(d) and 30120(h), GM has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports."

Notice of receipt of the application was published, with a 30-day comment period, on August 15, 2003 in the **Federal Register** (68 FR 48992). NHTSA received no comments.

GM produced 55,825 model year 2001–2003 Oldsmobile Silhouettes and 15,343 model year 2003 Pontiac Azteks, totaling 71,168 vehicles. These vehicles are classified as multipurpose passenger vehicles (MPVs). According to GM, the rims fitted to the MPVs were originally released for use on passenger cars, and meet all the requirements of FMVSS No. 110, "Tire Selection and Rims—Passenger Cars." FMVSS No. 110 does not require marking the rims with either the designation of the source of the rims' dimensions or the symbol "DOT." When the rims were subsequently released for use on the subject MPVs, they were evaluated for the alternative usage with respect to performance requirements, but they inadvertently were not reviewed with respect to the marking requirements of FMVSS No. 120. These rims meet all requirements of FMVSS No. 120, except the marking requirements of S5.2(a) and S5.2(c), which require the designation of the source of the rims' dimensions, and use of the symbol "DOT," respectively.

Paragraph S5.2 of FMVSS No. 120 requires that each rim be marked with specific information, including a designation indicating the source of the rim's published nominal dimensions and the symbol "DOT," constituting a certification by the manufacturer of the rim that the rim complies with all applicable motor vehicle safety standards.

The agency concludes that the noncompliance is inconsequential to motor vehicle safety. All other informational markings including the correct rim size designation, as required by FMVSS No. 120, are present. While the absence of the letter "T" could increase the possibility of mismatching rims to tires, GM stated and the agency verified that the dimensions of these rims, as published in the Tire and Rim Association Yearbook (T), and by European Tyre and Rim Technical Organisation and the Japan Automobile Tire Manufacturers Association, Inc., are essentially identical. In addition, the rims of the affected vehicles are properly matched and appropriate with respect to all performance requirements and the vehicle placards correctly indicate the rim sizes.

In consideration of the foregoing, NHTSA has decided that the applicant has met its burden of persuasion that the noncompliance it describes is inconsequential to motor vehicle safety. Accordingly, GM's application is hereby granted, and the applicant is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

Authority: (49 U.S.C. 301118, 301120; delegations of authority at 49 CFR 1.50 and 501.8).

Issued on: January 14, 2004.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 04–1132 Filed 1–16–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34456]

The Burlington Northern and Santa Fe Railway Company—Temporary Trackage Rights Exemption—Union Pacific Railroad Company

Union Pacific Railroad Company (UP) has agreed to grant temporary overhead trackage rights to The Burlington Northern and Santa Fe Railway Company (BNSF) over UP's Dallas Subdivision lines between UP milepost 245.3 at Fort Worth, TX (East Tower 55), and UP milepost 214.6 at Dallas, TX (Terminal Junction), a distance of approximately 30.7 miles.

The transaction was scheduled to become effective on January 13, 2004, and the trackage rights are scheduled to expire on January 22, 2004. The purpose of the temporary trackage rights is to allow BNSF to bridge its train service while its main lines are out of service due to certain programmed track, roadbed, and structural maintenance.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982).

This notice is filed under 49 CFR 1180.2(d)(8). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to

revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34456, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Sarah W. Bailiff, 2500 Lou Menk Drive, P.O. Box 961039, Fort Worth, TX 76161–0039.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: January 13, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–1112 Filed 1–16–04; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning Regulations governing U.S. Treasury Certificates of Indebtedness—State and Local Government Series.

DATES: Written comments should be received on or before March 21, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Vicki S. Thorpe, 200 Third Street, Parkersburg, WV 26106–1328, or *Vicki.Thorpe@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies should be directed to Vicki S. Thorpe, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–1328, (304) 480–6553.

SUPPLEMENTARY INFORMATION: *Title:* Regulations Governing United States Treasury Certificates Of Indebtedness—State and Local Government Series, United States Treasury Notes—State and Local Government Series, and United States Treasury Bonds—State and Local Government Series.

OMB Number: 1535–0091.

Abstract: The information is requested to establish an investor account, issue and redeem securities.

Current Actions: None.

Type of Review: Extension.

Affected Public: State or local governments.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 167.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 13, 2004.

Vicki S. Thorpe,

Manager, Graphics, Printing and Records Branch.

[FR Doc. 04–1093 Filed 1–16–04; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 12, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before February 19, 2004 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0889.

Form Numbers: IRS Forms 8275 and 8275–R.

Type of Review: Extension.

Title: Form 8275: Disclosure Statement; and *Form 8275–R:* Regulation Disclosure Statement.

