
# Federal Register

2–10–04 Tuesday
Vol. 69 No. 27 Feb. 10, 2004

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# Rules and Regulations

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 71

RIN 3150–AG71

### Compatibility With IAEA Transportation Safety Standards and Other Transportation Safety Amendments; Correction

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule: correction.

**SUMMARY:** This document corrects a final rule appearing in the **Federal Register** on January 26, 2004 (69 FR 3698) amending the regulations governing the packaging and transportation of radioactive materials. This action is necessary to precisely identify provisions that will expire four years after the final rule becomes effective and the date on which that will occur.

**EFFECTIVE DATE:** The final rule is effective on October 1, 2004. Sections 71.19(a) and 71.20 expire on October 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** Naiem S. Tanious, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6103, e-mail *nst@nrc.gov*.

■ 1. On page 3698, the effective date is corrected to read as follows: **EFFECTIVE DATE:** The final rule is effective on October 1, 2004. Sections 71.19(a) and 71.20 expire on October 1, 2008.

2. In § 71.19 paragraph (a)(3) is corrected to read as follows:

**§ 71.19 Previously approved package.**

(a) * * *

(3) Paragraph (a) of this section expires October 1, 2008.

* * * * *

Dated at Rockville, Maryland, this 4th day of February, 2004.

For the Nuclear Regulatory Commission.

**Michael T. Lesar,**

*Federal Register Liaison Officer.*

[FR Doc. 04–2774 Filed 2–9–04; 8:45 am]

BILLING CODE 7590–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 2003–NM–154–AD; Amendment 39–13458; AD 2004–03–14]**

RIN 2120–AA64

### Airworthiness Directives; Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 series airplanes, that requires repetitive inspections for discrepancies of certain rear spar fittings between the flex shaft of the flap secondary drive and the wing-to-fuselage structure, and corrective action if necessary. This action also provides for an optional modification of the flex shaft installation, which terminates the repetitive inspections. This action is necessary to find and fix damage and prevent subsequent failure of the rear spar fittings, which could result in loss of the wing. This action is intended to address the identified unsafe condition.

**DATES:** Effective March 16, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of March 16, 2004.

**ADDRESSES:** The service information referenced in this AD may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. 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, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Jon Hjelm, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York 11581; telephone (516) 228–7300; fax (516) 794–5531.

**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 Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 series airplanes was published in the **Federal Register** on November 28, 2003 (68 FR 66765). That action proposed to require repetitive inspections for discrepancies of certain rear spar fittings between the flex shaft of the flap secondary drive and the wing-to-fuselage structure, and corrective action if necessary. That action also provides for an optional modification of the flex shaft installation, which would terminate the repetitive inspections.

#### 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

The FAA estimates that 218 airplanes of U.S. registry will be affected by this AD.

It will take about 16 work hours per rear spar fitting (two fittings per airplane) to accomplish the inspection, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $453,440, or $2,080 per airplane, per inspection cycle.

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 optional terminating modification, if done, will take about 16 work hours, at an average labor rate of $65 per work hour. Required parts will cost about $365 per airplane. Based on these figures, we estimate the cost of the optional terminating modification to be $1,405 per airplane.

**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:

**2004–03–14 Bombardier, Inc. (Formerly de Havilland, Inc.):** Amendment 39–13458. Docket 2003–NM–154–AD.

*Applicability:* Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 series airplanes; certificated in any category; as listed in Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 2002.

*Compliance:* Required as indicated, unless accomplished previously.

To find and fix damage and prevent subsequent failure of the rear spar fittings between the flex shaft of the flap secondary drive and the wing-to-fuselage structure, which could result in loss of the wing, accomplish the following:

**Repetitive Inspections/Corrective Action**

(a) For airplanes with rear spar fittings having part number (P/N) 85320053, 85322060, or 85334180: Within 12 months after the effective date of this AD; do a detailed inspection for discrepancies (chafing, wear damage, cracking) of the rear spar fittings located between the flex shaft of the flap secondary drive and the wing-to-fuselage structure. Do the inspection as defined in Parts III.A., III.B., and III.D. of the Accomplishment Instructions of Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 2002; except where the service bulletin specifies to report inspection findings, this AD does not require such reporting. Do the inspection per the service bulletin, and repeat the inspection thereafter at the applicable time specified in Part I.D. "Compliance" of the service bulletin. Any applicable corrective action (high frequency eddy current inspection for cracking, blending out wear damage, replacement of rear spar fittings) must be done at the applicable time specified in Part I.D. "Compliance" of the service bulletin.

**Note 1:** For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

**Optional Terminating Modification**

(b) Modification of the flex shaft of the flap secondary drive per Part III.C. of the Accomplishment Instructions of Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 2002, terminates the repetitive inspections required by paragraph (a) of this AD.

**Actions Done per Previous Issue of Service Bulletins**

(c) Accomplishment of the inspections or the modification before the effective date of this AD in accordance with Bombardier Service Bulletin 8–27–83, dated October 19, 2001, is considered acceptable for compliance with the applicable actions specified in this AD.

**Alternative Methods of Compliance**

(d) In accordance with 14 CFR 39.19, the Manager, New York Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

**Incorporation by Reference**

(e) The actions shall be done in accordance with Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 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 Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**Note 2:** The subject of this AD is addressed in Canadian airworthiness directive CF–2001–42, dated November 23, 2001.

**Effective Date**

(f) This amendment becomes effective on March 16, 2004.

Issued in Renton, Washington, on January 29, 2004.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 04–2583 Filed 2–9–04; 8:45 am]

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## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 1

**RIN 3038–AC01**

### Investment of Customer Funds

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission ("Commission") is amending its regulations to allow futures commission merchants ("FCMs") and derivatives clearing organizations ("DCOs") to engage in repurchase agreements ("repos") with securities deposited by customers, subject to certain conditions, and to modify the portfolio time-to-maturity requirements for securities deposited in connection with certain collateral

management programs of DCOs, pursuant to certain conditions.

**EFFECTIVE DATE:** March 11, 2004.

**FOR FURTHER INFORMATION CONTACT:** John C. Lawton, Deputy Director and Chief Counsel, or Phyllis P. Dietz, Special Counsel, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. Telephone (202) 418–5450.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Commission Rule 1.25 (17 CFR 1.25) sets forth the types of instruments in which FCMs and DCOs are permitted to invest customer segregated funds. Rule 1.25 was substantially amended in December 2000 to expand the list of permitted investments.[1] In connection with that expansion, the Commission added several provisions intended to minimize the credit, liquidity, and volatility risks associated with the additional investments.

On June 30, 2003, the Commission published for public comment proposed amendments to some of those provisions and further requested comment on several other provisions of the rule.[2] The Commission received comment letters from the Futures Industry Association ("FIA"), National Futures Association ("NFA"), Chicago Mercantile Exchange ("CME"), Federal Home Loan Mortgage Corporation ("Freddie Mac"), and Lehman Brothers. In light of the comments received, the Commission has determined to adopt amendments to Rule 1.25 substantially as proposed and to further clarify certain provisions of the rule.[3]

## II. Discussion of the Final Rules

### *A. Repurchase Agreements Involving Collateral Deposited by Customers*

CFTC Staff Letter 84–24 ("Letter 84–24")[4] permits FCMs to enter into repos with collateral deposited by customers ("customer collateral"), subject to certain terms and conditions. When the Commission adopted the amendments to Rule 1.25 in December 2000, it included provisions governing repos and reverse repos involving investments purchased with customer funds ("permitted investments"), subject to terms and conditions that differ in a number of ways from those in Letter 84–24.[5] The Commission did not, however, specifically address Letter 84–24 at that time.

The Commission proposed to amend Rule 1.25(a)(2) to permit FCMs and DCOs to engage in repos of customer-deposited securities subject to certain terms and conditions. The proposed amendments did not include a requirement that the FCM provide written disclosure of the mechanics of the repo transaction and obtain prior written authorization from the customer. In contrast, Letter 84–24 does include such a requirement. The Commission requested public comment on whether it is appropriate to permit repos of customer collateral without prior written consent, and, if so, whether the limitations set forth in the proposal are appropriate. The Commission further requested comment on whether one-way notice disclosure to the customer should be required, or whether an "opt-out" mechanism should be provided.

The Commission received three comments on the disclosure issue. The FIA pointed out that the securities used in the repos would have to be highly liquid and any loss incurred as a result of a counterparty default would be borne by the FCM. The FIA therefore concluded that the Commission should not require an FCM to provide one-way disclosure or obtain a customer's written consent prior to engaging in a repo transaction with the customer's securities. It further stated its view that all customers are presumed to be aware of the rules and regulations governing their accounts.[6]

The NFA observed that because the Commission's proposed amendments exclude specifically identifiable property from repo transactions, it is not necessary to provide an opt-out mechanism whereby a customer could instruct an FCM not to subject collateral to a repo. The NFA expressed its belief that an opt-out provision would be costly and burdensome for FCMs that would have to revise their existing customer agreements without a corresponding regulatory benefit.

Freddie Mac expressed the contrary view that the written disclosure and customer consent requirements of Letter 84–24 are appropriate, and should be retained. It pointed out that, in posting margin to its clearing firms, Freddie Mac may transfer securities, which may include mortgage-related securities that are not fungible. In certain cases, it may be necessary to have the same security returned in order to achieve the company's asset/liability management goals or for other risk management purposes. Freddie Mac stated that, at a minimum, customers and FCMs should be permitted to provide contractually for disclosure and notice.

The Commission has determined to amend Rule 1.25(a)(2) as proposed, without a requirement for written disclosure and customer consent. The Commission believes that in light of the stringent safeguards discussed below, it is appropriate to provide FCMs and DCOs this additional flexibility in performing collateral management. The Commission wishes to emphasize, however, that the absence of disclosure and consent requirements does not preclude any customer of an FCM from requiring on its own initiative, by written agreement (*e.g.*, the customer agreement), that the FCM obtain the customer's prior consent in order to engage in repo transactions with securities deposited by the customer. As in other instances where disclosure and customer authorization are not expressly required by regulation, a customer and its FCM are always free to negotiate terms and conditions of disclosure and consent, and to enter into a binding agreement accordingly.[7]

With respect to the criteria for engaging in repos with customer collateral under proposed paragraphs (a)(2)(ii)(A)–(D), the FIA expressed the view that those requirements, in combination with the requirements of paragraph (d), "will be more than sufficient to safeguard both the customer-owned securities specifically as well as the customer segregated account generally." Similarly, the NFA observed that the safeguards included in the proposal provide "ample protection" for customer-deposited securities.

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[1] See 65 FR 77993 (Dec. 13, 2000) (publishing final rules); 65 FR 82270 (Dec. 28, 2000) (making technical corrections and accelerating effective date of final rules from February 12, 2001 to December 28, 2000).

[2] *See* 68 FR 38654 (June 30, 2003). In a separate release, the Commission will address comments received on aspects of Rule 1.25 that were not related to textual amendments proposed in the June 30, 2003 **Federal Register** release.

[3] The Commission is also making technical revisions in that the final rules consistently use the term "derivatives clearing organization," rather than the terms "clearing organization" or "registered clearing organization," as had appeared in the text of the proposed rules.

[4] CFTC Staff Letter No. 84–24, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,449 (Dec. 5, 1984).

[5] *See* Rule 1.25(a)(2) and Rule 1.25(d).

[6] Lehman Brothers stated in its comment letter that it fully supports the views set forth in the FIA's comment letter.

[7] The Commission believes that a customer's ability to negotiate arrangements for disclosure and consent adequately addresses Freddie Mac's concerns. It notes, however, that it is not making any determination as to whether the instruments identified in the Freddie Mac letter would satisfy the standards set forth under paragraph (a)(2)(ii)(A)–(D) (discussed below), thereby making them suitable for repurchase.

Proposed paragraph (a)(2)(ii)(A) would provide that, to be eligible for repurchase, securities would have to meet the marketability requirements of Rule 1.25(b)(1).[8] Application of this standard is intended to ensure that, if a repo counterparty should default, the FCM or DCO could use the cash proceeds from the repo to buy the securities elsewhere. Both the NFA and FIA supported the marketability requirement. The Commission has determined to adopt paragraph (a)(2)(ii)(A) as proposed.

Proposed paragraph (a)(2)(ii)(B) would provide that securities subject to repos must not be "specifically identifiable property" as defined in Rule 190.01(kk) (17 CFR 190.01(kk)). Such property is generally not eligible for repurchase. The NFA expressed the opinion that the exclusion of specifically identifiable property eliminates the need to require the FCM to replace the securities in the event of a counterparty default. The NFA further stated its belief that, in the event of a default, it would be acceptable for an FCM to make the customer whole by giving the customer the cash equivalent of the securities plus any transaction costs that might be incurred in replacing the securities. This topic is discussed in connection with paragraph (a)(2)(ii)(D), below. The Commission has determined to adopt paragraph (a)(2)(ii)(B) as proposed.

Proposed paragraph (a)(2)(ii)(C) would provide that the terms and conditions of a repo involving customer-deposited securities must be in accordance with the requirements of Rule 1.25(d).[9] As noted above, the FIA commented that application of the requirements of paragraph (d), combined with the additional requirements of proposed paragraph (a)(2)(ii), will more than sufficiently safeguard both the customer-owned securities and the customer segregated account. The Commission believes that these safeguards, currently applicable to repos for permitted investments, are appropriate to apply to customer-deposited securities as well. The Commission, therefore, has determined to adopt paragraph (a)(2)(ii)(C) as proposed.

Proposed paragraph (a)(2)(ii)(D) would provide that, in the unlikely event of a default by a counterparty to a repo, the FCM or DCO "must take steps to ensure" that the default does not result in "any cost or expense" to the customer. The Commission requested comment on how an FCM might fulfill its obligations to its customer in the event a repo counterparty fails to perform. In this regard, the Commission asked commenters to consider whether it is sufficient for the FCM to give the customer the cash equivalent of the securities, plus any transaction costs that might be incurred in replacing the securities, or whether the FCM should be required to replace the securities. The Commission recognized the possibility that cash compensation might be insufficient if a customer needed the particular securities to maintain the risk profile of its portfolio.

The FIA observed that, among other things, because the customer-owned securities used for repos must be highly liquid, an FCM should have little difficulty using the cash proceeds of the repo held in the customer segregated account to buy the same securities elsewhere. The FIA stated its belief that if a counterparty fails to perform, an FCM should make every reasonable effort to replace the customer-owned securities that are the subject of the repo. The FIA added that "[o]f course, any loss incurred as a result of such difficulty would be borne by the FCM." In response to the Commission's specific request for comments on whether there are tax implications that should be considered in connection with the proposal, the FIA stated its understanding that the failure of a counterparty to return the customer-owned securities could, in certain circumstances, have tax implications. Given the remoteness of counterparty default, the FIA said it does not believe the Commission should consider potential tax implications in adopting final rules. The Commission received no other comments on tax implications.

As noted above, the NFA stated its view that in the event of a counterparty default, it would be acceptable for an FCM to make the customer whole by giving the customer the cash equivalent of the securities plus any transaction costs that might be incurred in replacing the securities. It noted, however, that replacing the securities may be the preferable course of action.

Freddie Mac, in pointing out that it posts margin in the form of securities that are not fungible, explained that in certain cases, it may be necessary to have the same security returned in order to achieve the company's asset/liability management goals or for other risk management purposes. Based on this concern, Freddie Mac requested that the Commission make more explicit, and specifically state, that an FCM is responsible for losses arising from a customer's inability to maintain the risk profile of a portfolio or otherwise replicate necessary positions (*e.g.*, "breakage"), transactional costs, and similar consequential losses resulting from the repo transaction.

The Commission has determined that in the unlikely event of a counterparty default involving customer-deposited securities, the FCM or DCO must make the customer economically whole and must do so in a timely manner. The FCM or DCO will not be required to replace the securities; rather, it may exercise its discretion in determining the means for making the customer whole in light of the relevant facts and circumstances. Making the customer "whole" includes, but is not limited to replacing the securities that were the subject of the repo, paying the customer the cash equivalent of the securities, reimbursing the customer for any commissions or other transactional costs incurred by the customer in replacing the securities, compensating the customer for any adverse tax consequences accruing to the customer,[10] or covering any other losses that arise from the counterparty's failure to return the securities deposited by the customer.

Accordingly, the proposed language of 1.25(a)(2)(ii)(D), which would have obligated the FCM or DCO "to take steps to ensure" that the default by a repo counterparty does not result in "any cost or expense to the customer," has been revised to read "[u]pon the default by a counterparty to a repurchase

[8] Under Rule 1.25(b)(1), except for interests in money market mutual funds, investments must be "readily marketable" as defined in 17 CFR 240.15c3–1 (the net capital rule of the Securities and Exchange Commission). Paragraph (c)(11)(i) of that rule provides that "(t)he term ready market shall include a recognized established securities market in which there exists independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined for a particular security almost instantaneously and where payment will be received in settlement of a sale at such price within a relatively short time conforming to trade custom."

[9] Rule 1.25(d) specifies criteria for repos and reverse repos involving permitted investments. Those criteria address, among other things, identification of securities, permissible counterparties, applicability of concentration limits, duration of the agreement, substitution and transfer of securities, documentation and confirmation requirements, and bookkeeping requirements.

[10] While the FIA has suggested that the Commission need not consider possible tax consequences in its deliberations, the Commission wishes to make clear that adverse tax consequences for customers as a result of a repo counterparty default are the type of cost or expense that must be covered by the FCM. The Commission agrees that it is not necessary to engage in an analysis of specific factual situations that may give rise to adverse tax consequences, but it is necessary to point out that the Commission contemplates that adverse tax consequences are the type of cost or expense for which the customer must be compensated.

agreement, the futures commission merchant or derivatives clearing organization shall act promptly to ensure that the default does not result in any direct or indirect cost or expense to the customer." This modified language is intended to clarify: (1) The FCM or DCO has an unconditional responsibility to make the customer whole; (2) the FCM or DCO must act promptly; and (3) making the customer whole includes compensation for a wide range of costs and expenses, both direct and indirect, as discussed above.

In its proposal, the Commission requested comment on whether the terms and conditions applicable to DCOs engaging in repos should differ in any way from those applicable to FCMs. The Commission received no comments on this topic. The Commission has determined to apply the same rules to both FCMs and DCOs engaging in repo transactions with customer-deposited securities because the same economic risks apply to both situations.