Description: Internal Revenue Code (IRC) section 6662 imposes accuracy related penalties for substantial understatement of tax liability or negligence or disregard of rules and regulations. Section 6694 imposes similar penalties on return preparers. Regulations sections 1.6662–4(e) and (f) provide for reduction of these penalties if adequate disclosure of the tax treatment is made on Form 8275 or, if the position is contrary to a regulation on Form 8275–R.

Respondents: Individuals or households, business or other for-profit, not-for-profit institutions, farms.

Estimated Number of Respondents/ Recordkeepers: 595,000.

Estimated Burden Hours Respondent/ Recordkeepers:

Recordkeeping	3 hr., 35 min.
Learning about the law or the form.	53 min.
Preparing and sending the form to the IRS.	59 min.

Frequency of Response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 5,575,000 hours.

Clearance Officer: Robert M. Coar, (202) 622–3579, Internal Revenue Service, Room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–1134 Filed 1–16–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 12, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to

OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before February 19, 2004 to be assured of consideration.

Bureau of the Public Debt (PD)

OMB Number: 1535–0111.

Form Number: SB 2362, 2378 and 2383.

Type of Review: Revision.

Title: Authorization for Purchase and Request for Change U.S. Savings Bonds.

Description: These forms are used to authorize employers to allot funds from employee's pay for the purchase of Savings Bonds.

Respondents: Individuals or households.

Estimated Number of Respondents: 1,300,000.

Estimated Burden Hours Per Respondent: 1 minute.

Frequency of Response: On occasion.

Estimated Total Reporting Burden Hours: 21,667 hours.

Clearance Officer: Vicki S. Thorpe (304) 480–6553, Bureau of the Public Debt, 200 Third Street, Parkersburg, West VA 26106–1328.

OMB Reviewer: Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–1135 Filed 1–16–04; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Publication 1075

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Publication 1075, Tax Information Security Guidelines for Federal, State, and Local Agencies.

DATES: Written comments should be received on or before March 22, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert M. Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the publication should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3945, or through the internet at *CAROL.A.SAVAGE@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tax Information Security Guidelines for Federal, State, and Local Agencies.

OMB Number: 1545–0962.

Form Number: Publication 1075.

Abstract: Section 6103(p) of the Internal Revenue Code requires the Internal Revenue Service to provide periodic reports to Congress describing safeguard procedures utilized by agencies which receive information from the IRS to protect the confidentially of the information. This Code section also requires that these agencies furnish reports to the IRS describing their safeguards.

Current Actions: There are no changes being made to Publication 1075 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and Federal, state, local, or tribal governments.

Estimated Number of Respondents: 5,100.

Estimated Time Per Respondent: 40 hours.

Estimated Total Annual Burden Hours: 204,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 13, 2004.

Robert M. Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1143 Filed 1–16–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–105170–97 and REG–112991–01]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulations, REG–105170–97 (TD 8930) and REG–112991–01 (TD 9104), Credit for Increasing Research Activities (§ 1.41–8(b)).

DATES: Written comments should be received on or before March 22, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Robert M. Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulations should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Credit for Increasing Research Activities.

OMB Number: 1545–1625.

Regulation Project Number: REG–105170–97 and REG–112991–01.

Abstract: These final regulations relate to the computation of the credit under section 41(c) and the definition of *qualified research* under section 41(d). These regulations are intended to provide (1) guidance concerning the requirements necessary to qualify for the credit for increasing research activities, (2) guidance in computing the credit for increasing research activities, and (3) rules for electing and revoking the election of the alternative incremental credit.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5.

Estimated Time Per Respondent: 50 hours.

Estimated Total Annual Burden Hours: 250.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 13, 2004.

Robert M. Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1144 Filed 1–16–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8716

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8716, Election To Have a Tax Year Other Than a Required Tax Year.

DATES: Written comments should be received on or before March 22, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Larnice Mack at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *Larnice.Mack@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Election To Have a Tax Year Other Than a Required Tax Year.

OMB Number: 1545–1036.

Form Number: Form 8716.

Abstract: Form 8716 is filed by partnerships, S corporations, and personal service corporations under Internal Revenue Code section 444(a) to elect to retain or to adopt a tax year that is not a required tax year. The form provides IRS with information to determine that the section 444(a) election is properly made and identifies the tax year to be retained, changed, or adopted.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and farms.

Estimated Number of Respondents: 40,000.

Estimated Time Per Respondent: 5 hours, 7 minutes.

Estimated Total Annual Burden Hours: 204,400.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 9, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1145 Filed 1–16–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form SS–8

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form SS–8, Determination of Worker Status for Purpose of Federal Employment Taxes and Income Tax Withholding.

DATES: Written comments should be received on or before March 22, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Larnice Mack at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the internet at *Larnice.Mack@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

OMB Number: 1545–0004.

Form Number: SS–8.

Abstract: Form SS–8 is used by employers and workers to furnish information to IRS in order to obtain a determination as to whether a worker is an employee for purposes of Federal employment taxes and income tax withholding. IRS uses the information on Form SS–8 to make the determination.

Current Actions: There are no changes being made to the Form SS–8 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, not-for-profit institutions, Federal government, farms, and state, local or tribal governments.

Estimated Number of Respondents: 6,900.

Estimated Time Per Respondent: 23 hours, 59 minutes.

Estimated Total Annual Burden Hours: 165,462.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 12, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1146 Filed 1–16–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Subscription For Purchase and Issue of U.S. Treasury Securities, State and Local Government Series.

DATES: Written comments should be received on or before March 21, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Vicki S. Thorpe, 200 Third Street, Parkersburg, WV 26106–1328, or *Vicki.Thorpe@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Vicki S. Thorpe, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–1328, (304) 480–6553.

SUPPLEMENTARY INFORMATION:

Title: Subscription For Purchase And Issue Of U.S. Treasury Securities—State And Local Government Series.

OMB Number: 1535–0092.

Form Number: PD F 4144.

Abstract: The information is requested to establish accounts for the owners of securities of State and Local Government Series.

Current Actions: None.

Type of Review: Extension.

Affected Public: State or Local Government.

Estimated Number of Respondents: 5,000.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 2500.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to

minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 13, 2004.

Vicki S. Thorpe.

Manager, Graphics, Printing and Records Branch.

[FR Doc. 04–1092 Filed 1–16–04; 8:45 am]

BILLING CODE 4810–39–P

Corrections

Federal Register
Vol. 69, No. 12
Tuesday, January 20, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16747; Airspace Docket No. 03–ACE–91]

Modification of Class E Airspace; Iowa Falls, IA

Correction

In rule document 04–484 beginning on page 1662 in the issue of Monday, January 12, 2004 make the following correction:

On page 1663, in the first column under the heading **Comments Invited**, in the third line from the bottom of the paragraph, "Docket No. 03–ACE–19" should read "Docket No. 03–ACE–91".

[FR Doc. C4–484 Filed 1–16–04; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16748; Airspace Docket No. 03–ACE–92]

Modification of Class E Airspace; Anthony, KS

Correction

In rule document 04–486 beginning on page 1664 in the issue of Monday, January 12, 2004 make the following correction:

§71.1 [Corrected]

On page 1665, in the third column, in §71.1, under the heading **ACE KS E5 Anthony, KS**, in the first line, "Anthony Municipal Airports, KS" should read "Anthony Municipal Airport, KS".

[FR Doc. C4–486 Filed 1–16–04; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
January 20, 2004

Part II

The President

Federal Register
Vol. 69, No. 12
Tuesday, January 20, 2004

Presidential Documents

Title 3—

The President

Proclamation 7751 of January 15, 2004

Martin Luther King, Jr., Federal Holiday, 2004

By the President of the United States of America

A Proclamation

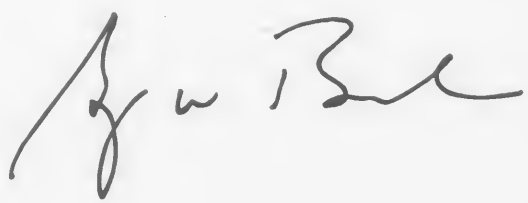
On the Martin Luther King, Jr., Federal Holiday, our Nation honors an American who dedicated his life to the fundamental principles of freedom, opportunity, and equal justice for all. Today, all Americans benefit from Dr. King's work and his legacy of courage, dignity, and moral clarity.

Forty years ago this past August, on the steps of the Lincoln Memorial, Dr. King spoke passionately of his dream for America. He dreamed of an America where all citizens would be judged by the content of their character and not by the color of their skin. He dreamed of an America where all would enjoy the riches of freedom and the security of justice. He dreamed of an America where the doors of opportunity would be open to all of God's children.