The Commission also requested comment on whether customer collateral that is subject to repo should be treated for concentration purposes like permitted investments under paragraph (b)(4)(ii) (repurchase agreements) or continue to be treated under paragraph (b)(4)(v) (treatment of customer-owned securities). Only the FIA touched on this. In footnote 3 of its letter, the FIA recommends that the concentration limit requirements in paragraph (b)(4)(i) (permitted investments) apply to all transactions. The Commission notes that under current paragraph (b)(4)(v), there is no concentration requirement for customer-deposited securities because changes in the value of such securities accrue to the customer, not the FCM.[11] The final rules in no way limit or alter the fact that changes in the value of such securities accrue to the customer and not the FCM. As discussed above, however, if an FCM engaged in a repo with a customer-deposited security and the counterparty defaulted, the FCM would bear the cost. Thus, the FCM would incur price risk. Accordingly, consistent with the FIA comment, the concentration requirements of direct investments apply.

In light of the Commission's adoption of amendments to Rule 1.25(a)(2), as discussed above, Rule 1.25, as amended, supersedes Letter 84–24.

[11] *See* 65 FR at 78002 (Dec. 13, 2000) (discussion accompanying the Commission's adoption of the concentration requirements).

*B. Time-to-Maturity Requirements for Certain Collateral*

Rule 1.25(b)(5) establishes a time-to-maturity requirement for the portfolio of permitted investments. In order to encourage development of innovative collateral management programs, and thereby facilitate the efficient use of capital, the Commission proposed to amend Rule 1.25(b)(5) to permit certain instruments to be treated as if they had a time-to-maturity of one day, if certain terms and conditions were satisfied.[12]

The Commission proposed the following criteria for such treatment: first, under proposed paragraph (b)(5)(ii)(A), the instrument must be deposited with a DCO solely on an overnight basis, pursuant to the terms and conditions of a collateral management program. Second, under proposed paragraph (b)(5)(ii)(B), the instrument must be one that the FCM owns or has the unqualified right to pledge, is free of any lien, and is deposited by the FCM into a segregated account at a DCO.[13] Third, under proposed paragraph (b)(5)(ii)(C), the instrument must be used only for the purpose of meeting concentration margin or other similar charges that are in addition to the basic margin requirement established by the DCO. Fourth, under proposed paragraph (b)(5)(ii)(D), the DCO must price the instrument each day based on the current mark-to-market value. Fifth, under proposed paragraph (b)(5)(ii)(E), the DCO must haircut the instrument by at least two percent.

The Commission requested comment on the appropriateness of the proposed terms and conditions. In particular, the Commission requested comment on whether the relief should be limited to instruments deposited to meet concentration and similar margin requirements, as proposed, or whether the modified treatment should be extended to apply to initial margin generally. If the latter, the Commission requested comment on whether alternative safeguards should be developed. The Commission also requested comment on whether the proposed haircut is appropriate.

The Commission received two comment letters on the proposed amendments to Rule 1.25(b)(5). With respect to the permitted categories of margin (proposed paragraph (b)(5)(ii)(C)), the CME requested clarification that the proposed language would not restrict it from applying assets in the IEF 3 program to reserve and/or core performance bond requirements. The CME stated that it performs its own conservative risk management and stress testing functions on a daily basis, establishing a prudent and flexible program that benefits market participants. It asserted that by expanding the list of permitted margin categories, industry participants and DCOs would realize greater benefits. The CME stated its belief that it is important to have the flexibility to expand the IEF 3 program to satisfy other classes of performance bond requirements.

Similarly, the FIA expressed the view that certain of the proposed terms and conditions would unnecessarily restrict the scope of the relief. In particular, the FIA stated its belief that the benefits of the amendment should not be limited to those circumstances in which the securities are used only for the purpose of meeting concentration margin or other similar charges. Referring to the IEF 3 program, the FIA noted that although it is limited to the deposit of concentration margin, "we see no reason why, if a clearing organization desired, a comparable program could not be designed for initial margin deposits generally."

With respect to the proposed minimum haircut of two percent (proposed paragraph (b)(5)(ii)(E)), the CME expressed the view that the rule should allow either a DCO or a qualified custodian to perform the pricing and haircutting functions. It indicated that it plans to use third party custodians to price and haircut securities that qualify for the one-day time-to-maturity benefit, but would like the ability to perform these functions if it obtains the necessary expertise. The CME did not object to the two percent minimum haircut.

The FIA opposed the minimum haircut, expressing the view that the DCO core principles support the authority of DCOs to exercise discretion in managing risks in setting haircuts on

[12] The proposed amendments to Rule 1.25(b)(5) were intended to address the CME's Interest Earning Facility 3 program ("IEF 3"), and any similar programs, whereby FCMs could deposit certain collateral on an overnight basis to meet concentration margin requirements. Absent amendment of the rule, the deposit of such collateral could cause the FCM's portfolio to exceed the time-to-maturity limits of Rule 1.25(b)(5).

[13] Instruments given to an FCM by a customer for deposit in a segregated account currently are not subject to the time-to-maturity provisions of Rule 1.25, and this remains the case under the final rules. Instruments purchased by an FCM with customer funds and held in a segregated account currently are subject to those provisions. This generally will remain the case under the final rules. The final rules provide relief with regard to instruments that are held by an FCM in its non-segregated inventory and that are deposited on an overnight basis into a segregated account at a DCO. So long as an FCM has an unqualified right to pledge the instruments, it may include instruments obtained through reverse repos, or otherwise.

deposited securities. The FIA requested that the Commission defer to the DCO's judgment in establishing such haircuts, until the Commission has reason to believe that the DCO is not complying with a core principle.

The Commission has carefully considered the views expressed by the CME and FIA. The Commission has determined to adopt the amendments to Rule 1.25(b)(5), as proposed, with two exceptions. First, the Commission has decided not to adopt proposed paragraph (b)(5)(ii)(C), which would have limited the one-day time-to-maturity treatment to instruments deposited to meet concentration margin or similar charges. The Commission believes that the other provisions of the rule constitute prudent safeguards and that it is appropriate to give DCOs the flexibility to apply the rule to other classes of performance bond.

Second, in the final rules, the Commission has added language to proposed paragraph (b)(5)(ii)(A) to make clear that the DCO's collateral management program must have become effective in accordance with the notice procedures of Rule 39.4.[14] The notice procedures, which apply generally to DCO rules,[15] provide the Commission with a mechanism for maintaining an appropriate level of oversight to ensure that the relief granted in paragraph (b)(5) is applied consistent with core principles and the Commission's regulations. The Commission notes that rather than adopt prescriptive rules for collateral management programs that incorporate the one-day time-to-maturity treatment, the Commission has taken a more flexible approach in permitting DCOs to exercise discretion in developing such programs.

With regard to the CME's comment on performance of the pricing and haircutting function, the Commission confirms that a DCO could outsource the daily execution of these functions to a third party custodian. Under the rule, however, the DCO would remain ultimately responsible for compliance.

With regard to the FIA's comment on the haircut, the Commission has decided to impose a minimum two percent haircut, as proposed. The effect of new paragraph (b)(5)(ii) will be to give relief from the time-to-maturity requirement of paragraph (b)(5)(i) that would otherwise apply. The Commission believes that in light of this relief, the two percent haircut is a prudent substitute safeguard. The Commission understands that two percent is the standard haircut generally used in the repo market.

Finally, the FIA concluded its comments on (b)(5) with a request for the Commission to confirm that, to the extent the concentration limits in Rule 1.25 apply to deposits of securities with DCOs under 1.25(b)(2), the applicable limits will be the limits for direct investments. The Commission hereby confirms this.

## III. Section 4(c) Findings

The final rules allowing FCMs and DCOs to engage in repos with securities deposited by customers are promulgated under section 4d(a)(2) of the Commodity Exchange Act ("Act"),[16] which governs investment of customer funds, and Section 4(c) of the Act,[17] which grants the Commission broad exemptive authority. Section 4d(a)(2) provides that customer funds may be invested in obligations of the United States, in general obligations of any State or of any political subdivision thereof, and in obligations fully guaranteed as to principal and interest by the United States. It further provides that such investments must be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

Section 4(c) of the Act provides that, in order to promote responsible economic or financial innovation and fair competition, the Commission, by rule, regulation or order, may exempt any class of agreements, contracts or transactions, including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction, from the contract market designation requirement of section 4(a) of the Act, or any other provision of the Act other than section 2(a)(1)(C)(ii) or (D), if the Commission determines that the exemption would be consistent with the public interest. For the reasons stated below, the Commission believes that issuing the exemptive relief as set forth in these final rules is consistent with the public interest.

The Commission is expanding the range of instruments in which FCMs may invest customer funds beyond those listed in section 4d(a)(2) of the Act, to enhance the yield available to FCMs, DCOs, and their customers without compromising the safety of customer funds. These final rules should enable FCMs and DCOs to remain competitive globally and domestically, while maintaining safeguards against systemic risk. In light of the foregoing, the Commission has determined that the adoption of the final rules regarding the expansion of permitted instruments for the investment of customer funds will be consistent with the "public interest," as that term is used in section 4(c) of the Act. When that provision was enacted, the Conference Report accompanying the Futures Trading Practices Act of 1992[18] stated that the "public interest" in this context would "include the national public interests noted in the Act, the prevention of fraud and the preservation of the financial integrity of the markets, as well as the promotion of responsible economic or financial innovation and fair competition."[19]

## IV. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[20] requires federal agencies, in promulgating rules, to consider the impact of those rules on small businesses. The rule amendments adopted herein will affect FCMs and DCOs. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on small entities in accordance with the RFA.[21] The Commission has previously determined that registered FCMs[22] and DCOs[23] are not small entities for the purpose of the RFA. Pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that the final rules will not have a significant economic impact on a substantial number of small entities.

### B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[24] imposes certain requirements on federal agencies

[14] Rule 39.4(a) provides that DCOs may request Commission approval for rules and rule amendments under Rule 40.5, and Rule 39.4(b) provides that DCOs may self-certify new or amended rules under Rule 40.6.

[15] The Commission broadly defines the term "rule" to include, among other things, rules, regulations, interpretations, and stated policies, in whatever form adopted, and any amendment or addition thereto, made or issued by a DCO. *See* Rule 40.1.

[16] 7 U.S.C. 6d(a)(2).

[17] 7 U.S.C. 6(c).

[18] Pub. L. No. 102–546, 106 Stat. 3590 (1992).

[19] H.R. Conf. Rep. No. 102–978 (1992). The Conference Report also states that the reference in Section 4(c) to the "purposes of the Act" is intended to "underscore [the Conferees'] expectation that the Commission will assess the impact of a proposed exemption on the maintenance of the integrity and soundness of markets and market participants." *Id.*

[20] 5 U.S.C. 601 *et seq.*

[21] 47 FR 18618 (Apr. 30, 1982).

[22] *Id.* at 18619.

[23] 66 FR 45604, 45609 (Aug. 29, 2001).

[24] 44 U.S.C. 3507.

(including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The final rule amendments that have been adopted do not require a new collection of information on the part of any entities subject to these rules.

*C. Cost-Benefit Analysis*

Section 15(a) of the Act requires that the Commission, before promulgating a regulation under the Act or issuing an order, consider the costs and benefits of its action. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new rule or determine whether the benefits of the rule outweigh its costs. Rather, section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of the following considerations: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any one of the five considerations and could, in its discretion, determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission has evaluated the costs and benefits of the final rules in light of the specific considerations identified in section 15(a) of the Act, as follows:

1. *Protection of market participants and the public.* The final rules facilitate greater capital efficiency on the part of FCMs and DCOs, while protecting customers by establishing prudent standards for repos with customer-deposited collateral and requirements for adjustment to time-to-maturity calculations for certain collateral management programs.

2. *Efficiency and competition.* The final rules provide FCMs and DCOs with greater flexibility in using repos to maximize returns on direct investment of customer funds. They also facilitate the implementation of collateral management programs, which can also serve to maximize capital efficiency. The rules should enable FCMs and DCOs to remain competitive globally and domestically, while maintaining safeguards against systemic risk.

3. *Financial integrity of futures markets and price discovery.* The final rules will not affect the financial integrity of futures markets and price discovery.

4. *Sound risk management practices.* The final rules impose sound risk management practices for FCMs and DCOs that elect to invest customer funds under the rules. The rules regarding repos with customer-deposited securities make clear that FCMs and DCOs, not customers, will bear the costs of any default by a repo counterparty. DCOs acting pursuant to the one-day time-to-maturity relief must satisfy the requirements set forth in the final rules, which include a requirement that the governing collateral management program must have been filed with the Commission.

5. *Other public considerations.* The final rules are expected to enhance the ability of FCMs and DCOs to earn revenue from the investment of customer funds, while protecting the safety of such funds and preserving the rights of customers. FCMs and DCOs are not obligated to enter into repos with customer-deposited collateral under Rule 1.25(a)(2), and, similarly, DCOs are not obligated to implement collateral management programs applying the relief granted in Rule 1.25(b)(5). Therefore, any costs to FCMs and DCOs in connection with the implementation of these rules are voluntarily incurred. With respect to customer costs, the rules clarify that, in the case of a default by a repo counterparty, the customer must be made whole, promptly. The requirements that must be satisfied in order for collateral to be used for a repo (including ready marketability) will make prompt replacement of the securities or payment of replacement costs readily feasible solutions.

**List of Subjects in 17 CFR Part 1**

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

■ Accordingly, the Commission amends part 1 as follows:

## PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

**Authority:** 7 U.S.C.

■ 2. Section 1.25 is amended by revising paragraphs (a)(2) and (b)(5) to read as follows:

**§ 1.25 Investment of customer funds.**

(a) * * *

(2)(i) In addition, a futures commission merchant or derivatives clearing organization may buy and sell the permitted investments listed in paragraphs (a)(1)(i) through (viii) of this section pursuant to agreements for resale or repurchase of the instruments, in accordance with the provisions of paragraph (d) of this section.

(ii) A futures commission merchant or a derivatives clearing organization may sell securities deposited by customers as margin pursuant to agreements to repurchase subject to the following:

(A) Securities subject to such repurchase agreements must meet the marketability requirement of paragraph (b)(1) of this section.

(B) Securities subject to such repurchase agreements must not be "specifically identifiable property" as defined in § 190.01(kk) of this chapter.

(C) The terms and conditions of such an agreement to repurchase must be in accordance with the provisions of paragraph (d) of this section.

(D) Upon the default by a counterparty to a repurchase agreement, the futures commission merchant or derivatives clearing organization shall act promptly to ensure that the default does not result in any direct or indirect cost or expense to the customer.

(b) * * *

(5) Time-to-maturity. (i) Except for investments in money market mutual funds, the dollar-weighted average of the time-to-maturity of the portfolio, as that average is computed pursuant to § 270.2a-7 of this title, may not exceed 24 months.

(ii) For purposes of determining the time-to-maturity of the portfolio, an instrument that is set forth in paragraphs (a)(1)(i) through (vii) of this section may be treated as having a one-day time-to-maturity if the following terms and conditions are satisfied:

(A) The instrument is deposited solely on an overnight basis with a derivatives clearing organization pursuant to the terms and conditions of a collateral management program that has become effective in accordance with § 39.4 of this chapter;

(B) The instrument is one that the futures commission merchant owns or has an unqualified right to pledge, is not subject to any lien, and is deposited by the futures commission merchant into a segregated account at a derivatives clearing organization;

(C) The derivatives clearing organization prices the instrument each day based on the current mark-to-market value; and

(D) The derivatives clearing organization reduces the assigned value

of the instrument each day by a haircut of at least 2 percent.

* * * * *

Issued in Washington, DC on February 4, 2004, by the Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 04–2752 Filed 2–9–04; 8:45 am]

**BILLING CODE 6351–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 147

**[CGD08–03–028]**

**RIN 1625–AA76**

## Safety Zone for Outer Continental Shelf Facility in the Gulf of Mexico for Green Canyon 645

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is establishing a safety zone around a petroleum and gas production facility in Green Canyon 645 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 will significantly reduce the threat of allisions, oil spills and releases of natural gas. This rule prohibits 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:** This final rule is effective March 11, 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 (CGD08–03–028) and are available for inspection or copying at Commander, Eighth Coast Guard District (m), Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA, between 8 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

**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:**

### Regulatory History

On September 26, 2003, we published a notice of proposed rulemaking (NPRM) entitled "Safety Zone for Outer Continental Shelf Facility in the Gulf of Mexico for Green Canyon 645" in the **Federal Register** (68 FR 55557). We received no comments on the proposed rule. No public hearing was requested, and none was held.

### Background and Purpose

The Coast Guard is establishing a safety zone around a petroleum and gas production facility in the Gulf of Mexico: Holstein, Green Canyon Block 645 (GC 645), located at position 27°19′17″ N, 90°32′08″ W. The safety zone will be in effect while the facility is being constructed and after the construction is completed.

This 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 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 safety zone include the East-West Gulf of Mexico Safety Fairway and Louisiana Offshore Oil Port (LOOP) Shipping Safety Fairway. Significant amounts of vessel traffic occur in or near the various fairways in the deepwater area.

BP Exploration & Production Inc., hereafter referred to as "BP" requested that the Coast Guard establish a safety zone in the Gulf of Mexico around the Holstein 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. BP 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 BP'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 concluded 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 Holstein warrants the establishment of this safety zone. The regulation will 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 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 Comments and Changes

We received no comments on the proposed rule. Therefore, we have not made any change in the final rule.

### Regulatory Evaluation

This 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 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 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 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. Since the construction site for the

Holstein is located far offshore, few privately owned fishing vessels and recreational boats/yachts operate in the area. This rule will not impact an attending vessel or vessels less than 100 feet in length overall not engaged in towing. Alternate routes are available for all other vessels impacted by this rule. Use of an alternate route may cause a vessel to incur a delay of four to ten minutes in arriving at their destinations depending on how fast the vessel is traveling. Therefore, the Coast Guard expects the impact of this regulation on small entities to be minimal.

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 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 (Public Law 104–121), we offered to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

We have analyzed this rule under Commandant Instruction M16475.1D, 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 final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES.**

**List of Subjects in 33 CFR Part 147**

Continental shelf, Marine safety, Navigation (water).

■ For the reasons discussed in the preamble, the Coast Guard amends 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 § 147.831 to read as follows:

**§ 147.831 Holstein Truss Spar safety zone.**

(a) *Description.* Holstein, Green Canyon 645 (GC 645), located at position 27°19′17″N, 90°32′08″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 North American Datum 1983.

(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: January 23, 2004.