Dr. King's leadership moved Americans to examine our hearts—to reject what he called the "tranquilizing drug of gradualism" on the path to racial justice—and to live up to the ideals of our Constitution and Declaration of Independence. America has come far in realizing Dr. King's dream, but there is still work to be done. In remembering Dr. King's vision and life of service, we renew our commitment to guaranteeing the unalienable rights of life, liberty, and the pursuit of happiness for all Americans.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim Monday, January 19, 2004, as the Martin Luther King, Jr., Federal Holiday. I encourage all Americans to observe this day with appropriate activities and programs that honor the memory and legacy of Dr. King.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of January, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–1320
Filed 1–16–04; 11:38 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7752 of January 15, 2004

National Sanctity of Human Life Day, 2004

By the President of the United States of America

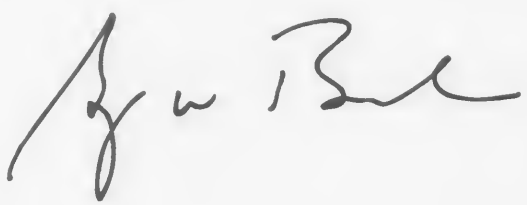
A Proclamation

As Americans, we are led by the power of our conscience and the history of our country to defend and promote the dignity and rights of all people. Each person, however frail or defenseless, has a place and a purpose in this world. On National Sanctity of Human Life Day, we celebrate the gift of life and our commitment to building a society of compassion and humanity.

Today, the principles of human dignity enshrined in the Declaration of Independence—that all persons are created equal and possess the unalienable rights to life, liberty, and the pursuit of happiness—continue to guide us. In November, I signed into law the Partial-Birth Abortion Ban Act of 2003, reaffirming our commitment to protecting innocent life and to a basic standard of humanity—the duty of the strong to defend the weak. My Administration encourages adoption and supports abstinence education, crisis pregnancy programs, parental notification laws, and other measures to help us continue to build a culture of life. By working together, we will provide hope to the weakest among us and achieve a more compassionate and merciful world.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim Sunday, January 18, 2004, as National Sanctity of Human Life Day. I call upon all Americans to recognize this day with appropriate ceremonies in our homes and places of worship and to reaffirm our commitment to respecting the life and dignity of every human being.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of January, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–1321
Filed 1–16–04; 11:38 am]
Billing code 3195–01–P

Presidential Documents

Executive Order 13324 of January 15, 2004

Termination of Emergency With Respect to Sierra Leone and Liberia

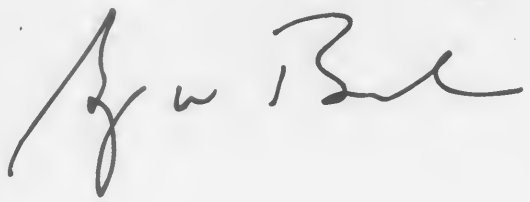
By the authority vested in me as President by the Constitution and the laws of the United States, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), and section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c),

I, GEORGE W. BUSH, President of the United States of America, find that the situations that gave rise to the declaration of a national emergency in Executive Order 13194 of January 18, 2001, with respect to Sierra Leone and the expansion of the scope of that emergency in Executive Order 13213 of May 22, 2001, with respect to Liberia, have been significantly altered given that in January 2002 the Government of Sierra Leone, the Sierra Leonean rebel group Revolutionary United Front (RUF), and the United Nations Mission in Sierra Leone declared the war in Sierra Leone to have ended; the parties to the Liberian civil war entered into a Comprehensive Peace Agreement in August 2003; the RUF no longer exists as a military organization; Charles Taylor, who was the prime instigator of violence both in Sierra Leone and in Liberia, has resigned from the Liberian presidency and gone into exile; the Government of Sierra Leone has established a rough diamond certification regime that meets the minimum standards of the Kimberley Process Certification Scheme; and the United States has implemented the Clean Diamond Trade Act (Public Law 108-19), prohibiting the importation into the United States of rough diamonds that are not controlled through the Kimberley Process Certification Scheme, currently including rough diamonds from Liberia. Accordingly, I hereby terminate the national emergency declared and expanded in scope in those two prior orders, revoke those orders, and further order:

Section 1. Pursuant to section 202 of the NEA (50 U.S.C. 1622), termination of the national emergency declared in Executive Order 13194 and expanded in scope in Executive Order 13213 shall not affect any action taken or proceeding pending not finally concluded or determined as of the effective date of this order, or any action or proceeding based on any act committed prior to such date, or any rights or duties that matured or penalties that were incurred prior to such date.

Sec. 2. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

Sec. 3. This order is effective at 12:01 a.m. eastern standard time on January 16, 2004. This order shall be transmitted to the Congress and published in the **Federal Register**.



THE WHITE HOUSE,
January 15, 2004.