**R.F. Duncan,**

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

[FR Doc. 04–2730 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 165**

**[CGD05–03–207]**

**RIN 1625–AA00**

## Security Zone; Cape Fear River, Eagle Island, North Carolina State Port Authority Terminal, Wilmington, NC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary security zone at the North Carolina State Port Authority (NCSPA), Wilmington to include the Cape Fear River and Eagle Island. Entry into or movement within the security zone will be prohibited without authorization from the COTP. This action is necessary to safeguard the vessels and the facility from sabotage, subversive acts, or other threats.

**DATES:** This rule is in effect from January 15, 2004, to June 13, 2004.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket CGD05–03–207 and are available for inspection or copying at the Marine Safety Office 721 Medical Center Drive Wilmington, North Carolina 28401 between 7:30 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** LCDR Chuck Roskam, Chief, Port Operations (910) 772–2200 or toll free (877) 229–0770.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this rule. The Coast Guard is promulgating this security zone regulation to protect NCSPA Wilmington and the surrounding vicinity from threats to national security. Accordingly, based on the military function exception set forth in the Administrative Procedure Act, 5 U.S.C. 553(a)(1), notice and comment rule-making and advance publication are not required for this regulation.

### Background and Purpose

Vessels frequenting the North Carolina State Port Authority (NCSPA) Wilmington facility serve as a vital link in the transportation of military munitions, explosives, equipment, and personnel in support of Department of Defense missions at home and abroad. This vital transportation link is potentially at risk to acts of terrorism, sabotage and other criminal acts. Munitions and explosives laden vessels also pose a unique threat to the safety and security of the NCSPA Wilmington, vessel crews, and others in the maritime community and the surrounding community should the vessels be subject to acts of terrorism or sabotage, or other criminal acts. The ability to control waterside access to vessels laden with munitions and explosives, as well as those used to transport military equipment and personnel, moored at the NCSPA Wilmington is critical to national defense and security, as well as to the safety and security of the NCSPA Wilmington, vessel crews, and others in the maritime community and the surrounding community. Therefore, the Coast Guard is establishing this security zone to safeguard human life, vessels and facilities from sabotage, terrorist acts or other criminal acts.

### Discussion of Rule

The security zone is necessary to provide security for, and prevent acts of terrorism against, vessels loading or offloading and the NCSPA Wilmington facility during a military operation. It will include an area from 800 yards south of the Cape Fear River Bridge encompassing the southern end of Eagle Island, the Cape Fear River, and the grounds of the State Port Authority Terminal south to South Wilmington Terminal. The security zone will prevent access to unauthorized persons who may attempt to enter the secure area via the Cape Fear River, the North Carolina State Port Authority terminal, or use Eagle Island as vantage point for surveillance of the secure area. The security zone will protect vessels moored at the facility, their crews, others in the maritime community and the surrounding communities from subversive or terrorist attack that could cause serious negative impact to vessels, the port, or the environment, and result in numerous casualties.

No person or vessel may enter or remain in the security zone at any time without the permission of the Captain of the Port, Wilmington. Each person or vessel operating within the security zone will 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 this 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).

Although this regulation restricts access to the security zone, the effect of this regulation will not be significant because: (i) The COTP or his or her representative may authorize access to the security zone; (ii) the security zone will be enforced for limited duration; and (iii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

### 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 may be small entities: the owners or operators of vessels intending to transit or anchor in a portion of the Cape Fear River that is within the security zone.

This security zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Although the security zone will apply to the entire width of the river, traffic will be allowed to pass through the zone with the permission of the COTP or his or her designated representative. Before the effective period, we will issue maritime advisories widely available to users of the river.

### Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for

compliance, please contact the address listed under **ADDRESSES**.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–207 to read as follow:

**§ 165.T05–207 Security Zone: Cape Fear River, Eagle Island and North Carolina State Port Authority Terminal, Wilmington, NC.**

(a) *Location.* The following area is a security zone: The grounds of the North Carolina State Port Authority, Wilmington Terminal and the southern portion of Eagle Island; and an area encompassed from South Wilmington Terminal at 34°10′38.394″ N, 077°57′16.248″ W (Point 1); across Cape Fear River to Southern most entrance of Brunswick River on the West Bank at 34°10′38.052″ N, 077°57′43.143″ W (Point 2); extending along the West bank of the Brunswick River for approximately 750 yards to 34°10′57.062″ N, 077°58′01.342″ W (Point 3); proceeding North across the Brunswick River to the east bank at 34°11′04.846″ N, 077°58′02.861″ W (Point 4) and continuing north on the east bank for approximately 5000 yards along Eagle Island to 34°13′17.815″ N, 077°58′30.671″ W (Point 5); proceeding East to 34°13′19.488″ N, 077°58′24.414″ W (Point 6); and then approximately 1700 yards to 34°13′27.169″ N, 077°57′51.753″ W (Point 7); proceeding East to 34°13′21.226″ N, 077°57′19.264″ W (Point 8); then across Cape Fear River to the Northeast corner of the Colonial Terminal Pier at 34°13′18.724″ N, 077°57′07.401″ W (Point 9), 800 yards South of Cape Fear Memorial Bridge; proceeding South along shoreline (east bank) of Cape Fear River for approximately 500 yards; proceeding east inland to Wilmington State Port property line at 34°13′03.196″ N, 077°56′52.211″ W (Point 10); extending South along Wilmington State Port property line to 34°12′43.409″ N, 077°56′50.815″ W (Point 11); proceeding to the North entrance of Wilmington State Port at 34°12′28.854″ N, 077°57′01.017″ W (Point 12); proceeding South along Wilmington State Port property line to 34°12′20.819″ N, 077°57′08.871″ W (Point 13); continuing South along the Wilmington State Port property line to 34°12′08.164″ N, 077°57′08.530″ W (Point 14); continuing along State Port property to 34°11′44.426″ N, 077°56′55.003″ W (Point 15); proceeding South to the main

gate of the Wilmington State Port at 34°11′29.578″ N, 077°56′55.240″ W (Point 16); proceeding South approximately 750 yards to the Southeast property corner of the Apex facility at 34°11′10.936″ N, 077°57′04.798″ W (Point 17); proceeding West to East bank of Cape Fear River at 34°11′11.092″ N, 077°57′17.146″ W (Point 18); proceeding South along East bank of Cape Fear River to the point of origins at 34°10′38.394″ N, 077°57′16.248″ W (Point 1).

(b) *Captain of the Port. Captain of the Port* means the Commanding Officer of the Marine Safety Office Wilmington, NC, or any Coast Guard commissioned, warrant, or petty officer who has been authorized to act on her behalf.

(c) *Regulations.* (1) All persons are required to comply with the general regulations governing security zones in 33 CFR 165.33.

(2) Persons or vessels with a need to enter or get passage within the security zone, must first request authorization from the Captain of the Port. The Captain of the Port's representative enforcing the zone can be contacted on VHF marine band radio, channel 16. The Captain of the Port can be contacted at (910) 772–2200 or toll free (877) 229–0770.

(3) The operator of any vessel within this security zone must:

(i) Stop the vessel immediately upon being directed to do so by the Captain of the Port or his or her designated representative.

(ii) Proceed as directed by the Captain of the Port or his or her designated representative.

(d) *Effective period.* This section is effective from January 15, 2004, to June 13, 2004.

Dated: January 15, 2004.

**Jane M. Hartley,**

*Captain, U.S. Coast Guard, Captain of the Port, Wilmington, North Carolina.*

[FR Doc. 04–2735 Filed 2–9–04; 8:45 am]

**BILLING CODE 4910–15–P**

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP San Juan 03–176]**

**RIN 1625–AA00**

## Security Zone; St. Croix, United States Virgin Islands

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule; request for comments.

**SUMMARY:** The Coast Guard is re-establishing a temporary security zone in the vicinity of the HOVENSA refinery facility on St. Croix, U.S. Virgin Islands. This security zone extends 3 miles seaward from the HOVENSA facility waterfront area along the south coast of the island of St. Croix, U.S. Virgin Islands. All vessels must receive permission from the U.S. Coast Guard Captain of the Port San Juan to entering this temporary security zone. This security zone is needed for national security reasons to protect the public and the HOVENSA facility from potential subversive acts.

**DATES:** This rule is effective from 11:59 p.m. on December 24, 2003, through 11:59 p.m. on April 15, 2004. Comments and related material must reach the Coast Guard on or before April 12, 2004.

**ADDRESSES:** 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 the docket [COTP San Juan 03–176] and will be available for inspection or copying at Marine Safety Office San Juan between 7 a.m. and 3:30 p.m. Monday through Friday, except Federal holidays. Marine Safety Office San Juan, is located in the RODVAL Bldg, San Martin St. 90 Ste 400, Guaynabo, PR 00968. Marine Safety Office San Juan maintains the public docket for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** LT Fred Meadows, Marine Safety Office San Juan, Puerto Rico at (787) 706–2440.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a NPRM. Publishing a NPRM and delaying the rule's effective date would be contrary to the public interest since immediate action is needed to protect the public, ports and waterways of the United States.

For the same 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**.

Similar regulations were established on December 19, 2001, and published in the **Federal Register** (67 FR 2332, January 17, 2002); and again on September 13, 2002 (67 FR 57952, September 13, 2002), on March 18, 2003 (67 FR 22296, April 28, 2003); and on June 30, 2003 (67 FR 41081, July 10, 2003). However, these regulations have expired—on June 15, 2002; December 15, 2002; June 15, 2003; and December 15, 2003, respectively. We did not receive any comments on these regulations.

The Captain of the Port San Juan has determined that due to the continued security risks, the nature of the HOVENSA facility, recent increases in the Homeland Security Advisory System level and maritime security level, this rule is needed to ensure the safety and security of this facility. The Coast Guard intends to publish a notice of proposed rulemaking to propose making this temporary rule a final rule.

### Request for Comments

Although the Coast Guard has good cause to implement this regulation without a notice of proposed rulemaking, we want to afford the public the opportunity to participate in this rulemaking by submitting comments and related material regarding the size and boundaries of these security zones in order to minimize unnecessary burdens. If you submit a comment, please include your name and address, identify the docket number for this rulemaking (COTP San Juan 03–176), 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 to the address indicated in **ADDRESSES.** 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 temporary final rule in view of them.

### Background and Purpose

Based on the September 11, 2001, terrorist attacks and recent increases in maritime security levels, there is an increased risk that subversive activity could be launched by vessels or persons in close proximity to the HOVENSA refinery on St. Croix, USVI against tank vessels and the waterfront facility. Given the highly volatile nature of the substances stored at the HOVENSA facility, this security zone is necessary to decrease the risk that subversive activity could be launched against the HOVENSA facility. The Captain of the Port San Juan is reducing this risk by prohibiting all vessels without a scheduled arrival from coming within 3 miles of the HOVENSA facility unless specifically permitted by the Captain of the Port San Juan, his designated representative, or the HOVENSA Facility Port Captain. The Captain of the Port San Juan can be reached through

the Coast Guard Greater Antilles Section Command Center via VHF Marine Band Radio, Channel 16 (156.8 Mhz) or by calling (787) 289–2040, 24 hours a day, 7 days a week. The HOVENSA Facility Port Captain can be reached on VHF Marine Band Radio channel 11 (156.6 Mhz) or by calling (340) 692–3488, 24 hours a day, 7 days a week.

The temporary security zone around the HOVENSA facility is outlined by the following coordinates: 64°45′09″ West, 17°41′32″ North, 64°43′36″ West, 17°38′30″ North, 64°43′36″ West, 17°38′30″ North and 64°43′06″ West, 17°38′42″ North.

**Regulatory Evaluation**

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that order. It is not significant under the regulatory policies and procedures of the Department of Homeland Security (DHS) because this zone covers an area that is not typically used by commercial vessel traffic, including fishermen, and vessels may be allowed to enter the zone on a case by case basis with the permission of the Captain of the Port San Juan or the HOVENSA Port Captain.

**Small Entities**

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

This rule may affect the following entities, some of which may be small entities: owners of small charter fishing or diving operations that operate near the HOVENSA facility. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities because this zone covers an area that is not typically used by commercial fishermen and vessels may be allowed to enter the zone on a case by case basis with the permission of the Captain of the Port San Juan or the HOVENSA Port Captain.

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

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

**Collection of Information**

This 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 would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This proposed rule would 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 would not create an environmental risk to health or risk to safety that might disproportionately affect children.

**Indian Tribal Governments**

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

**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.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors

in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" (CED) 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 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. A new section 165.T07–176 is added to read as follows:

**§ 165.T07–176 Security Zone; HOVENSA Refinery, St. Croix, U.S. Virgin Islands.**

(a) *Location.* The following area is a security zone: All waters from surface to bottom, 3 miles seaward of the HOVENSA facility waterfront outlined by the following coordinates:

| Latitude | Longitude |
|---|---|
| 64°45′09″ West ..... | 17°41′32″ North. |
| 64°43′36″ West ..... | 17°38′30″ North. |
| 64°43′36″ West ..... | 17°38′30″ North. |
| 64°43′06″ West ..... | 17°38′42″ North. |

(b) *Regulations.* Under § 165.33, with the exception of vessels with scheduled arrivals to the HOVENSA Facility, no vessel may enter the regulated area unless specifically authorized by the Captain of the Port San Juan or a Coast Guard commissioned, warrant, or petty officer designated by him, or the HOVENSA Facility Port Captain. The Captain of the Port will notify the public of any changes in the status of this zone by Marine Safety Radio Broadcast on VHF Marine Band Radio, Channel 16 (156.8 Mhz). The Captain of the Port San Juan can be reached through the Greater Antilles Section Command Center via VHF Marine Band Radio, Channel 16 (156.8 Mhz) or by calling (787) 289–2040, 24 hours a day, 7 days a week. The HOVENSA Facility Port Captain can be reached on VHF Marine Band Radio channel 11 (156.6 Mhz) or by calling (340) 692–3488, 24 hours a day, 7 days a week.

(c) *Effective period.* This section is effective from 11:59 p.m. on December 24, 2003, through 11:59 p.m. on April 15, 2004.

Dated: December 24, 2003.

**W.J. Uberti,**

*Captain, U.S. Coast Guard, Captain of the Port, San Juan.*

[FR Doc. 04–2749 Filed 2–9–04; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP Philadelphia 03–004]**

**RIN 1625–AA00**

## Security Zone; Limerick Generating Station, Schuylkill River, Montgomery County, PA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule; change in effective period.

**SUMMARY:** The Coast Guard is continuing the effective period of the temporary security zone on the waters adjacent to the Limerick Generating Station. This will protect the safety and security of the generating station from subversive activity, sabotage, or terrorist attacks initiated from surrounding waters. This action will close water areas around the station.

**DATES:** Effective January 16, 2004, § 165.T05–090, originally added at 68 FR 33386, June 4, 2003, effective from 5 p.m. e.d.t. on May 13, 2003, to 5 p.m. e.s.t. on January 24, 2004, is reinstated and is effective through 11:59 p.m. (e.s.t.) on February 29, 2004.

**ADDRESSES:** Documents as indicated in this preamble are available as part of docket COTP Philadelphia 03–004 for inspection or copying at Coast Guard Marine Safety Office Philadelphia, One Washington Avenue, Philadelphia, Pennsylvania, 19147, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Kevin Sligh or Ensign Doreen Moore, Coast Guard Marine Safety Office/Group Philadelphia, at (215) 271–4889.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

We did not publish a notice of proposed rulemaking (NPRM) for this rule. Under 5 U.S.C. 553(b)(B) and (d)(3), the Coast Guard finds that good cause exists for not publishing a NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. Based upon the warnings from national security and intelligence personnel, this rule is urgently required to protect the plant from subversive activity, sabotage or possible terrorist attacks initiated from the waters surrounding the plants.

Delaying the effective date of the rule would be contrary to the public interest, since immediate action is needed to continue to protect the persons at the facilities, the public and surrounding communities from the release of nuclear radiation. This security zone should have minimal impact on vessel transits because the security zone does not block the channel.

On September 16, 2003, we published a notice of proposed rulemaking (68 FR 53928) to create a permanent security zone in the same area this temporary final rule covers. It is taking longer to resolve issues related to the final rule than originally expected at the time the first temporary final rule was issued (68 FR 33386, June 4, 2003). Our extension of the effective period of the temporary security zone is intended to provide the Coast Guard with enough time to complete the rulemaking for a permanent zone without an interruption in the protection provided at the site by the temporary security zone.

**Background and Purpose**

Due to the continued warnings from national security and intelligence officials that future terrorist attacks are possible, such as those launched against New York and Washington, DC, on September 11, 2001, heightened security measures are necessary for the area surrounding the Limerick Generating Station. This rule will provide the Captain of the Port Philadelphia with enforcement options to deal with potential threats to the security of the generating station. As noted, the Coast Guard has proposed to establish a permanent security zone that would control waterside access to the station.

**Discussion of Rule**

This temporary rule will extend the effective period of the security zone from 5 p.m. (EST) on January 24, 2004 to 11:59 p.m. (EST) on February 29, 2004. No person or vessel may enter or remain in the prescribed security zone

at any time without the permission of the Captain of the Port, Philadelphia, Pennsylvania or designated representative. Federal, state, and local agencies may assist the Coast Guard in the enforcement of this rule.

**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).

The primary impact of this rule will be on vessels wishing to transit the affected waterway. Although this rule restricts traffic from freely transiting portions of the Schuylkill River, that restriction affects only a limited area and will be well publicized to allow mariners to make alternative plans.

**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 may affect the following entities, some of which may be small entities: owners or operators of fishing vessels and recreational vessels wishing to transit the portions of the Schuylkill River.

The rule will not have a significant impact on a substantial number of small entities for the following reasons: the restrictions affect only a limited area and traffic will be allowed to transit through the zone with permission of the Coast Guard or designated representative. The opportunity to engage in recreational and charter fishing outside the geographical limits of the security zone will not be disrupted. Therefore, this regulation should have a negligible impact on recreational and charter fishing activity.

**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 the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

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

A final "Environmental Analysis Checklist" and a final "Categorical Exclusion Determination" will be available in the docket where indicated under **ADDRESSES.**

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Temporary § 165.T05–090 is reinstated and revised to read as follows:

**§ 165.T05–090 Security Zone; Limerick Generating Station, Schuylkill River, Montgomery County, Pennsylvania.**

(a) *Location.* The following area is a security zone: the waters of the Schuylkill River in the vicinity of the Limerick Generation Station bounded by a line drawn from a point located at 40°13′21.34″ N, 075°35′27.49″ W to 40°13′18.92″ N, 075°35′29.83″ W, thence to 40°13′11.36″ N, 075°35′27.57″ W, thence to 40°13′12.97″ N, 075°35′22.74″ W. All coordinates reference Datum: NAD 1983.

(b) *Regulations.* (1) All persons are required to comply with the general regulations governing security zones in § 165.33 of this part.

(2) No person or vessel may enter or navigate within this security zone unless authorized to do so by the Coast Guard or designated representative. Any person or vessel authorized to enter the security zone must operate in strict conformance with any directions given by the Coast Guard or designated representative and leave the security zone immediately if the Coast Guard or designated representative so orders.

(3) The Coast Guard or designated representative enforcing this section can be contacted on VHF Marine Band Radio, channels 13 and 16. The Captain of the Port can be contacted at (215) 271–4807.

(4) The Captain of the Port will notify the public of any changes in the status of this security zone by Marine Safety Radio Broadcast on VHF–FM marine band radio, channel 22 (157.1 MHZ).

(c) *Definitions.* For the purposes of this temporary section, *Captain of the Port* means the Commanding Officer of the Coast Guard Marine Safety Office/Group Philadelphia or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to act as a designated representative on his behalf.

(d) *Effective period.* This section is effective from 5 p.m. (EDT) on May 13, 2003, through 11:59 p.m. (EST) on February 29, 2004.

Dated: January 16, 2004.

**Jonathan D. Sarubbi,**

*Captain, U.S. Coast Guard, Captain of the Port Philadelphia.*

[FR Doc. 04–2745 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–P

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP Philadelphia 03–006]**

**RIN 1625–AA00**

## Security Zone; Peach Bottom Atomic Power Station, Susquehanna River, York County, PA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule; change in effective period.

**SUMMARY:** The Coast Guard is continuing the effective period of the temporary security zone on the waters adjacent to the Peach Bottom Atomic Power Station. This will protect the safety and security of the plants from subversive activity, sabotage, or terrorist attacks initiated from surrounding waters. This action will close water areas around the power station.

**DATES:** Effective January 16, 2004, § 165.T05–092, originally added at 68 FR 33388, June 4, 2003, effective from 5 p.m. e.d.t. on May 13, 2003, to 5 p.m. e.s.t. on January 24, 2004, is reinstated and is effective through 11:59 p.m. (e.s.t.) on February 29, 2004.

**ADDRESSES:** Documents as indicated in this preamble are available as part of docket COTP Philadelphia 03–006 for inspection or copying at Coast Guard Marine Safety Office Philadelphia, One Washington Avenue, Philadelphia, Pennsylvania, 19147, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Kevin Sligh or Ensign Doreen Moore, Coast Guard Marine Safety Office/Group Philadelphia, at (215) 271–4889.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this rule. Under 5 U.S.C. 553(b)(B) and (d)(3), the Coast Guard finds that good cause exists for not publishing a NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. Based upon the warnings from national security and intelligence personnel, this rule is urgently required to protect the plant from subversive activity, sabotage or possible terrorist attacks initiated from the waters surrounding the plants.

Delaying the effective date of the rule would be contrary to the public interest, since immediate action is needed to continue to protect the persons at the facilities, the public and surrounding communities from the release of nuclear radiation. This security zone should have minimal impact on vessel transits due to the fact that the security zone does not block the channel.

On September 15, 2003, we published a notice of proposed rulemaking (68 FR 53932) to create a permanent security zone in the same area this temporary final rule covers. It is taking longer to resolve issues related to the final rule than originally expected at the time the first temporary final rule was issued (68 FR 33388, June 4, 2003). Our extension of the effective period of the temporary security zone is intended to provide the Coast Guard with enough time to complete the rulemaking for a permanent zone without an interruption in the protection provided at the site by the temporary security zone.

### Background and Purpose

Due to the continued warnings from national security and intelligence officials that future terrorist attacks are possible, such as those launched against New York and Washington DC on September 11, 2001, heightened security measures are necessary for the area surrounding the Peach Bottom Atomic Power Station. This rule will provide the Captain of the Port Philadelphia with enforcement options to deal with potential threats to the security of the plants. As noted, the Coast Guard has proposed to establish a permanent security zone that would control waterside access to the power station.

This will allow the Coast Guard time to publish a notice of proposed rulemaking (NPRM) and a final rule in the **Federal Register** without an interruption in the protection provided by the security zone.

### Discussion of Rule

This temporary final rule will extend the effective period of the security zone from 5 p.m. (EST) January 24, 2004, to 11:59 p.m. (EST) on February 29, 2004. No person or vessel may enter or remain

in the prescribed security zone at any time without the permission of the Captain of the Port, Philadelphia, Pennsylvania or designated representative. Federal, state, and local agencies may assist the Coast Guard in the enforcement of this rule.

**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).

The primary impact of this rule will be on vessels wishing to transit the affected waterway. Although this rule restricts traffic from freely transiting portions of the Susquehanna River, that restriction affects only a limited area and will be well publicized to allow mariners to make alternative plans.

**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 may affect the following entities, some of which may be small entities: owners or operators of fishing vessels and recreational vessels wishing to transit the portions of the Susquehanna River.

The rule will not have a significant impact on a substantial number of small entities for the following reasons: The restrictions affect only a limited area and traffic will be allowed to transit through the zone with permission of the Coast Guard or designated representative. The opportunity to engage in recreational and charter fishing outside the geographical limits of the security zone will not be disrupted. Therefore, this regulation should have a negligible impact on recreational and charter fishing activity.

**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 the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

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

A final "Environmental Analysis Checklist" and a final "Categorical Exclusion Determination" will be available in the docket where indicated under **ADDRESSES.**

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Temporary § 165.T05–092 is reinstated and revised to read as follows:

**§ 165.T05–093 Security Zone; Peach Bottom Atomic Power Station, Susquehanna River, York County, Pennsylvania.**

(a) *Location.* The following area is a security zone: The waters of the Susquehanna River in the vicinity of the Peach Bottom Atomic Power Station bounded by a line drawn from a point located at 39°45′36.36″ N, 076°16′08.93″ W to 39°45′38.72″ N, 076°15′57.00″ W, thence to 39°45′28.95″ N, 076°15′49.74″ W, thence to 39°45′28.20″ N, 076°16′02.24″ W. All coordinates reference Datum: NAD 1983.

(b) *Regulations.* (1) All persons are required to comply with the general regulations governing security zones in § 165.33 of this part.

(2) No person or vessel may enter or navigate within this security zone unless authorized to do so by the Coast Guard or designated representative. Any person or vessel authorized to enter the security zone must operate in strict conformance with any directions given by the Coast Guard or designated representative and leave the security zone immediately if the Coast Guard or designated representative so orders.

(3) The Coast Guard or designated representative enforcing this section can be contacted on VHF Marine Band Radio, channels 16. The Captain of the Port can be contacted at (215) 271–4940.

(4) The Captain of the Port will notify the public of any changes in the status of this security zone by Marine Safety Radio Broadcast on VHF–FM marine band radio, channel 16.

(c) *Definitions.* For the purposes of this section, *Captain of the Port* means the Commanding Officer of the Coast Guard Marine Safety Office/Group Philadelphia or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to act as a designated representative on his behalf.

(d) *Effective period.* This section is effective from 5 p.m. (EDT) on May 13, 2003, through 11:59 p.m. EST on February 29, 2004.

Dated: January 16, 2004.

**Jonathan D. Sarubbi,**

*Captain, U.S. Coast Guard, Captain of the Port Philadelphia.*

[FR Doc. 04–2744 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–P

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP Philadelphia 03–007]**

**RIN 1625–AA00**

## Security Zone; Three Mile Island Generating Station, Susquehanna River, Dauphin County, PA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule; change in effective period.

**SUMMARY:** The Coast Guard is continuing the effective period of the temporary security zone on the waters adjacent to the Three Mile Island Generating Station. This will protect the safety and security of the plants from subversive activity, sabotage, or terrorist attacks initiated from surrounding waters. This action will close water areas around the generating station.

**DATES:** Effective January 16, 2004, § 165.T05–093, originally added at 68 FR 33399, June 4, 2003, effective from 5 p.m. e.d.t. on May 13, 2003, to 5 p.m. e.s.t. on January 24, 2004, is reinstated and is effective through 11:59 p.m. (e.s.t.) on February 29, 2004.

**ADDRESSES:** Documents as indicated in this preamble are available as part of docket COTP Philadelphia 03–007 for inspection or copying at Coast Guard Marine Safety Office Philadelphia, One Washington Avenue, Philadelphia, Pennsylvania, 19147, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Kevin Sligh or Ensign Doreen Moore, Coast Guard Marine Safety Office/Group Philadelphia, at (215) 271–4889.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this rule. Under 5 U.S.C. 553(b)(B) and (d)(3), the Coast Guard finds that good cause exists for not publishing a NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. Based upon the warnings from national security and intelligence personnel, this rule is urgently required to protect the plant from subversive activity, sabotage or possible terrorist attacks initiated from the waters surrounding the plants.

Delaying the effective date of the rule would be contrary to the public interest, since immediate action is needed to continue to protect the persons at the facilities, the public and surrounding communities from the release of nuclear radiation. This security zone should have minimal impact on vessel transits because the security zone does not block the channel.

On September 16, 2003, we published a notice of proposed rulemaking (68 FR 54177) to create a permanent security zone in the same area this temporary final rule covers. It is taking longer to resolve issues related to the final rule than originally expected at the time the first temporary final rule was issued (68 FR 33399, June 4, 2003). Our extension of the effective period of the temporary security zone is intended to provide the Coast Guard with enough time to complete the rulemaking for a permanent zone without an interruption in the protection provided at the site by the temporary security zone.

### Background and Purpose

Due to the continued warnings from national security and intelligence officials that future terrorist attacks are possible, such as those launched against New York and Washington, DC, on September 11, 2001, heightened security measures are necessary for the area surrounding the Three Mile Island Generating Station. This rule will provide the Captain of the Port Philadelphia with enforcement options to deal with potential threats to the security of the plants. As noted, the Coast Guard has proposed to implement a permanent security zone surrounding the plants.

### Discussion of Rule

This temporary rule will extend the effective period of the security zone from 5 p.m. (e.s.t.) on January 24, 2004, to 11:59 p.m. (e.s.t.) on February 29, 2004. No person or vessel may enter or remain in the prescribed security zone at any time without the permission of the Captain of the Port, Philadelphia, Pennsylvania or designated representative. Federal, State, and local

agencies may assist the Coast Guard in the enforcement of this rule.

**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).

The primary impact of this rule will be on vessels wishing to transit the affected waterway. Although this rule restricts traffic from freely transiting portions of the Susquehanna River, that restriction affects only a limited area and will be well publicized to allow mariners to make alternative plans.

**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 may affect the following entities, some of which may be small entities: owners or operators of fishing vessels and recreational vessels wishing to transit the portions of the Susquehanna River.

The rule will not have a significant impact on a substantial number of small entities for the following reasons: the restrictions affect only a limited area and traffic will be allowed to transit through the zone with permission of the Coast Guard or designated representative. The opportunity to engage in recreational and charter fishing outside the geographical limits of the security zone will not be disrupted. Therefore, this regulation should have a negligible impact on recreational and charter fishing activity.

**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 the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

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

A final "Environmental Analysis Checklist" and a final "Categorical Exclusion Determination" will be available in the docket where indicated under **ADDRESSES.**

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Section 165.T05–093 is reinstated and revised to read as follows:.

**§ 165.T05–093 Security Zone; Three Mile Island Generating Station, Susquehanna River, York County, Pennsylvania.**

(a) *Location.* The following area is a security zone: The waters of the Susquehanna River in the vicinity of the Three Mile Island Generating Station bounded by a line drawn from a point located at 40°09′14.74″ N, 076°43′40.77″ W to 40°09′14.74″ N, 076°43′42.22″ W, thence to 40°09′16.67″ N, 076°43′42.22″ W, thence to 40°09′16.67″ N, 076°43′40.77″ W. All coordinates reference Datum: NAD 1983.

(b) *Regulations.* (1) All persons are required to comply with the general regulations governing security zones in § 165.33 of this part.

(2) No person or vessel may enter or navigate within this security zone unless authorized to do so by the Coast Guard or designated representative. Any person or vessel authorized to enter the security zone must operate in strict conformance with any directions given by the Coast Guard or designated representative and leave the security zone immediately if the Coast Guard or designated representative so orders.

(3) The Coast Guard or designated representative enforcing this section can be contacted on VHF Marine Band Radio, channels 13 and 16. The Captain of the Port can be contacted at (215) 271–4807.

(4) The Captain of the Port will notify the public of any changes in the status of this security zone by Marine Safety Radio Broadcast on VHF–FM marine band radio, channel 22 (157.1 MHZ).

(c) *Definitions.* For the purposes of this section, *Captain of the Port* means the Commanding Officer of the Coast Guard Marine Safety Office/Group Philadelphia or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to act as a designated representative on his behalf.

(d) *Effective period.* This section is effective from 5 p.m. (EDT) on May 13, 2003, through 11:59 p.m. (EST) on February 29, 2004.

Dated: January 16, 2004.

**Jonathan D. Sarubbi,**

*Captain, U.S. Coast Guard, Captain of the Port Philadelphia.*

[FR Doc. 04–2743 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[CGD05–04–011]**

**RIN 1625–AA00**

## Security Zone; Chesapeake Bay, Hampton Roads, Elizabeth River, VA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary security zone encompassing all waters surrounding P/V MAASDAM, to ensure the security of the vessel during inbound and outbound transits in the Port of Hampton Roads, and while the vessel is berthed at Nauticus International Terminal. The security zone will extend in a 500-yard radius around P/V MAASDAM and require that all vessels transiting within 500 yards of P/V MAASDAM operate only at the minimum speed necessary to maintain course. No vessels are allowed within 100 yards of P/V MAASDAM without authorization by the Captain of the Port, Hampton Roads, or his designated representative.

**DATES:** This rule is effective from January 20, 2004, to April 24, 2004.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket CGD05–04–011 and are available for inspection or copying at USCG Marine Safety Office Hampton Roads, 200 Granby Street, Suite 700, Norfolk, Virginia, 23510, between 9:30 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** LT Mike Dolan, project officer, USCG Marine Safety Office Hampton Roads, at (757) 668–5590.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The Holland America cruise line only recently finalized arrangements with Federal and local agencies to allow the P/V MAASDAM to conduct regular passenger cruises from Norfolk. As a result, the Coast Guard received the final schedule for the MAASDAM in January 2004. Coast Guard policy dictates that the Captain of the Port will provide for the security of high-capacity passenger vessels, and this security zone is necessary for that purpose.

Publishing an NPRM, which would incorporate a comment period before a final rule was issued, would be contrary to the public interest since immediate action is needed to protect this vessel from potential security threats. For similar 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**.

### Background and Purpose

Following terrorist attacks on the United States in September 2001, there is a heightened awareness that vessels or persons could launch subversive activity against passenger ships. These regulations are necessary to protect the vessel, its passengers, and its crew from these potential threats. The Coast Guard is establishing a temporary security zone to ensure the vessel's safe inbound and outbound transits, and to protect the vessel while moored at Nauticus International Terminal.

### Discussion of Rule

The Coast Guard is establishing temporary security zones to ensure safe transits and port calls for the P/V MAASDAM. The security zones will be activated while the P/V MAASDAM transits in the Port of Hampton Roads, and while it is berthed at Nauticus International Terminal. This rule is effective from January 20, 2004, to April 24, 2004. The security zone will extend in a 500-yard radius around P/V MAASDAM. All vessels within 500 yards must operate only at the minimum speed necessary to maintain course. No vessels are allowed within 100 yards of P/V MAASDAM without authorization by the Captain of the Port, Hampton Roads, or his designated representative. This rule will provide for increased security of the vessel and other vessels transiting in the area, and will allow the uninterrupted flow of commerce in the Port of Hampton Roads. Public notifications will be made prior to the transit via marine information broadcasts.

### 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).

Although this rule restricts access to the regulated area, the effect of this rule will not be significant because: (i) The COTP may authorize access to the security zone; (ii) the security zones will be in effect for a limited duration; and (iii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

**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" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations 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 may be small entities: The owners and operators of vessels intending to transit or anchor within a 500-yard radius of P/V MAASDAM as she transits the Port of Hampton Roads, and while she is berthed at the Nauticus International Terminal.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Environment**

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because it creates temporary security zones. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES.**

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add temporary § 165.T05–011, to read as follows:

**§ 165.T05–011 Security Zone: Chesapeake Bay, Hampton Roads and Elizabeth River, Virginia.**

(a) *Location.* The following area is a security zone: All waters within a 500-yard radius around the P/V MAASDAM, while the vessel transits through the Captain of the Port Hampton Roads zone, and while berthed at Nauticus International Terminal.

(b) *Definitions:* The *designated representative of the Captain of the Port* is any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Contact information.* The Captain of the Port, Hampton Roads and the Command Duty Officer at the Marine Safety Office Hampton Roads, Norfolk, Virginia, can be contacted at telephone Number (757) 668–5555 or (757) 484–8192. The Coast Guard vessels enforcing the security zone can be contacted on VHF–FM channels 13 and 16.

(d) *Regulation:* (1) Under § 165.33, vessels are prohibited from entering within 100 yards of the P/V MAASDAM, unless authorized by the Captain of the Port, Hampton Roads, Virginia, or his designated representatives. Vessels within 500 yards of the P/V MAASDAM must operate only at the minimum speed necessary to maintain course.

(2) The operator of any vessel in any part of this security zone must:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign.

(iii) Operate at minimum speed within a 500-yard radius of P/V MAASDAM.

(e) *Effective period:* This section is effective from January 20, 2004, to April 24, 2004.

Dated: January 16, 2004.

**Robert R. O'Brien, Jr.,**

*Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.*

[FR Doc. 04–2742 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–U

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[WV063–6032a; FRL–7612–9]

## Approval and Promulgation of Air Quality Implementation Plans; West Virginia; MOBILE6-Based Motor Vehicle Emission Budgets for Greenbrier County and the Charleston, Huntington, and Parkersburg 1-Hour Ozone Maintenance Areas

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to approve State Implementation Plan (SIP) revisions submitted by the State of West Virginia. The revisions amend the 1-hour ozone maintenance plans for Greenbrier County and the Charleston, Huntington and Parkersburg areas. These revisions amend the maintenance plans' base year and 2005 highway mobile volatile organic compound (VOC) and nitrogen oxide ($NO_X$) emission inventories and the 2005 motor vehicle emissions budgets (MVEBs) to reflect the use of MOBILE6. These revisions also reallocate a portion of each plans' safety margins which results in an increase in the MVEBs. The revised plans continue to demonstrate maintenance of the 1-hour national ambient air quality standard (NAAQS) for ozone. EPA is approving these SIP revisions to the West Virginia maintenance plans in accordance with the requirements of the Clean Air Act.