[FR Doc. 04–1322
Filed 1–16–04; 11:38 am]
Billing code 3195–01–P

Reader Aids

Federal Register

Vol. 69, No. 12

Tuesday, January 20, 2004

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	202–741–6000
Laws	741–6000
Presidential Documents	
Executive orders and proclamations	741–6000
The United States Government Manual	741–6000
Other Services	
Electronic and on-line services (voice)	741–6020
Privacy Act Compilation	741–6064
Public Laws Update Service (numbers, dates, etc.)	741–6043
TTY for the deaf-and-hard-of-hearing	741–6086

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FEDERAL REGISTER PAGES AND DATE, JANUARY

1–242 2
243–484 5
485–848 6
849–1268 7
1269–1502 8
1503–1646 9
1647–1892 12
1893–2052 13
2053–2288 14
2289–2478 15
2479–2652 16
2654–2824 20

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
7751 2819
7752 2821
Executive Orders:
12543 (See Notice of January 5, 2004 847
13194 (See EO 3324) 2823
13213 (See EO 3324) 2823
13322 231
13323 241
13324 2823
Administrative Orders:
Notice of January 5, 2004 847
Memorandums:
Memorandum of May 6, 2003 (Amended by Memorandum of December 5, 2003) 1645
Presidential Determinations:
No. 2004–16 2053
No. 2004–17 2055
No. 2004–18 2057
No. 2004–19 2479
No. 2004–20 2477

5 CFR

317 2048
352 2048
531 2048
534 2048
Proposed Rules:
370 2308
2634 1954

7 CFR

55 1647
301 ..... 243, 245, 247, 2653
319 ..... 2289, 2481
718 249
868 1893
905 485
944 485
959 2491
981 1269
982 2493
1124 1654
1480 249
Proposed Rules:
981 551
1135 1957
1469 ..... 194, 2083
1980 2521
4279 2521

8 CFR

214 468
215 468
235 468

9 CFR

300 250
301 ..... 250, 1874
306 250
309 1862
310 ..... 1862, 1885
311 1862
313 1885
318 ..... 250, 1862, 1874
319 1862
320 ..... 250, 1874
381 250
592 1647
Proposed Rules:
381 1547

10 CFR

1 2182
2 2182
50 2182
51 2182
52 2182
54 2182
60 2182
63 2182
70 2182
72 ..... 849, 2182, 2497
73 2182
75 2182
76 2182
110 2182
Proposed Rules:
50 879
72 2528

11 CFR

Proposed Rules:
4 2083
5 2083
11 2083

12 CFR

7 ..... 1895, 1904
34 1904
229 1655
1102 2500
Proposed Rules:
5 ..... 1, 892
229 1470

14 CFR

1 1620
23 488
25 490
39 ..... 492, 494, 859, 861, 864, 867, 869, 871, 1503, 1504, 1505, 1507, 1509, 1511, 1513, 1515, 1516, 1519, 1521, 1657, 1659, 2059,

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 20, 2004

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Hazelnuts grown in—
Oregon and Washington; published 1-16-04
Onions grown in—
South Texas; published 1-16-04

FEDERAL COMMUNICATIONS COMMISSION
Digital television stations; table of assignments:
Alaska; published 12-15-03
Texas; published 12-15-03
Television broadcasting:
Digital television—
Digital broadcast television redistribution control; digital broadcast content protection; published 1-20-04

HEALTH AND HUMAN SERVICES DEPARTMENT
Food and Drug Administration
Medical devices:
Neurological devices—
Human dura matter; classification; published 12-18-03

HOMELAND SECURITY DEPARTMENT
Coast Guard
Ports and waterways safety:
New York Marine Inspection Zone and Captain of the Port Zone, NY; safety and security zones; published 1-20-04

INTERIOR DEPARTMENT
Surface Mining Reclamation and Enforcement Office
Permanent program and abandoned mine land reclamation plan submissions:
North Dakota; published 1-20-04

JUSTICE DEPARTMENT
Parole Commission
Federal prisoners; paroling and releasing, etc.:
District of Columbia and United States Codes; prisoners serving sentences—
Parole violators found mentally incompetent prior to scheduled parole revocation hearings; fair and expeditious handling of hearing; published 12-19-03

TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Airworthiness directives:
Cessna; published 12-4-03
Cessna; correction; published 12-30-03
Eurocopter France; published 12-15-03
General Electric Co.; published 1-2-04

TRANSPORTATION DEPARTMENT
National Highway Traffic Safety Administration
Motor vehicle safety standards:
Occupant crash protection—
Future air bags designed to create less risk of serious injuries for small women and young children, etc.; published 11-19-03

TREASURY DEPARTMENT
Comptroller of the Currency
International banking activities:
Foreign banks seeking to establish Federal branches and agencies in U.S.; approval procedures; published 12-19-03

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Oranges and grapefruit grown in—
Texas; comments due by 1-26-04; published 11-25-03 [FR 03-29513]