**DATES:** This rule is effective on April 12, 2004, without further notice, unless EPA receives adverse written comment by March 11, 2004. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Comments may be submitted either by mail or electronically. Written comments should be mailed to Larry Budney, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Electronic comments should be sent either to *budney.larry@epa.gov* or to *http://www.regulations.gov*, which is an alternative method for submitting electronic comments to EPA. To submit comments, please follow the detailed instructions described in Part III of the **SUPPLEMENTARY INFORMATION** section. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the West Virginia Department of Environmental Protection, Division of Air Quality, 7012 MacCorkle Avenue, SE., Charleston, West Virginia 25304–2943.

**FOR FURTHER INFORMATION CONTACT:** Larry Budney, (215) 814–2184, or by e-mail at *budney.larry@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On August 4, 1995 (60 FR 39911), September 6, 1994 (59 FR 45985), December 21, 1994 (59 FR 65719) and September 6, 1994 (59 FR 45978), respectively, EPA redesignated Greenbrier County and the Charleston, Huntington and Parkersburg areas of West Virginia to attainment for the 1-hour ozone NAAQS. For each of those areas, the redesignations included approvals of 1-hour ozone maintenance plans, which identify on-road MVEBs for VOCs and $NO_X$, which are ozone precursors. The MVEBs contained in those maintenance plans were based upon MOBILE5, which was the latest EPA on-road motor vehicle emission factor model available at the time.

The MOBILE model is an EPA emission factor model for estimating pollutant emissions from on-road motor vehicles. The MOBILE model calculates emissions of VOCs and $NO_X$ from passenger cars, motorcycles, buses, and light-duty and heavy-duty trucks. The model accounts for the emission impacts of factors such as changes in vehicle emission standards, changes in vehicle populations and activity, and various local conditions such as temperature, humidity, fuel quality, and air quality programs. The MOBILE model is used to calculate current and future inventories of motor vehicle emissions at the national and local level. These inventories are used to make decisions about air pollution policies and programs at the local, State and national level. MOBILE-based inventories are also used in demonstrating how the Clean Air Act's (the Act's) requirements for SIPs and transportation conformity are met.

The MOBILE model was first developed in 1978. It has been updated several times to reflect changes in the vehicle fleet and fuels, to incorporate EPA's growing understanding of vehicle emissions, and to address new emission regulations and modeling needs. EPA released MOBILE6, the latest version of

the MOBILE model, on January 29, 2002 (67 FR 4254). Although some minor updates were made in 1996 with the release of MOBILE5b, MOBILE6 is the first major revision to MOBILE since MOBILE5a was released in 1993. Beginning in January of 2004, all conformity determinations for new transportation improvement programs and long range transportation plans will be required to use MOBILE6 to demonstrate conformity.

For the year 2005, the maintenance plans identified and established MVEBs for VOC and $NO_X$ for each area, to which each respective area's transportation improvement program and long range transportation plan must conform. Conformity to MVEBs in a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS.

## II. Summary of West Virginia's SIP Revision and EPA's Review

### *A. MOBILE6-Based Highway Motor Vehicle Emission Inventories*

On October 15, 2003, the State of West Virginia submitted to EPA a formal revision to its State Implementation Plan (SIP). The SIP revision contains recalculations of the MVEBs to reflect the use of the MOBILE6 emission factor model for Greenbrier County and the Charleston, Huntington and Parkersburg maintenance areas. The revisions also reallocate a portion of the differences (safety margins) between the total base year and total projected 2005 emissions for each area which produces an increase in the MVEBs. The base year is 1990 for the Charleston and Parkersburg areas, and 1993 for Greenbrier County and the Huntington area. By increasing the MVEBs, the West Virginia Department of Environmental Protection (WVDEP) is ensuring that conformity can be demonstrated in each area. The October 15, 2003 submittal, while increasing the MVEBs still ensures maintenance of the NAAQS for ozone in each area.

Tables 1–4 and the discussion that follows describe how the new MOBILE6-based MVEBs were determined for each maintenance area.

TABLE 1.—GREENBRIER COUNTY REALLOCATION OF EMISSIONS AND DETERMINATION OF MOBILE6-BASED MVEBS

[Tons/day]

| | Emissions prior to reallocation | | Safety margin | 2005 emissions |
|---|---|---|---|---|
| | 1993 base year | 2005 projection | Allocated safety margin | 2005 MVEB |
| Highway MOBILE6 Emissions: | | | | |
| VOC | 4.22 | 1.96 | 1.50 | 3.46 |
| $NO_X$ | 5.07 | 3.80 | 1.05 | 4.85 |
| | 1993 base year | 2005 projection | base minus 2005 | 2005 total |
| Total (Point, Area and Mobile) Emissions: | | | | |
| VOC | 8.59 | 6.92 | 1.67 | 8.42 |
| $NO_X$ | 6.67 | 5.50 | 1.17 | 6.56 |

TABLE 2.—CHARLESTON AREA REALLOCATION OF EMISSIONS AND DETERMINATION OF MOBILE6-BASED MVEBS

[Tons/day]

| | Emissions prior to reallocation | | Safety margin | 2005 emissions |
|---|---|---|---|---|
| | 1990 base year | 2005 projection | Allocated safety margin | 2005 MVEB |
| Highway MOBILE6 Emissions: | | | | |
| VOC | 38.2 | 14.4 | 30.1 | 44.5 |
| $NO_X$ | 35.8 | 24.5 | 29.6 | 54.1 |
| | 1990 base year | 2005 projection | Base minus 2005 | 2005 total |
| Total (Point, Area and Mobile) Emissions: | | | | |
| VOC | 114.8 | 81.3 | 33.5 | 111.4 |
| $NO_X$ | 441.9 | 409.0 | 32.9 | 438.6 |

TABLE 3.—HUNTINGTON AREA REALLOCATION OF EMISSIONS AND DETERMINATION OF MOBILE6-BASED MVEBS

[Tons/day]

| | Emissions prior to reallocation | | Safety margin | 2005 emissions |
|---|---|---|---|---|
| | 1993 base year | 2005 projection | Allocated safety margin | 2005 MVEB |
| Highway MOBILE6 Emissions: | | | | |
| VOC | 13.0 | 6.5 | 6.9 | 13.4 |
| $NO_X$ | 13.0 | 10.2 | 3.7 | 13.9 |
| | 1993 base year | 2005 projection | Base minus 2005 | 2005 total |
| Total (Point, Area and Mobile) Emissions: | | | | |
| VOC | 42.5 | 34.9 | 7.6 | 41.8 |

TABLE 3.—HUNTINGTON AREA REALLOCATION OF EMISSIONS AND DETERMINATION OF MOBILE6-BASED MVEBS—Continued

[Tons/day]

| | Emissions prior to reallocation | | Safety margin | 2005 emissions |
|---|---|---|---|---|
| | 1993 base year | 2005 projection | Allocated safety margin | 2005 MVEB |
| $NO_X$ | 42.2 | 38.1 | 4.1 | 41.8 |

TABLE 4.—PARKERSBURG AREA REALLOCATION OF EMISSIONS AND DETERMINATION OF MOBILE6-BASED MVEBS

[Tons/day]

| | Emissions prior to reallocation | | Safety margin | 2005 emissions |
|---|---|---|---|---|
| | 1990 base year | 2005 projection | Allocated safety margin | 2005 MVEB |
| Highway MOBILE6 Emissions: | | | | |
| VOC | 10.0 | 4.0 | 9.5 | 13.4 |
| $NO_X$ | 8.7 | 6.3 | 3.6 | 9.9 |
| | 1990 base year | 2005 projection | Base minus 2005 | 2005 total |
| Total (Point, Area and Mobile) Emissions: | | | | |
| VOC | 55.1 | 44.6 | 10.5 | 54.1 |
| $NO_X$ | 28.6 | 24.6 | 4.1 | 28.2 |

All emissions presented in the tables are recalculated based upon MOBILE6. The 2005 MVEB VOC AND $NO_X$ emissions (upper portion of last column) serve as the new MVEBs for transportation conformity planning.

As indicated in Tables 1–4 (see explanation that follows), ninety percent of the difference between the total base year emissions and the total projected 2005 emissions has been allocated to the respective on-road MVEBs. The remaining ten percent has been reserved as residual safety margins in the total maintenance budgets to ensure continued maintenance of the 1-hour ozone NAAQS.

To explain how the safety margins are determined and allocated, the VOC emissions for the Parkersburg area (in Table 4) may be used as an example. The total 1990 base year VOC emissions are 55.1 tons/day (tpd), which is the maximum amount of VOC emissions consistent with maintenance of the 1-hour ozone NAAQS. Since the total projected 2005 emissions are 44.6 tpd, there is a 10.5 tpd VOC safety margin (*i.e.*, the ozone NAAQS would continue to be maintained if total VOC emissions increased as much as 10.5 tpd above the projected 2005 emissions of 44.6 tpd.) Ninety percent of the 10.5 tpd safety margin (*i.e.*, 9.5 tpd) has been allocated to the 2005 projected highway VOC emissions (4.0 tpd) yielding a MVEB of 13.4 tpd of VOC for year 2005. (Note regarding the 13.4 number: 13.4, as opposed to 13.5, results from mathematical rounding of the VOC and safety margin numbers).

In the same Parkersburg example (again refer to Table 4), the remaining 1.0 tpd of the VOC safety margin has been reserved as a residual safety margin in the total (point, area and mobile source) maintenance VOC budget. The 1.0 tpd residual VOC safety margin is subtracted from the 1990 total allowable base year emissions (55.1 tpd) to yield 54.1 as the new total VOC maintenance budget for the Parkersburg area.

For all of the West Virginia 1-hour ozone maintenance areas addressed herein, the WVDEP recalculated the 2005 MVEBs using the latest available planning assumption data. However, the most up-to-date West Virginia vehicle registration data do not differentiate between passenger cars and light duty trucks, rendering those data inadequate for use in estimating emissions. Therefore, the WVDEP used the latest available West Virginia Highway Performance Monitoring System (HPMS) data on vehicle miles traveled (VMT) by vehicle type and roadway class obtained from the West Virginia Department of Transportation. The WVDEP used the HPMS data to adjust the national MOBILE6 default VMT data to generate a more accurate VMT mix by vehicle type and roadway class. That adjusted VMT mix was used in conjunction with MOBILE6 in calculating the base year and projected 2005 VOC and $NO_X$ emissions.

## III. Final Action

EPA is approving West Virginia's October 15, 2003 SIP revision submittal which amends the 1-hour ozone maintenance plans for the Greenbrier County and the Charleston, Huntington and Parkersburg areas. These revisions amend the maintenance plans' base year and 2005 highway mobile VOC and $NO_X$ emission inventories and the 2005 MVEBs to reflect the use of MOBILE6. These revisions also reallocate a portion of each plans' safety margins which results in an increase in the MVEBs. EPA is approving these SIP revisions to the maintenance plans for Greenbrier County and the Charleston, Huntington and Parkersburg areas because the October 15, 2003 submittal continues to demonstrate maintenance of the 1-hour ozone NAAQS. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment, since no significant adverse comments were received on the SIP revision at the State level. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on April 12, 2004 without further notice unless EPA receives adverse comment by March 11, 2004.

If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the

public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

You may submit comments either electronically or by mail. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number WV063–6032 in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

*1. Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

*i. E-mail.* Comments may be sent by electronic mail (e-mail) to *budney.larry@epa.gov* attention WV063–6032. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly without going through *Regulations.gov*, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket.

*ii. Regulations.gov.* Your use of Regulations.gov is an alternative method of submitting electronic comments to EPA. Go directly to *http://www.regulations.gov,* then select "Environmental Protection Agency" at the top of the page and use the "go" button. 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 the **ADDRESSES** section of this document. 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.* Written comments should be addressed to the EPA Regional office listed in the **ADDRESSES** section of this document. For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (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.

*Submittal of CBI Comments*—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.

*Considerations When Preparing Comments to EPA*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate regional file/rulemaking identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

## IV. Statutory and Executive Order Reviews

*A. General Requirements*

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

governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

*B. Submission to Congress and the Comptroller General*

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

*C. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 12, 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 approving West Virginia's revisions to the base-year and 2005 MVEBs of its 1-hour ozone maintenance plans for the Greenbrier County and the Charleston, Huntington and Parkersburg areas to reflect the use of MOBILE6 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, Nitrogen dioxide, Ozone, Incorporation by reference, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: January 14, 2004.

**James W. Newsom,**

*Acting Regional Administrator, Region III.*

■ 40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart XX—West Virginia

■ 2. Section 52.2520 is amended by adding paragraph (c)(57) to read as follows:

**§ 52.2520 Identification of plan.**

* * * * *

(c) * * *

(57) Revisions to the West Virginia 1-hour ozone maintenance plans for Greenbrier County and the Charleston, Huntington and Parkersburg areas to amend the base year and 2005 mobile emissions inventories and the 2005 motor vehicle emission budgets to reflect the use of MOBILE6, and to reallocate a portion of projected MOBILE6-based emission safety margins to those 2005 motor vehicle emission budgets. These revisions were submitted by the State of West Virginia Department of Environmental Protection to EPA on October 15, 2003.

(i) Incorporation by reference.

(A) Letter of October 15, 2003 from the Secretary of the West Virginia Department of Environmental Protection transmitting revisions to West Virginia's ozone maintenance plans for the Greenbrier County and the Charleston, Huntington and Parkersburg areas.

(B) Document entitled "Final Revisions to the 1–Hour Ozone Maintenance Plans for the Charleston, WV (Kanawha and Putnam Counties); Huntingdon, WV (Cabell & Wayne Counties); Parkersburg, WV (Wood County); and Greenbrier County WV Maintenance Areas." This document establishes revised motor vehicle emissions budgets for the following 1-hour ozone maintenance plans, effective September 26, 2003:

(*1*) Revisions to the Charleston, West Virginia (Kanawha and Putnam Counties) ozone maintenance plan, establishing revised motor vehicle emissions budgets of 44.5 tons/day of VOC and 54.1 tons/day of $NO_X$.

(*2*) Revisions to the Huntington, West Virginia (Cabell and Wayne Counties) ozone maintenance plan, establishing revised motor vehicle emissions budgets of 13.4 tons/day of VOC and 13.9 tons/day of $NO_X$.

(*3*) Revisions to the Parkersburg, West Virginia (Wood County) ozone maintenance plan, establishing revised motor vehicle emissions budgets of 13.4 tons/day of VOC and 9.9 tons/day of $NO_X$.

(*4*) Revisions to the Greenbrier County, West Virginia ozone maintenance plan, establishing revised motor vehicle emissions budgets of 3.46 tons/day of VOC and 4.85 tons/day of $NO_X$.

(ii) Additional Material.—Remainder of the State submittal pertaining to the revisions listed in paragraph (c)(57)(i) of this section.

[FR Doc. 04–2707 Filed 2–9–04; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 65

### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** Modified Base (1% annual chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified elevations will be used to calculate flood insurance premium rates for new buildings and their contents.

**EFFECTIVE DATES:** The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect for each listed community prior to this date.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA makes the final determinations listed below of modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this rule includes the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection.

The modifications are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State or regional entities.

These modified elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

The changes in BFEs are in accordance with 44 CFR 65.4.

### National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

### Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

### Regulatory Classification

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

### Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

### Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

### List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

### § 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Alabama: | | | | | |
| Jefferson (FEMA Docket No. D–7541). | City of Birmingham ... | May 13, 2003, May 20, 2003, *The Birmingham News.* | The Honorable Bernard A. Kincaid, Mayor of the City of Birmingham, Birmingham City Hall, 710 North 20th Street, Birmingham, Alabama 35203. | May 6, 2003 ..... | 010116 E |
| Montgomery (FEMA Docket No. D–7543). | City of Montgomery .. | May 28, 2003, June 4, 2003, *Montgomery Advertiser.* | The Honorable Bobby N. Bright, Mayor of the City of Montgomery, City Hall, P.O. Box 1111, Montgomery, Alabama 36101–1111. | Aug. 5, 2003 ..... | 010174 G |
| Connecticut: | | | | | |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Fairfield (FEMA Docket No. D–7541). | Town of Greenwich .. | May 6, 2003, May 13, 2003, *Greenwich Time.* | Mr. Richard Bergstresser, Town of Greenwich First Selectman, Town Hall, 101 Field Point Road, Greenwich, Connecticut 06830. | Apr. 28, 2003 ..... | 090008 C |
| Delaware: | | | | | |
| New Castle (FEMA Docket No. D–7543). | Unincorporated Areas | July 3, 2003, July 10, 2003 *The News Journal.* | Mr. Thomas P. Gordon, New Castle County Executive, New Castle County Government Center, 87 Reads Way, New Castle, Delaware 19720. | Oct. 9, 2003 ..... | 105085 G&H |
| Florida: | | | | | |
| Dade (FEMA Docket No. D–7543). | City of Miami ..... | July 7, 2003, July 14, 2003, *The Miami Herald.* | The Honorable Manuel A. Diaz, Mayor of the City of Miami, 3500 Pan American Drive, Miami, Florida 33133. | July 26, 2003 ..... | 120650 J |
| Santa Rosa (FEMA Docket No. D–7543). | Unincorporated Areas | June 4, 2003, June 11, 2003, *The Press Gazette.* | Mr. Hunter Walker, Santa Rosa County Administrator, 6495 Caroline Street, Suite D, Milton, Florida 32570–4592. | May 28, 2003 ..... | 120274 C |
| Hillsborough (FEMA Docket No. D–7541). | City of Tampa ..... | May 20, 2003, May 27, 2003, *St. Petersburg Times.* | The Honorable Dick A. Greco, Mayor of the City of Tampa, 306 East Jackson Street, First Floor, Tampa, Florida 33602. | May 12, 2003 ..... | 120114 C |
| Georgia: | | | | | |
| Bryan (FEMA Docket No. D–7543). | Unincorporated Areas | June 19, 2003, June 26, 2003, *Bryan County News.* | Mr. Brooks Wamell, Chairman of the Bryan County Board of Commissioners, P.O. Box 430, Pembroke, Georgia 31321. | Sept. 25, 2003 ..... | 130016 A |
| Chatham (FEMA Docket No. D–7541). | City of Savannah ..... | May 22, 2003, May 29, 2003, *Savannah Morning News.* | The Honorable Floyd Adams, Jr., Mayor of the City of Savannah, P.O. Box 1027, Savannah, Georgia 31402. | May 15, 2003 ..... | 135163 C |
| Maine: | | | | | |
| Camden (FEMA Docket No. D–7543). | Town of Camden ..... | June 26, 2003, July 3, 2003, *The Camden Herald.* | Ms. Roberta Smith, Camden Town Manager, P.O. Box 1207, Camden, Maine 04843. | June 18, 2003 ..... | 230074 B |
| Massachusetts: | | | | | |
| Plymouth (FEMA Docket No. D–7539). | Town of Plymouth .... | April 9, 2003, April 16, 2003, *Old Colony Memorial.* | Ms. Eleanor Beth, Plymouth Town Manager, Plymouth Town Hall, 11 Lincoln Street, Plymouth, Massachusetts 02360. | Apr. 1, 2003 ..... | 250278 C |
| Pennsylvania: | | | | | |
| Chester (FEMA Docket No. D–7543). | Township of East Fallowfield. | July 2, 2003, July 9, 2003, *Daily Local News.* | Mr. Earl Emel, Chairman of the Township of East Fallowfield Board of Supervisors, 2264 Strasburg Road, East Fallowfield, Pennsylvania 19320. | June 25, 2003 ..... | 421479 D |
| Lebanon (FEMA Docket No. D–7543). | Township of North Cornwall. | June 13, 2003, June 20, 2003, *Lebanon Daily News.* | Ms. Robin Getz, Lebanon County Planning and Zoning Department, 400 South Eight Street, Lebanon, Pennsylvania 17042. | Sept. 19, 2003 ..... | 420576 C |
| Wyoming (FEMA Docket No. D–7541). | Township of Tunkhannock. | April 30, 2003, May 7, 2003, *The New Age Examiner.* | Mr. Randy L. White, Chairman of the Township of Tunkhannock Board of Commissioners, Township Building, 438 State Route 92 South, Tunkhannock, Pennsylvania 18657. | Apr. 23, 2003 ..... | 422206 C |
| South Carolina: | | | | | |
| Richland (FEMA Docket No. D–7543). | Unincorporated Areas | June 5, 2003, June 12, 2003, *The State.* | Mr. T. Cary McSwain, Richland County Administrator, 2020 Hampton Street, P.O. Box 192, Columbia, South Carolina 29202. | May 29, 2003 ..... | 450170 H |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: February 3, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–2791 Filed 2–9–04; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Service

### 44 CFR Part 65

**[Docket No. FEMA–D–7551]**

### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA) Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule lists commmunities where modification of the Base (1% annual chance) Flood Elevations (BFEs), is appropriate because of new scientific or technical data. New Flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

**DATES:** These modified BFEs are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Director reconsider the changes. The modified elevations may be changed during the 90-day period.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based upon knowledge of changed conditions, or upon new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et. seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State or regional entities.

The changes in BFEs are in accordance with 44 CFR 65.4.

**National Environmental Policy Act**

This rule is categorically excluded from the requirement of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

**Regulatory Flexibility Act**

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

**Regulatory Classification**

This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

**Executive Order 12612, Federalism**

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

**Executive Order 12778, Civil Justice Reform**

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 65**

Flood Insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows.

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p.329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 65.4 [Amended]**

■ 2. The tables published under the authority of § 65.4 are amended as shown below:

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Florida: Walton | Unincorporated Areas | December 29, 2003, January 5, 2004, *Defuniak Springs Herald-Breeze.* | Mr. Larry Jones, Chairman of the Walton County Board of Commissioners, P.O. Drawer 1355, Defuniak Springs, Florida 32435. | April 5, 2004 | 120317 F. |
| Georgia: Gwinnett | Unincorporated Areas | January 8, 2004, January 15, 2004, *Gwinnett Daily Post.* | Mr. F. Wayne Hill, Chairman of the Gwinnett County Board of Commissioners, Justice and Administration Center, 75 Langley Drive, Lawrenceville, Georgia 30045. | December 29, 2003 | 130322 C. |
| Georgia: Bibb and Jones | City of Macon and Bibb County | December 31, 2003, January 7, 2004, *The Macon Telegraph.* | The Honorable C. Jack Ellis, Mayor of the City of Macon, 700 Poplar Street, Macon, Georgia 31201. | April 7, 2004 | 130011 E. |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Massachusetts: Middlesex. | Town of Andover | December 9, 2003, December 16, 2003, The *Eagle-Tribune*. | Mr. Reginald S. Stapczynski, Manager of the Town of Andover, Andover Town Office, 36 Bartlett Street, Andover, Massachusetts 01810. | March 16, 2004 | 250076 B. |
| Massachusetts: Middlesex. | Town of Wilmington | December 9, 2003, December 16, 2003, *The Sun*. | Mr. Michael Caira, Manager of the Town of Wilmington, Wilmington Town Hall, 121 Glen Road, Wilmington, Massachusetts 01887. | March 16, 2004 | 250227 C&D. |
| Pennsylvania: Lebanon .. | City of Lebanon | January 2, 2004, January 9, 2004, *Lebanon Daily News*. | The Honorable Robert A. Anspach, Mayor of the City of Lebanon, 400 South Eight Street, Lebanon, Pennsylvania 17042. | April 9, 2004 | 420573 B. |
| Pennsylvania: Lebanon .. | Township of South Lebanon | January 2, 2004, January 9, 2004, *Lebanon Daily News*. | Mr. Curtis Kulp, Township of South Lebanon Manager, 1800 South Fifth Avenue, Lebanon, Pennsylvania 17042. | April 9, 2004 | 420581 C. |
| Pennsylvania: Montgomery. | Township of Springfield | December 17, 2003, December 24, 2003, *Ambler Gazette*. | Mr. Donald Berger, Township of Springfield Manager, 1510 Papermill Road, Wyndmoor, Pennsylvania 19118. | December 10, 2003 | 425388 E. |
| Pennsylvania: Montgomery. | Township of Upper Dublin | December 17, 2003, December 24, 2003, *Ambler Gazette*. | Mr. Paul Leonard, Township of Upper Dublin Manager, 801 Loch Alsh Avenue, Fort Washington, Pennsylvania 19304. | December 10, 2003 | 420708 E. |
| New York: Niagara ..... | Town of Newfane | December 24, 2003, December 31, 2003, *Union & Sun Journal*. | Mr. Eric Krueger, Town of Newfane Supervisor, Newfane Town Hall, 2896 Transit Road, Newfane, New York 14108. | June 16, 2004 | 360504 B. |
| New York: Niagara ..... | City of Niagara Falls | December 23, 2003, December 30, 2003, *Niagara Falls Gazette*. | The Honorable Irene J. Elia, Mayor of the City of Niagara Falls, P.O. Box 69, Niagara Falls, New York 14302–0069. | June 16, 2004 | 360506 B. |
| North Carolina: Gaston .. | City of Belmont | December 8, 2003, December 15, 2003, *The Gaston Gazette*. | The Honorable Billy W. Joye, Jr., Mayor of the City of Belmont, P.O. Box 431, Belmont, North Carolina 28012. | December 1, 2003 | 370320 E. |
| North Carolina: Durham | Unincorporated Areas | June 24, 2003, July 1, 2003, *The Herald-Sun*. | Mr. Michael M. Ruffin, Durham County Manager, 200 East Main Street, 2nd Floor, Durham, North Carolina 27701. | September 30, 2003. | 370085 G. |
| North Carolina: Durham | City of Durham | June 24, 2003, July 1, 2003, *The Herald-Sun*. | The Honorable William V. Bell, Mayor of the City of Durham, 101 City Hall Plaza, Durham, North Carolina 27701. | September 30, 2003. | 370086 G. |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| North Carolina: Durham | Unincorporated Areas | December 8, 2003, December 15, 2003, *The Gaston Gazette.* | Mr. Jan Winters, Gaston County Manager, P.O. Box 1578, Gastonia, North Carolina 28053. | December 1, 2003. | 370099 E. |
| North Carolina: Gaston .. | City of Mount Holly | December 8, 2003, December 15, 2003, *The Gaston Gazette.* | The Honorable Robert Black, Mayor of the City of Mount Holly, P.O. Box 406, Mount Holly, North Carolina 28120. | December 1, 2003. | 370102 E. |
| Pennsylvania: Montgomery. | Township of Whitemarsh | December 17, 2003, December 24, 2003, *Times Herald.* | Mr. Lawrence J. Gregan, Township of Whitemarsh Manager, 616 Germantown Pike, Lafeyette Hill, Pennsylvania 19444–1821. | December 20, 2003. | 420712 E. |
| Puerto Rico ..... | Commonwealth | January 2, 2004, January 9, 2004, *The San Juan Star.* | The Honorable Sila M. Calderon, Governor of the Commonwealth of Puerto Rico, Office of the Governor, P.O. Box 9020082, San Juan, Puerto Rico 00902–0082. | April 9, 2004. | 720000 C. |
| South Carolina: Horry .... | Unincorporated Areas | December 29, 2003, January 5, 2004, *The Sun News.* | Mr. Danny Knight, Horry County Administrator, P.O. Box 1236, Conway, South Carolina 29528. | December 22, 2003 | 450104 H. |
| Tennessee: Rutherford .. | City of La Vergne | January 5, 2004, January 12, 2004, *The Daily News Journal.* | The Honorable Mike Webb, Mayor of the City of LaVergne, 5093 Murfreesboro, Road, LaVergne, Tennessee 37086. | December 29, 2003 | 470167 E. |
| Virginia: Fauquier ..... | Unincorporated Areas | January 8, 2004, January 15, 2004, *Fauquier Citizen.* | Mr. G. Robert Lee, Fauquier County Administrator, 40 Culpeper Street, Warrenton, Virginia 20186. | December 23, 2003 | 510055 A. |
| Wisconsin: Dane ..... | Unincorporated Areas | November 20, 2003, November 27, 2003, *Wisconsin State Journal.* | Ms. Kathleen Falk, Dane County Executive, City-Council Building, Room 421, 210 Martin Luther King, Jr., Boulevard, Madison, Wisconsin 53709. | February 26, 2004 | 550077 F. |
| Wisconsin: Dane ..... | Village of Mazomanie | November 20, 2003, November 27, 2003, *News-Sickle-Arrow.* | Mr. Jeff Wirth, Mazomanie Village President, 133 Crescent Street, Mazomanie, Wisconsin 53560. | February 26, 2004 | 550085 F. |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: February 3, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–2789 Filed 2–9–04; 8:45 am]

BILLING CODE 9110–12–M

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 65

**[Docket No. FEMA–P–7632]**

### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

**DATES:** These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Map(s) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Division Director of the Emergency Preparedness and Response Directorate reconsider the changes. The modified BFEs may be changed during the 90-day period.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities.

The changes in BFEs are in accordance with 44 CFR 65.4.

### National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

### Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

### Regulatory Classification

This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

### Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

### Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

### List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and record keeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

### § 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Illinois: | | | | | |
| Adams (Case No. 03–05–5163P). | Unincorporated Areas | December 3, 2003, December 10, 2003, *Quincy Herald-Whig.* | Mr. Mike McLaughlin, Adams County Board Chairman, Adams County Courthouse, 507 Vermont Street, Quincy, IL 62301. | Mar. 10, 2004 ..... | 170001 |
| Calhoun (Case No. 03–05–5163P). | Unincorporated Areas | December 3, 2003, December 10, 2003, *Calhoun News-Herald.* | Mr. Vince Tepen, Chairman, Calhoun County Board of Commissioners, P.O. Box 187, Hardin, IL 62047. | Mar. 10, 2004 ..... | 170018 |
| Madison (Case No. 03–05–5172P). | Village of Hartford ..... | November 19, 2003, November 26, 2003, *The Telegraph.* | The Honorable William Moore, Jr., Mayor, Village of Hartford, 140 West Hawthorne, Hartford, IL 62048. | Dec. 8, 2003 ..... | 170444 |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Pike (Case No. 03–05–5163P). | Village of Hull | December 2, 2003, December 9, 2003, *The Paper.* | The Honorable Kirk Rued, Mayor, Village of Hull, Hull Village Hall, P.O. Box 70, Hull, IL 62343. | Mar. 10, 2004 | 170553 |
| Madison (Case No. 03–05–5172P). | Unincorporated Areas | November 19, 2003, November 26, 2003, *The Telegraph.* | The Honorable Alan J. Dunstan, Madison County Board Chairman, Madison County Administration Building, 157 N. Main Street, Suite 165, Edwardsville, IL 62025–1963. | Dec. 8, 2003 | 170436 |
| Pike (Case No. 03–05–5163P). | Unincorporated Areas | December 3, 2003, December 10, 2003, *The Pike Press.* | Mr. Scott Syrcle, Pike County Board Chairman, 100 East Washington Street, Pittsfield, IL 62363. | Mar. 10, 2004 | 170551 |
| Pike (Case No. 03–05–5163P). | Village of Pleasant Hill. | December 3, 2003, December 10, 2003, *The Pike Press.* | Mr. William R. Graham, President, Village of Pleasant Hill, Village Hall, 104 West Quincy Street, Pleasant Hill, IL 62366. | Mar. 10, 2004 | 170558 |
| Madison (Case No. 03–05–5172P). | Village of Roxana | November 19, 2003, November 26, 2003, *The Telegraph.* | The Honorable Fred Hubbard, President, Village of Roxana, 400 South Central Avenue, Roxana, IL 62084. | Dec. 8, 2003 | 170448 |
| Iowa: Johnson (Case No. 03–07–105P). | City of Coralville | November 7, 2003, November 14, 2003, *Iowa City Press-Citizen.* | The Honorable Jim Fausett, Mayor, City of Coralville, 1512 7th Street, Coralvillle, IA 52241. | Feb. 13, 2004 | 190169 |
| Kansas: Douglas (Case No. 03–07–1276P). | City of Lawrence | November 7, 2003, November 14, 2003, *Lawrence Journal World.* | The Honorable David M. Dunfield, Mayor, City of Lawrence, 6 East 6th Street, Lawrence, KS 66044. | Feb. 13, 2004 | 200090 |
| Michigan: Oakland (Case No. 03–05–0535P). | City of Troy | December 4, 2003, December 11, 2003, *The Troy Times.* | The Honorable Matt Pryor, Mayor, City of Troy, 500 West Big Beaver Road, Troy, MI 48084. | Mar. 11, 2004 | 260180 |
| Minnesota: | | | | | |
| Le Sueur (Case No. 03–05–1835P). | City of New Prague | December 4, 2003, December 11, 2003, *The New Prague Times.* | The Honorable Craig Sindelar, Mayor, City of New Prague, City Hall, 118 Central Avenue, New Prague, MN 56071. | Mar. 11, 2004 | 270249 |
| Sherburne (Case No. 03–05–3980P). | Unincorporated Areas | December 19, 2003, December 26, 2003, *St. Cloud Times.* | Mr. Brian Bensen, Sherburne County Administrator, Sherburne County Government Center, 13880 Highway 10, Elk River, MN 55330. | Dec. 3, 2003, | 270435 |
| New Mexico: | | | | | |
| Bernalillo, (Case No. 03–06–1742P). | City of Albuquerque | November 6, 2003, November 13, 2003, *Albuquerque Journal.* | The Honorable Martin Chavez, Mayor, City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103. | Oct. 21, 2003 | 350002 |
| Bernalillo (Case No. 03–06–1742P). | Unincorporated Areas | November 6, 2003, November 13, 2003, *Albuquerque Journal.* | Mr. Tom Rutherford, Chairman, Bernalillo County, One Civic Plaza N.W., Albuquerque, NM 87102. | Oct. 21, 2003 | 350001 |
| Bernalillo (Case No. 04–06–246P). | City of Albuquerque | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | The Honorable Martin Chavez, Mayor, City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103. | Nov. 20, 2003 | 350002 |
| Bernalillo (Case No. 04–06–242P). | City of Albuquerque | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | The Honorable Martin Chavez, Mayor, City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103. | Nov. 20, 2003 | 350002 |
| Bernalillo (Case No. 04–06–241P). | City of Albuquerque | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | The Honorable Martin Chavez, Mayor, City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103. | Nov. 20, 2003 | 350002 |
| Bernalillo (Case No. 04–06–245P). | City of Albuquerque | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | The Honorable Martin Chavez, Mayor, City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103. | Nov. 20, 2003 | 350002 |
| Bernalillo (Case No. 04–06–243P). | Unincorporated Areas | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | Mr. Tom Rutherford, Chairman, Bernalillo County, One Civic Plaza, N.W., Albuquerque, NM 87102. | Dec. 4, 2003 | 350001 |
| Bernalillo (Case No. 04–06–241P). | Unincorporated Areas | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | Mr. Tom Rutherford, Chairman, Bernalillo County, One Civic Plaza, NW., Albuquerque, NM 87102. | Nov. 20, 2003 | 350001 |
| Bernalillo (Case No. 04–06–242P). | Unincorporated Areas | December 22, 2003, December 29, 2003, *Albuquerque Journal.* | Mr. Tom Rutherford, Chairman, Bernalillo County, One Civic Plaza, NW., Albuquerque, NM 87102. | Nov. 20, 2003 | 350001 |
| Ohio: | | | | | |
| Allen (Case No. 03–05–0444P). | Allen County | December 22, 2003, December 29, 2003, *The Lima News.* | Mr. Fred Eldridge, Allen County Administrator, 301 North Main, Lima, OH 45802. | Mar. 29, 2004 | 390758 |
| Delaware (Case No. 03–05–2574P). | Village of Powell | November 19, 2003, November 26, 2003, *Olentangy Valley News.* | The Honorable Art Schultz, Mayor, Village of Powell, 47 Hall Street, Powell, OH 43065. | Feb. 25, 2004 | 390626 |
| Oklahoma: | | | | | |
| Oklahoma (Case No. 03–06–691P). | Unincorporated Areas | November 18, 2003, November 25, 2003, *The Daily Oklahoman.* | Mr. Stan Inman, Chairman, Oklahoma County, Commission, 320 Robert S. Kerr Avenue, Suite 621, Oklahoma City, OK 73102. | Feb. 24, 2004 | 400466 |
| Rogers (Case No. 03–06–1392P). | Unincorporated Areas | August 29, 2003, September 5, 2003, *Claremore Daily Progress.* | Mr. Gerry Payne, Chairman, Rogers County, Board of Commissioners, 219 South Missouri, Claremore, OK 74017. | Sept. 12, 2003 | 405379 |
| Tulsa (Case No. 03–06–831P). | City of Tulsa | November 18, 2003, November 25, 2003, *Tulsa World.* | The Honorable Bill LaFortune, Mayor, City of Tulsa, City Hall, 200 Civic Center, Tulas, OK 74103. | Nov. 5, 2003 | 405381 |
| Texas: | | | | | |