AGRICULTURE DEPARTMENT
Debarment and suspension (nonprocurement) and drug-free workplace (grants):
Governmentwide requirements; comments due by 1-26-04; published 11-26-03 [FR 03-28454]
Procurement and property management:
Excess personal property acquisition and transfer guidelines; comments due by 1-29-04; published 12-30-03 [FR 03-32013]

COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration
Fishery conservation and management:
Magnuson-Stevens Act provisions—
Essential fish habitat; comments due by 1-26-04; published 12-11-03 [FR 03-30728]
West Coast States and Western Pacific fisheries—
Highly Migratory Species Fisheries Management Plan; comments due by 1-26-04; published 12-10-03 [FR 03-30486]
Pacific Coast groundfish; comments due by 1-30-04; published 1-15-04 [FR 04-00910]

COMMERCE DEPARTMENT
Patent and Trademark Office
Practice and procedure:
Practice before Board of Patent Appeal and Interferences; comments due by 1-26-04; published 11-26-03 [FR 03-29154]

COMMODITY FUTURES TRADING COMMISSION
Commodity Exchange Act:
Exempt commercial markets; comments due by 1-26-04; published 11-25-03 [FR 03-29437]

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
Army Department
Acquisition regulations:
Foreign acquisition; contractors accompanying the force; deployment of contractor personnel in support of military operations; comments due by 1-27-04; published 11-28-03 [FR 03-29416]
Solicitation provisions and contract clauses; contractors accompanying the force; comments due by 1-27-04; published 11-28-03 [FR 03-29417]

DEFENSE DEPARTMENT
Federal Acquisition Regulation (FAR):
Cost principles and penalties for unallowable costs; applicability; comments due by 1-27-04; published 11-28-03 [FR 03-29640]
Excluded Parties List System enhancement; comments due by 1-30-04; published 12-1-03 [FR 03-29819]

ENERGY DEPARTMENT
Acquisition regulations:
Conditional payment of fee, profit, and other incentives; comments due by 1-26-04; published 12-10-03 [FR 03-30364]

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 pollution control:
State operating permit programs—
California; comments due by 1-28-04; published 12-29-03 [FR 03-31871]
California; comments due by 1-28-04; published 12-29-03 [FR 03-31872]
Air quality implementation plans; approval and promulgation; various States:
Maryland; comments due by 1-29-04; published 12-30-03 [FR 03-32028]
Air quality; prevention of significant deterioration (PSD):
Permit determinations, etc.—
Virgin Islands; comments due by 1-30-04; published 12-31-03 [FR 03-32207]
Virgin Islands; comments due by 1-30-04; published 12-31-03 [FR 03-32206]
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]
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Dihydroazadirachtin, etc.; comments due by 1-26-04; published 11-26-03 [FR 03-29322]

MD Helicopters, Inc.; comments due by 1-26-04; published 11-25-03 [FR 03-29222]
Airworthiness standards:
Aircraft engines—
General Electric Model CT7-8A, -8A5, -8B, -8B5, -8E, -8E5, -8F, and -8F5 engines; comments due by 1-31-04; published 12-24-03 [FR 03-31734]
Special conditions—
Hamilton Sundstrand Model 54460-77E propeller; comments due by 1-30-04; published 11-17-03 [FR 03-28676]
Class E airspace; comments due by 1-27-04; published 1-15-04 [FR 04-00917]

TREASURY DEPARTMENT

Debarment and suspension (nonprocurement) and drug-free workplace (grants):
Governmentwide requirements; comments due by 1-26-04; published 11-26-03 [FR 03-28454]