| State and county | Location | Dates and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Johnson (Case No. 03–06–1544P). | City of Burleson | December 3, 2003, December 10, 2003, *The Burleson Star.* | The Honorable Byron Black, Mayor, City of Burleson, 141 West Renfo, Burleson, TX 76028. | Mar. 10, 2004 | 485459 |
| Dallas (Case No. 03–06–838P). | City of Carrollton | November 14, 2003, November 21, 2003, *Northwest Morning News.* | The Honorable Mark Stokes, Mayor, City of Carrollton, 1945 E. Jackson Road, Carrollton, TX 75006. | Oct. 30, 2003 | 480167 |
| Harris (Case No. 03–06–405P). | Unincorporated Areas | November 11, 2003, November 18, 2003, *The Houston Chronicle.* | The Honorable Robert A. Eckels, Judge, Harris County, 1001 Preston, Suite 911, Houston, TX 77002. | Feb. 17, 2004 | 480287 |
| Hidalgo (Case No. 03–06–1738P). | Unincorporated Areas | December 10, 2003, December 17, 2003, *Edinburg Daily Review.* | The Honorable Ramon Garcia, Judge, Hidalgo County, 100 East Cano Street, Edinburg, TX 78539. | Mar. 17, 2004 | 480334 |
| Harris (Case No. 03–06–405P). | City of Houston | November 11, 2003, November 18, 2003, *The Houston Chronicle.* | The Honorable Lee P. Brown, Mayor, City of Houston, P.O. Box 1562, Houston, TX 77251. | Feb. 17, 2004 | 480296 |
| Hays (Case No. 03–06–1735P). | City of Kyle | December 10, 2003, December 17, 2003, *The Kyle Eagle.* | The Honorable James L. Adkins, Mayor, City of Kyle, 300 West Center, Kyle TX 78640. | Nov. 17, 2003 | 480108 |
| Hidalgo (Case No. 03–06–1738P). | City of La Joya | December 10, 2003, December 17, 2003, *Edinburg Daily Review.* | The Honorable Billy Leo, Mayor, City of La Joya, 100 West Expressway 83, La Joya, TX 78560. | Mar. 17, 2004 | 480341 |
| Midland (Case No. 03–06–2541P). | City of Midland | November 12, 2003, November 19, 2003, *Midland Reporter-Telegram.* | The Honorable Michael J. Canon, Mayor, City of Midland, 300 North Loraine, Midland, TX 79701. | Oct. 21, 2003 | 480477 |
| Harris (Case No. 03–06–1531P). | City of Pasadena | November 11, 2003, November 18, 2003, *The Pasadena Citizen.* | The Honorable John Manlove, Mayor, City of Pasadena, City Hall, 1211 Southmore, Pasadena, TX 77502. | Feb. 17, 2004 | 480307 |
| Dallas (Case No. 03–06–427P). | City of Richardson | December 4, 2003, December 11, 2003, *The Richardson Morning News.* | The Honorable Gary A. Slagel, Mayor, City of Richardson, P.O. Box 830309, Richardson, TX 75083–0309. | Nov. 12, 2003 | 480184 |
| Bexar (Case No. 03–06–039P). | City of San Antonio | December 5, 2003, December 12, 2003, *San Antonio Express News.* | The Honorable Ed Garza, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283–3966. | Mar. 12, 2004 | 480045 |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: February 3, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–2788 Filed 2–9–04; 8:45 am]

BILLING CODE 6718–04–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

### Final Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**EFFECTIVE DATES:** The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

**ADDRESSES:** The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate, has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

#### National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

#### Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

**Regulatory Classification**

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

**Executive Order 12612, Federalism**

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

**Executive Order 12778, Civil Justice Reform**

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, flood insurance, reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

**PART 67—[AMENDED]**

■ 1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.11 [Amended]**

■ 2. The tables published under the authority of § 67.11 are amended as follows:

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| **NORTH CAROLINA** | |
| **Craven County (FEMA Docket No. D–7574)** | |
| *Bachelor Creek:* | |
| At Washington Post Road | •8 |
| At the Craven/Jones County boundary | •29 |
| Craven County (Unincorporated Areas) | |
| *Beaverdam Branch:* | |
| At the confluence with Bachelor Creek | •10 |
| Approximately 0.4 mile upstream of Hyman Road | •12 |
| Craven County (Unincorporated Areas) | |
| *Beaverdam Swamp:* | |
| At the confluence with Little Swift Creek | •9 |
| Approximately 800 feet upstream of Hudnell Road | •17 |
| Craven County (Unincorporated Areas) | |
| *Black Swamp Creek:* | |
| Approximately 2.0 miles downstream of Catfish Lake Road | •30 |
| Approximately 0.9 mile upstream of Catfish Lake Road | •37 |
| Craven County (Unincorporated Areas) | |
| *Brice Creek:* | |
| At upstream side of Old Airport Road | •8 |
| At the confluence with East Prong Brice Creek | •15 |
| Craven County (Unincorporated Areas) | |
| *Bushy Fork:* | |
| At the confluence with Little Swift Creek | •23 |
| Approximately 0.8 mile upstream of the confluence with Little Swift Creek | •28 |
| Craven County (Unincorporated Areas) | |
| *Cahoogue Creek:* | |
| Approximately 0.5 mile downstream of State Route 306 | •8 |
| Approximately 0.3 mile upstream of NC Route 101 | •19 |
| Craven County (Unincorporated Areas) | |
| *Clayroot Swamp:* | |
| At the confluence with Swift Creek | •19 |
| Approximately 0.5 mile upstream of Wilmer Road | •21 |
| Craven County (Unincorporated Areas) | |
| *Clubfoot Creek:* | |
| At the downstream side of Adam Creek Road | •8 |
| Approximately 1,850 feet downstream of Hodge Road | •10 |
| Craven County (Unincorporated Areas) | |
| *Clubfoot Creek Tributary:* | |
| Approximately 1,800 feet downstream of Adams Creek Road | •8 |
| Approximately 300 feet upstream of George Road | •13 |
| Craven County (Unincorporated Areas) | |
| *Core Creek:* | |
| At the confluence with Neuse River | •19 |
| Approximately 0.8 mile upstream of Trenton Road | •36 |
| Craven County (Unincorporated Areas) | |
| *Creeping Swamp:* | |
| At the confluence with Clayfoot Swamp | •21 |
| At the Craven/Beaufort County boundary | •33 |
| Craven County (Unincorporated Areas) | |
| *Deep Branch:* | |
| At the confluence with Bachelor Creek | •14 |
| Approximately 0.5 mile downstream of Clarks Road | •14 |
| Craven County (Unincorporated Areas) | |
| *East Prong Brice Creek:* | |
| At the confluence with Brice Creek | •15 |
| Approximately 1.9 miles upstream of the confluence with Brice Creek | •19 |
| Craven County (Unincorporated Areas) | |
| *East Prong Mortons Mill Pond:* | |
| At the confluence with Mortons Mill Pond | •8 |
| Approximately 1,500 feet upstream of NC 101 | •10 |
| Craven County (Unincorporated Areas) | |
| *East Prong Slocum Creek:* | |
| At the upstream side of Railroad Street | •15 |
| Approximately 1.5 miles upstream of Railroad Street | •19 |
| City of Havelock, Craven County (Unincorporated Areas) | |
| *Fisher Swamp:* | |
| At the confluence with Beaver Dam Swamp | •9 |
| Approximately 3.4 miles upstream of the confluence with Beaverdam Swamp | •22 |
| Craven County (Unincorporated Areas) | |
| *Flat Branch:* | |
| At the confluence with Core Creek | •19 |
| Approximately 1.8 miles upstream of NC 55 | •30 |
| Craven County (Unincorporated Areas) | |
| *Great Branch:* | |
| At the confluence with Brice Creek | •15 |
| Approximately 900 feet upstream of Tebo Road | •19 |
| Craven County (Unincorporated Areas) | |
| *Hancock Creek:* | |
| At the upstream side of NC 101 | •8 |
| Approximately 1.6 miles upstream of NC 101 | •21 |
| City of Havelock, Craven County (Unincorporated Areas) | |
| *Hollis Branch:* | |
| At the confluence with Bachelor Creek | •27 |
| Approximately 540 feet upstream of Hillard Road | •36 |
| Craven County (Unincorporated Areas) | |
| *Hunters Creek:* | |
| At the Craven/Carteret/Jones County boundary | •24 |
| Approximately 500 feet downstream of Great Lake | •40 |
| Craven County (Unincorporated Areas) | |
| *Jumping Run:* | |
| At the confluence with Bachelor Creek | •8 |
| Approximately 250 feet downstream of Highway 55 | •15 |

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| Craven County (Unincorporated Areas) | |
| *Little Swift Creek:* | |
| At the confluence of Swift Creek | •9 |
| Approximately 650 feet upstream of Beaver Dam Road | •25 |
| Craven County (Unincorporated Areas) | |
| *Maple Cypress:* | |
| At the confluence with Neuse River | •20 |
| Approximately 0.7 mile upstream of Harris Road | •29 |
| Craven County (Unincorporated Areas) | |
| *Mauls Swamp:* | |
| At the upstream side of Mill Pond Road | •15 |
| Approximately 1.1 miles upstream of the confluence of Mauls Swamp, Tributary 2 | •34 |
| Town of Vanceboro, Craven County (Unincorporated Areas) | |
| *Mauls Swamp Tributary 1:* | |
| At the confluence with Mauls Swamp | •23 |
| Approximately 0.8 mile upstream of the confluence with Mauls Swamp | •30 |
| Craven County (Unincorporated Areas) | |
| *Mauls Swamp Tributary 2:* | |
| At the confluence with Mauls Swamp | •28 |
| Approximately 0.9 mile upstream of the confluence with Mauls Swamp | •35 |
| Craven County (Unincorporated Areas) | |
| *Mill Branch:* | |
| At the confluence with Core Creek | •26 |
| Approximately 4.5 miles upstream of the confluence with Core Creek | •56 |
| Craven County (Unincorporated Areas) | |
| *Molocks Branch:* | |
| At the confluence with Hancock Creek | •8 |
| Approximately 0.7 mile upstream of the confluence with Hancock Creek | •14 |
| Craven County (Unincorporated Areas) | |
| *Morgan Swamp:* | |
| At the confluence with Upper Broad Creek | •10 |
| Approximately 1.2 miles upstream of Morgan Swamp Road | •22 |
| Craven County (Unincorporated Areas) | |
| *Mosley Creek:* | |
| At the confluence with Neuse River | •25 |
| Approximately 1.7 miles upstream of the confluence with Neuse River | •25 |
| Craven County (Unincorporated Areas) | |
| *Mosley Creek Tributary:* | |
| At the confluence with Mosley Creek | •29 |
| Approximately 2 miles upstream of the confluence with Mosley Creek | •37 |
| Craven County (Unincorporated Areas) | |
| *Neuse River:* | |
| Approximately 0.7 mile upstream of the confluence of Swift Creek | •9 |
| Approximately 1.2 mile upstream of the confluence with Contentnea Creek | •25 |
| City of New Bern, Craven County (Unincorporated Areas) | |
| *Palmetto Swamp:* | |
| At the confluence with Swift Creek | •17 |
| Approximately 1.5 miles upstream of Palmetto Swamp Tributary 4 | •32 |
| Craven County (Unincorporated Areas) | |
| *Palmetto Swamp Tributary 1:* | |
| At the confluence with Palmetto Swamp | •19 |
| Approximately 0.9 mile upstream of the confluence with Palmetto Swamp | •27 |
| Craven County (Unincorporated Areas) | |
| *Palmetto Swamp Tributary 2:* | |
| At the confluence with Palmetto Swamp | •20 |
| Approximately 150 feet upstream of Clark Road | •26 |
| Craven County (Unincorporated Areas) | |
| *Palmetto Swamp Tributary 3:* | |
| At the confluence with Palmetto Swamp | •24 |
| Approximately 0.6 mile upstream of the confluence with Palmetto Swamp | •28 |
| Craven County (Unincorporated Areas) | |
| *Palmetto Swamp Tributary 4:* | |
| At the confluence with Palmetto Swamp | •29 |
| Approximately 800 feet upstream of Gray Road | •39 |
| Craven County (Unincorporated Areas) | |
| *Pine Tree Swamp:* | |
| At the confluence with Little Swift Creek | •14 |
| At Cayton Road | •25 |
| Craven County (Unincorporated Areas) | |
| *Pollard Swamp:* | |
| At the confluence with Creeping Swamp | •30 |
| Approximately 1.4 miles upstream of Pollard Road | •41 |
| Craven County (Unincorporated Areas) | |
| *Rollover Creek:* | |
| At the confluence with Bachelor Creek | •17 |
| Approximately 0.7 mile upstream of Rollover Creek Road | •37 |
| Craven County (Unincorporated Areas) | |
| *Round Tree Branch:* | |
| At the confluence with Bachelor Creek | •8 |
| Approximately 1.2 miles upstream of the confluence with Bachelor Creek | •11 |
| Craven County (Unincorporated Areas) | |
| *South Canal:* | |
| At the confluence with Hunters Creek | •33 |
| Approximately 0.9 mile upstream of the confluence with Hunters Creek | •38 |
| Craven County (Unincorporated Areas) | |
| *Southwest Prong Slocum Creek:* | |
| At the upstream side of Miller Boulevard | •8 |
| Approximately 2.9 miles upstream of Central Street | •27 |
| City of Havelock, Craven County (Unincorporated Areas) | |
| *Spe Branch:* | |
| At the confluence with Cahoogue Creek | •10 |
| Approximately 0.7 mile upstream of the confluence with Cahoogue Creek | •15 |
| Craven County (Unincorporated Areas) | |
| *Swift Creek:* | |
| Approximately 1.8 mile upstream of confluence with Neuse River | •9 |
| Approximately 300 feet upstream of Gardnerville Road | •28 |
| Town of Vanceboro, Craven County (Unincorporated Areas) | |
| *Tracey Swamp:* | |
| At the upstream side of Sand Hill Road | •42 |
| At the Craven/Jones County boundary | •43 |
| Craven County (Unincorporated Areas) | |
| *Upper Broad Creek (Neuse Portion):* | |
| Approximately 1.8 miles downstream of the confluence of Deep Run | •8 |
| Approximately 2.9 miles upstream of the confluence of Possum Swamp | •29 |
| Craven County (Unincorporated Areas) | |
| *Upper Broad Creek (Tar-Pamlico Portion):* | |
| Approximately 125 feet downstream of the Craven/Beaufort County boundary | •31 |
| Approximately 0.7 mile upstream of the Craven/Beaufort County boundary | •37 |

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| Craven County (Unincorporated Areas) | |
| *Village Creek:* | |
| At the confluence with Neuse River | •20 |
| Approximately 400 feet upstream of Highway 55 | •45 |
| Craven County (Unincorporated Areas) | |
| *West Prong Brice Creek:* | |
| At the confluence with Brice Creek | •15 |
| Approximately 0.7 mile upstream of Catfish Lake Road | •36 |
| Craven County (Unincorporated Areas) | |
| *West Prong Mortons Mill Pond:* | |
| At the confluence with Mortons Mill Pond | •8 |
| Approximately 1.3 miles upstream of North Carolina Route 101 | •18 |
| **City of Havelock** | |
| **Maps available for inspection** at the City of Havelock Planning Department, 199 Cunningham Boulevard, Havelock, North Carolina. | |
| **City of New Bern** | |
| **Maps available for inspection** at the New Bern Building Inspection Department, 300 Pollock Street, New Bern, North Carolina. | |
| **Unincorporated Areas of Craven County** | |
| **Maps available for inspection** at the Craven County Planning Department, Craven County Government, 2828 Neuse Boulevard, New Bern, North Carolina. | |
| **Jones County (FEMA Docket Nos. D–7562 and D–7570)** | |
| *Crooked Run:* | |
| At the confluence with Trent River | •24 |
| Approximately 2.8 miles upstream of Francks Field Road | •45 |
| Township of Trenton, Jones County (Unincorporated Areas) | |
| *Trent River:* | |
| Approximately 2.8 miles downstream of the confluence of Mill Creek | •9 |
| At the Jones/Lenoir County boundary | •63 |
| Town of Pollockville, Township of Trenton, Jones County (Unincorporated Areas) | |
| *Ash Branch:* | |
| At the confluence with Vine Swamp | •56 |
| Approximately 0.5 mile upstream of State Highway 58 | •61 |
| Jones County (Unincorporated Areas) | |
| *Beaver Creek:* | |
| At the confluence with Trent River | •29 |
| Just downstream of Copeland Farm Road | •50 |
| Jones County (Unincorporated Areas) | |
| *Beaverdam Branch 2:* | |
| At the confluence with Mill Run | •16 |
| Approximately 0.5 mile upstream of Davis Field Road | •30 |
| Jones County (Unincorporated Areas) | |
| *Beaverdam Creek 3:* | |
| At the confluence with Trent River | •19 |
| Approximately 2.8 miles upstream of Ten Mile Fork Road | •42 |
| Jones County (Unincorporated Areas) | |
| *Black Swamp:* | |
| At the confluence with Trent River | •49 |
| Approximately 1.2 miles upstream of Foley Branch Lane | •58 |
| Jones County (Unincorporated Areas) | |
| *Chinquapin Branch:* | |
| At the confluence with Trent River | •30 |
| Approximately 3.2 miles upstream of Chinquapin Chapel Road | •39 |
| Jones County (Unincorporated Areas) | |
| *Island Branch Swamp:* | |
| At the confluence with Resolution Branch | •27 |
| Approximately 0.7 mile upstream of Henderson Road | •30 |
| Jones County (Unincorporated Areas) | |
| *Island Creek:* | |
| Approximately 0.3 mile downstream of the confluence of Long Branch | •8 |
| Approximately 1.2 mile upstream of Island Creek Road | •20 |
| Jones County (Unincorporated Areas) | |
| *Joshua Creek:* | |
| At the confluence with Trent River | •58 |
| At the Jones/Lenoir County boundary | •64 |
| Jones County (Unincorporated Areas) | |
| *Jumping Creek:* | |
| At the confluence with Trent River | •20 |
| Approximately 1.3 miles upstream of Ten Mile Fork Road | •32 |
| Jones County (Unincorporated Areas) | |
| *Little Chinquapin Branch:* | |
| At the confluence with Trent River | •36 |
| Approximately 0.6 mile upstream of Pleasant Hill Road | •49 |
| Jones County (Unincorporated Areas) | |
| *Little Hall Creek:* | |
| At the confluence with Trent River | •15 |
| Approximately 1.7 miles upstream of State Highway 58 | •28 |
| Jones County (Unincorporated Areas) | |
| *Long Branch:* | |
| At the confluence with Trent River | •18 |
| Approximately 500 feet upstream of Ben Banks Road | •34 |
| Jones County (Unincorporated Areas) | |
| *Mill Branch:* | |
| At the confluence with Trent River | •40 |
| Approximately 1.2 miles upstream of the confluence of Trent River | •44 |
| Jones County (Unincorporated Areas) | |
| *Holston Creek:* | |
| At the confluence with White Oak River | •10 |
| Approximately 2.6 miles upstream of State Highway 58 | •23 |
| Jones County (Unincorporated Areas) | |
| *Cypress Creek:* | |
| At the confluence with Trent River | •43 |
| Approximately 2.9 miles upstream of Old Comfort Highway | •54 |
| Jones County (Unincorporated Areas) | |
| *Deep Bottom Branch:* | |
| At the confluence with Beaver Creek | •29 |
| Approximately 1.6 miles upstream of Wyse Fork Road | •54 |
| Jones County (Unincorporated Areas) | |
| *Flat Swamp:* | |
| At the confluence with Beaver Creek | •44 |
| Approximately 0.6 mile upstream of the confluence of Flat Swamp Tributary 1 | •50 |
| Jones County (Unincorporated Areas) | |
| *Flat Swamp Tributary:* | |
| At the confluence with Flat Swamp | •49 |
| Approximately 1,300 feet upstream of the confluence with Flat Swamp | •49 |
| Jones County (Unincorporated Areas) | |
| *Goshen Branch:* | |
| At the confluence with Trent River | •14 |
| Approximately 475 feet upstream of Bell Loop Road | •23 |