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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CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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Title	Stock Number	Price	Revision Date
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
63 (63.1–63.599)	(869–050–00144–6)	58.00	July 1, 2003
63 (63.600–63.1199)	(869–050–00145–4)	50.00	July 1, 2003
63 (63.1200–63.1439)	(869–050–00146–2)	50.00	July 1, 2003
63 (63.1440–End)	(869–050–00147–1)	64.00	July 1, 2003
64–71	(869–050–00148–9)	29.00	July 1, 2003
72–80	(869–050–00149–7)	61.00	July 1, 2003
81–85	(869–050–00150–1)	50.00	July 1, 2003
86 (86.1–86.599–99)	(869–050–00151–9)	57.00	July 1, 2003
86 (86.600–1–End)	(869–050–00152–7)	50.00	July 1, 2003
87–99	(869–050–00153–5)	60.00	July 1, 2003
100–135	(869–050–00154–3)	43.00	July 1, 2003
136–149	(869–150–00155–1)	61.00	July 1, 2003
150–189	(869–050–00156–0)	49.00	July 1, 2003
190–259	(869–050–00157–8)	39.00	July 1, 2003
260–265	(869–050–00158–6)	50.00	July 1, 2003
266–299	(869–048–00156–5)	47.00	July 1, 2002
300–399	(869–050–00160–8)	42.00	July 1, 2003
400–424	(869–050–00161–6)	56.00	July 1, 2003
425–699	(869–050–00162–4)	61.00	July 1, 2003
700–789	(869–050–00163–2)	61.00	July 1, 2003
790–End	(869–050–00164–1)	58.00	July 1, 2003
41 Chapters:			
1, 1–1 to 1–10		13.00	[3] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3–6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10–17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3] July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3] July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3] July 1, 1984
19–100		13.00	[3] July 1, 1984
1–100	(869–048–00162–0)	23.00	July 1, 2002
101	(869–050–00166–7)	24.00	July 1, 2003
102–200	(869–050–00167–5)	50.00	July 1, 2003
201–End	(869–050–00168–3)	22.00	July 1, 2003
42 Parts:			
1–399	(869–048–00166–2)	56.00	Oct. 1, 2002
400–429	(869–048–00167–1)	59.00	Oct. 1, 2002
430–End	(869–050–00171–3)	64.00	Oct. 1, 2003
43 Parts:			
1–999	(869–050–00172–1)	55.00	Oct. 1, 2003
1000–end	(869–048–00170–1)	59.00	Oct. 1, 2002
44	(869–050–00174–8)	50.00	Oct. 1, 2003
45 Parts:			
1–199	(869–050–00175–6)	60.00	Oct. 1, 2003
200–499	(869–050–00176–4)	33.00	[9] Oct. 1, 2003
500–1199	(869–050–00177–2)	50.00	Oct. 1, 2003
1200–End	(869–050–00178–1)	60.00	Oct. 1, 2003
46 Parts:			
1–40	(869–050–00179–9)	46.00	Oct. 1, 2003
41–69	(869–048–00177–8)	37.00	Oct. 1, 2002
70–89	(869–050–00181–1)	14.00	Oct. 1, 2003
90–139	(869–050–00182–9)	44.00	Oct. 1, 2003
140–155	(869–050–00183–7)	25.00	[9] Oct. 1, 2003
156–165	(869–050–00184–5)	34.00	[9] Oct. 1, 2003
166–199	(869–048–00182–4)	44.00	Oct. 1, 2002
200–499	(869–050–00186–1)	39.00	Oct. 1, 2003
500–End	(869–050–00187–0)	25.00	Oct. 1, 2003
47 Parts:			
0–19	(869–048–00185–9)	57.00	Oct. 1, 2002
20–39	(869–048–00186–7)	45.00	Oct. 1, 2002
40–69	(869–048–00187–5)	36.00	Oct. 1, 2002
70–79	(869–048–00188–3)	58.00	Oct. 1, 2002
80–End	(869–048–00189–1)	57.00	Oct. 1, 2002
48 Chapters:			
1 (Parts 1–51)	(869–050–00193–4)	63.00	Oct. 1, 2003
1 (Parts 52–99)	(869–048–00191–3)	47.00	Oct. 1, 2002
2 (Parts 201–299)	(869–050–00195–1)	55.00	Oct. 1, 2003
3–6	(869–050–00196–9)	33.00	Oct. 1, 2003
*7–14	(869–050–00197–7)	61.00	Oct. 1, 2003
15–28	(869–048–00195–6)	55.00	Oct. 1, 2002
29–End	(869–050–00199–3)	38.00	[9] Oct. 1, 2003
49 Parts:			
1–99	(869–050–00200–1)	60.00	Oct. 1, 2003
*100–185	(869–050–00201–9)	63.00	Oct. 1, 2003
186–199	(869–050–00202–7)	20.00	Oct. 1, 2003

Title	Stock Number	Price	Revision Date
200–399	(869–048–00200–6)	61.00	Oct. 1, 2002
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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.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

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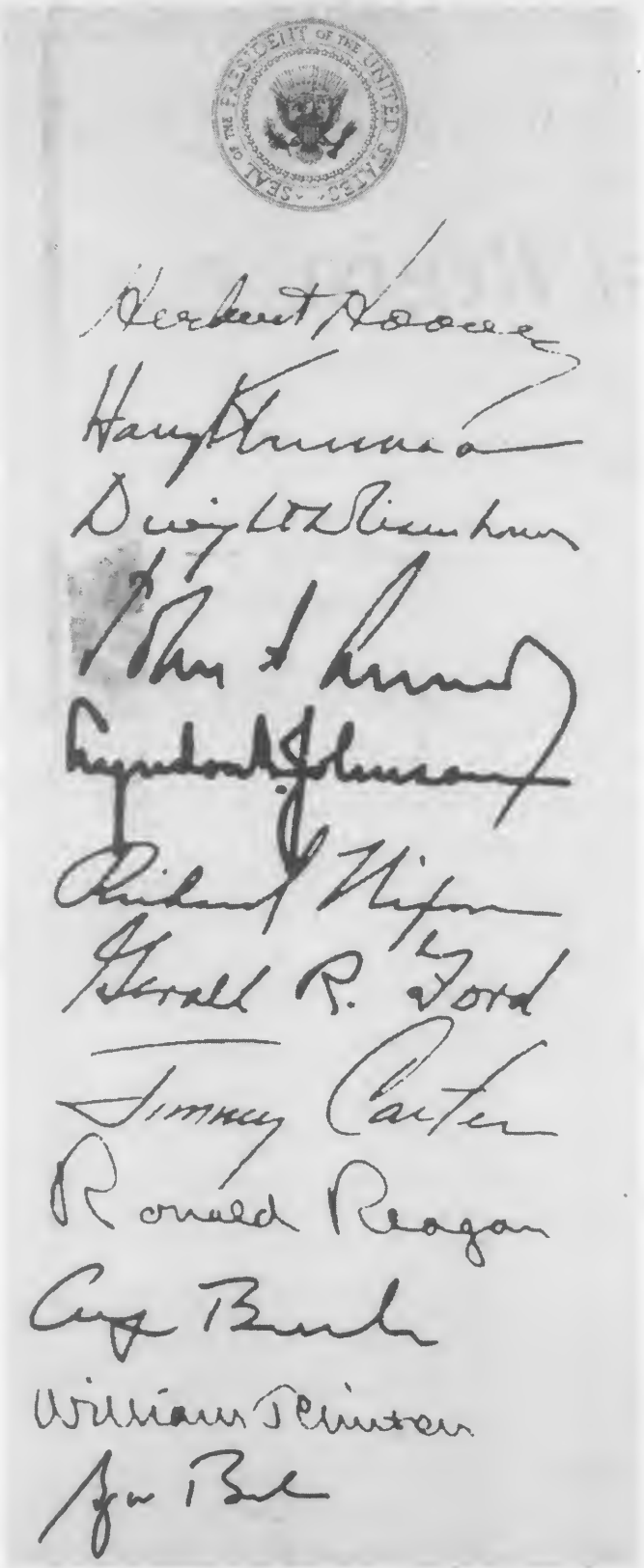

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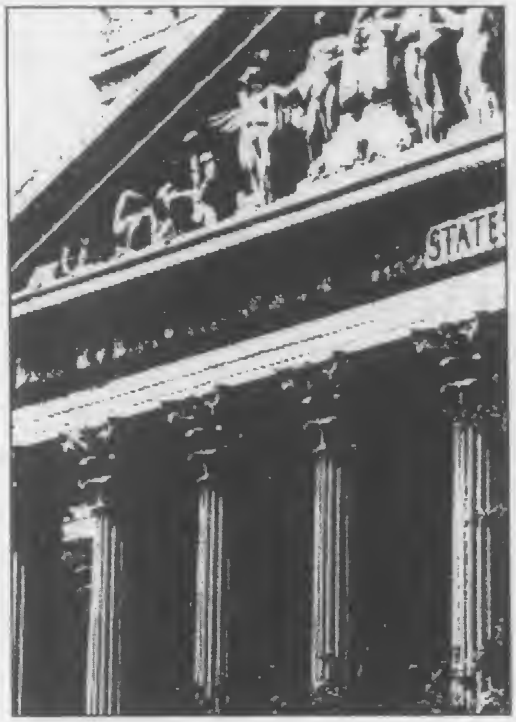

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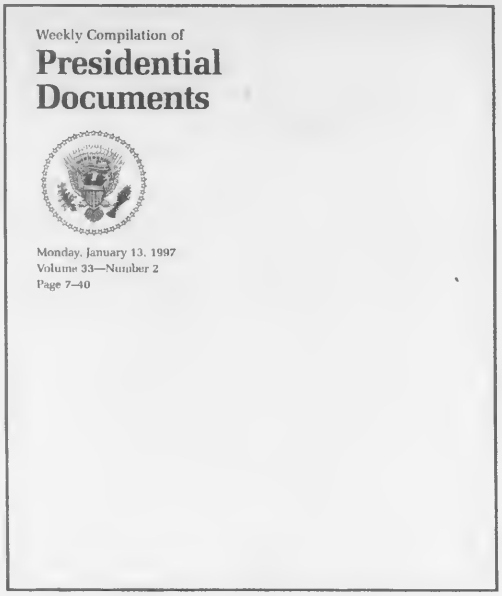

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