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| Jones County (Unincorporated Areas) | |
| *Grape Branch:* | |
| At the confluence with Tuckahoe Swamp | •62 |
| Approximately 0.9 mile upstream of the confluence of Grape Branch Tributary | •73 |
| Jones County (Unincorporated Areas) | |
| *Grape Branch Tributary 1:* | |
| At the confluence with Grape Branch | •64 |
| Approximately 1,300 feet upstream of the confluence with Grape Branch | •67 |
| Jones County (Unincorporated Areas) | |
| *Heath Mill Run:* | |
| At the confluence with Beaver Creek | •31 |
| Approximately 1.6 miles upstream of Wyse Fork Road | •51 |
| Jones County (Unincorporated Areas) | |
| *Mill Creek:* | |
| At the confluence with Trent River | •13 |
| Approximately 2.3 miles upstream of Bender Road | •37 |
| Township of Pollocksville, Jones County (Unincorporated Areas) | |
| *Mill Creek Tributary 1:* | |
| At the confluence with Mill Creek | •13 |
| Approximately 0.5 mile upstream of the confluence of Tributary to Mill Creek Tributary 1 | •24 |
| Jones County (Unincorporated Areas) | |
| *Mill Run:* | |
| At the confluence with Trent River | •16 |
| Approximately 1.4 miles upstream of the confluence of Beaverdam Branch 2 | •28 |
| Jones County (Unincorporated Areas) | |
| *Musselshell Creek:* | |
| At the confluence with Trent River | •26 |
| Approximately 1.0 mile upstream of the confluence of Musselshell Creek Tributary 2 | •43 |
| Jones County (Unincorporated Areas) | |
| *Pocoson Branch:* | |
| At the confluence with Trent River | •33 |
| Approximately 1.2 miles upstream of Highway 41 | •50 |
| Jones County (Unincorporated Areas) | |
| *Poplar Branch:* | |
| At the confluence with Trent River | •33 |
| Approximately 1.0 mile upstream of State Route 41 | •47 |
| Jones County (Unincorporated Areas) | |
| *Raccoon Creek:* | |
| Approximately 0.59 mile upstream of the confluence with Trent River | •8 |
| Approximately 650 feet downstream of Island Creek Road | •21 |
| Jones County (Unincorporated Areas) | |
| *Rattlesnake Branch:* | |
| At the confluence with Beaver Creek | •43 |
| Approximately 0.4 mile upstream of Moore Road | •50 |
| Jones County (Unincorporated Areas) | |
| *Reedy Branch 1:* | |
| At the confluence with Trent River | •48 |
| Approximately 1.3 miles upstream of State Route 41 | •58 |
| Jones County (Unincorporated Areas) | |
| *Resolution Branch:* | |
| At the confluence with Trent River | •27 |
| Approximately 0.8 mile upstream of Wyse Fork Road | •45 |
| Jones County (Unincorporated Areas) | |
| *Hunters Creek:* | |
| At the confluence with White Oak River | •9 |
| Approximately 1.3 miles upstream of the confluence of South Canal | •39 |
| Jones County (Unincorporated Areas) | |
| *Tributary to Mill Creek Tributary 1:* | |
| At the confluence with Mill Creek Tributary 1 | •18 |
| Approximately 0.8 mile upstream of the confluence with Mill Creek Tributary 1 | •27 |
| Jones County (Unincorporated Areas) | |
| *Tuckahoe Creek:* | |
| At the confluence with Trent River | •51 |
| Approximately 1,200 feet upstream of Lee Mills Road | •59 |
| Jones County (Unincorporated Areas) | |
| *Tuckahoe Swamp:* | |
| At the confluence of Tuckahoe Creek | •57 |
| At the Jones/Lenoir County boundary | •81 |
| Jones County (Unincorporated Areas) | |
| *Vine Swamp:* | |
| At the confluence with Beaver Creek | •49 |
| At the Jones/Lenoir County boundary | •56 |
| Jones County (Unincorporated Areas) | |
| *Black Swamp Creek:* | |
| At the confluence with White Oak River | •11 |
| Approximately 0.9 mile upstream of Catfish Lake Road | •37 |
| Jones County (Unincorporated Areas) | |
| *Chinkapin Branch:* | |
| At the confluence with White Oak River | •38 |
| Approximately 0.7 mile upstream of the confluence with White Oak River | •38 |
| Jones County (Unincorporated Areas) | |
| *Tracey Swamp:* | |
| At downstream limit of County boundary | •43 |
| Approximately 400 feet upstream of Burkett Road | •54 |
| Jones County (Unincorporated Areas) | |
| *Tracey Swamp Tributary:* | |
| At the confluence with Tracey Swamp | •47 |
| Approximately 1.1 miles upstream with the confluence of Tracey Swamp | •53 |
| Jones County (Unincorporated Areas) | |
| *White Oak River:* | |
| At the confluence of Hunters Creek | •9 |
| Approximately 2.8 miles upstream of the confluence of Chinkapin Branch | •50 |
| Jones County (Unincorporated Areas) | |
| *White Oak River Tributary 1:* | |
| At the confluence with White Oak River | •15 |
| Approximately 0.4 mile upstream of Eighth Street/ State Highway 58 | •36 |
| Town of Maysville, Jones County (Unincorporated Areas) | |
| *White Oak River Tributary 2:* | |
| At the confluence with White Oak River Tributary 1 | •22 |
| Approximately 0.6 mile upstream of Eighth Street/ State Highway 58 | •35 |
| Town of Maysville, Jones County (Unincorporated Areas) | |
| *Hollis Branch:* | |
| Approximately 450 feet downstream of the Craven/ Jones County boundary | •35 |
| Approximately 800 feet upstream of the Craven/ Jones County boundary | •36 |
| Jones County (Unincorporated Areas) | |
| **Town of Maysville** | |
| **Maps available for inspection** at the Town of Maysville Public Works Department, 404 Main Street, Maysville, North Carolina. | |
| **Town of Pollocksville** | |
| **Maps available for inspection** at the Pollocksville Town Hall, 215 Foy Street, Pollocksville, North Carolina. | |

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| **Township of Trenton** | |
| **Maps available for inspection** at the Trenton Town Hall, 119 Jones Street, Trenton, North Carolina. | |
| **Unincorporated Areas of Jones County** | |
| **Maps available for inspection** at the Jones County Building and Inspections Department, 101 Market Street, Trenton, North Carolina. | |
| **Lenoir County (FEMA Docket No. D–7570)** | |
| *Adkin Branch:* | |
| At the confluence with Neuse River | •35 |
| Approximately 0.4 mile upstream of Carey Road | •76 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Bear Creek:* | |
| At the confluence with Neuse River | •52 |
| At the Lenoir/Greene County boundary | •82 |
| Town of LaGrange, Lenoir County (Unincorporated Areas) | |
| *Southwest Creek:* | |
| At the confluence with Neuse River | •32 |
| At the downstream side of railroad | •34 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Moseley Creek into Falling Creek:* | |
| At the downstream LaGrange corporate limit | •76 |
| Approximately 150 feet upstream of State Highway 903 | •92 |
| **Town of LaGrange** | |
| *Briery Run:* | |
| Approximately 1,000 feet upstream of Rouse Road | •67 |
| Approximately 0.5 mile upstream of Dobbs Farm Road | •80 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Falling Creek:* | |
| At the confluence with Neuse River | •42 |
| Approximately 1.6 miles upstream of Brothers Road | •85 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Taylors Branch:* | |
| Approximately 300 feet upstream of Rouse Road | •72 |
| Approximately 1.4 miles upstream of Rouse Road | •101 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Eagle Swamp:* | |
| At the confluence with Contentnea Creek | •25 |
| At the downstream side of railroad | 25 |
| Lenoir County (Unincorporated Areas) | |
| *Contentnea Creek:* | |
| At the confluence with Neuse River | •24 |
| Approximately 2.6 miles upstream of Hugo Road | 34 |
| Lenoir County (Unincorporated Areas) | |
| *Neuse River:* | |
| At the confluence with Contentnea Creek | •24 |
| At the Lenoir/Wayne County boundary | •55 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Wheat Swamp:* | |
| At the Lenoir/Greene County boundary | •39 |
| Approximately 4 miles upstream of NC Route 58 | •77 |
| Lenoir County (Unincorporated Areas) | |
| *Wheat Swamp Tributary:* | |
| At the Lenoir/Greene County boundary | •40 |
| Approximately 0.4 mile upstream of Research Farm Road | 56 |
| Lenoir County (Unincorporated Areas) | |
| *Stonyton Creek:* | |
| At the confluence with Neuse River | •29 |
| Approximately 1,400 feet upstream of the confluence with Jerico Run | •30 |
| Lenoir County (Unincorporated Areas) | |
| *Jerico Run:* | |
| At the confluence with Stonyton Creek | •29 |
| Approximately 300 feet downstream of State Route 55 | •29 |
| Lenoir County (Unincorporated Areas) | |
| *Mosley Creek to Neuse River:* | |
| At the confluence with Neuse River | •25 |
| Approximately 650 feet downstream of Griffin Road | •31 |
| Lenoir County (Unincorporated Areas) | |
| *Beaverdam Swamp:* | |
| At the confluence with Trent River | •68 |
| Approximately 200 feet upstream of Rex-Howard Road | •95 |
| Lenoir County (Unincorporated Areas) | |
| *Deep Run:* | |
| Approximately 425 feet upstream of NC State Highway 11 | •87 |
| Approximately 0.7 mile upstream of NC State Highway 11 | •95 |
| Lenoir County (Unincorporated Areas) | |
| *Horse Branch:* | |
| At the confluence with Trent River | •71 |
| Approximately 2,120 feet upstream of Jesse Howard Road | •74 |
| Lenoir County (Unincorporated Areas) | |
| *Joshua Creek:* | |
| Approximately 1,200 feet upstream of Fordham Road | •63 |
| Approximately 1.2 miles upstream of Vine Swamp Road | •82 |
| Lenoir County (Unincorporated Areas) | |
| *Neuse River Tributary:* | |
| At the confluence with Neuse River | •42 |
| Approximately 1,400 feet upstream of railroad | •56 |
| **City of Kinston** | |
| *Southwest Creek Tributary:* | |
| At the confluence with Southwest Creek | •34 |
| Approximately 1,250 feet downstream of British Road | •35 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Strawberry Branch:* | |
| At the confluence with Southwest Creek | •39 |
| Approximately 150 feet downstream of Whaley Road | •47 |
| City of Kinston, Lenoir County (Unincorporated Areas) | |
| *Tracey Swamp:* | |
| At the upstream side of Sand Hill Road | •42 |
| At the Lenoir/Craven/Jones County boundary | •43 |
| Lenoir County (Unincorporated Areas) | |
| *Trent River:* | |
| At the Lenoir/Jones County boundary | •62 |
| Approximately 0.5 mile upstream of NC State Route 11 | •123 |
| Lenoir County (Unincorporated Areas) | |
| *Neuse River Tributary 2:* | |
| At the confluence with Neuse River Tributary | •44 |
| Approximately 1,800 feet upstream of railroad | •62 |
| **City of Kinston** | |
| *Vine Swamp:* | |
| At the Lenoir/Jones County boundary | •57 |
| Approximately 800 feet upstream of Parker Farm Road | •81 |
| Lenoir County (Unincorporated Areas) | |
| *Vine Swamp Tributary:* | |
| At the confluence with Vine Swamp | •62 |
| Approximately 0.5 mile upstream of Joe Williams Road | •67 |
| Lenoir County (Unincorporated Areas) | |
| *Tuckahoe Swamp:* | |
| At the Lenoir/Jones County boundary | •81 |

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| Approximately 0.5 mile downstream of West Hill Pleasant Road | •87 |
| *Rivermont Tributary:* | |
| At the confluence with Neuse River | •37 |
| Approximately 1,200 feet upstream of Andrews Street | •39 |
| **City of Kinston** | |
| **Maps available for inspection** at the City of Kinston Planning Department, 301 East King Street, Kinston, North Carolina. | |
| **Town of La Grange** | |
| **Maps available for inspection** at the La Grange Town Hall, 120 East Railroad Street, La Grange, North Carolina. | |
| **Lenoir County Unincorporated Areas** | |
| **Maps available for inspection** at the Lenoir County Building Inspectors Office, 201 East King Street, Kinston, North Carolina. | |
| **Pamlico County (FEMA Docket No. D–7570)** | |
| *Alexander Swamp:* | |
| Approximately 500 feet upstream of the confluence with Goose Creek | •8 |
| Approximately 2.0 miles downstream of the confluence with Goose Creek | •15 |
| Pamlico County (Unincorporated Areas) | |
| *Bay River/Vandemere Creek:* | |
| At the intersection of 1st Lane and Water Lane | •7 |
| **City of Mesic** | |
| *Beard Creek:* | |
| Approximately 0.8 mile downstream of the confluence of Cedar Gut | •8 |
| Approximately 0.8 mile upstream of Roberts Road | •14 |
| Pamlico County (Unincorporated Areas) | |
| *Black Creek:* | |
| Approximately 0.8 mile downstream of Prescott Road | •8 |
| Approximately 600 feet upstream of Prescott Road | •16 |
| Pamlico County (Unincorporated Areas) | |
| *Caraway Creek:* | |
| Approximately 0.6 mile upstream of confluence with Beard Creek | •8 |
| Approximately 0.8 mile upstream of Marvin Field Road | •14 |
| Pamlico County (Unincorporated Areas) | |
| *Cedar Gut:* | |
| At the confluence with Beard Creek | •8 |
| Approximately 0.6 mile upstream of Neuse Road | •13 |
| Pamlico County (Unincorporated Areas) | |
| *Deep Run South:* | |
| At the confluence with Dawson Creek | •8 |
| Approximately 900 feet upstream of Don Lee Road | •9 |
| *Deep Run North:* | |
| At the confluence with Upper Broad Creek | •11 |
| Approximately 0.5 mile upstream of the confluence with Upper Broad Creek | •15 |
| Pamlico County (Unincorporated Areas) | |
| *Deep Run Branch:* | |
| At the confluence with Goose Creek | •11 |
| Approximately 0.5 mile upstream of the confluence with Goose Creek | •13 |
| Pamlico County (Unincorporated Areas) | |
| *East Prong:* | |
| At the confluence with Beard Creek | •8 |
| Approximately 1.8 miles upstream of the confluence with Beard Creek | •16 |
| Pamlico County (Unincorporated Areas) | |
| *Fork Run:* | |
| Approximately 0.7 mile downstream of confluence of Deep South Run | •8 |
| Approximately 0.5 mile upstream of Kershaw Road | •11 |
| Pamlico County (Unincorporated Areas) | |
| *Goose Creek:* | |
| At Neuse Road | •8 |
| Approximately 1.7 miles upstream of confluence of Deep Run Branch | •15 |
| Pamlico County (Unincorporated Areas), Town of Grantsboro | |
| *Granny Gut:* | |
| At the confluence with Dawson Creek | •8 |
| Approximately 1,500 feet upstream of Kershaw Road | •8 |
| Pamlico County (Unincorporated Areas) | |
| *Green's Creek:* | |
| Approximately 1,750 feet west-southwest of the intersection of Harris Farm Road and Kershaw Road | •9 |
| Pamlico County (Unincorporated Areas) | |
| *Kershaw Creek:* | |
| Approximately 1,500 feet north-northeast of the intersection of Harris Farm Road and Kershaw Road | •7 |
| Pamlico County (Unincorporated Areas) | |
| *Mill Creek:* | |
| Approximately 1,800 feet upstream of the confluence with Neuse River | •8 |
| Approximately 1.8 miles upstream of the confluence with Neuse River | •9 |
| Pamlico County (Unincorporated Areas) | |
| *Neal Creek:* | |
| Approximately 0.6 mile upstream of confluence with South Prong Bay River | •7 |
| Approximately 1.4 miles upstream of confluence with South Prong Bay River | •10 |
| Pamlico County (Unincorporated Areas) | |
| *North Prong Bay River:* | |
| Approximately 1.1 miles upstream of the confluence with Bay River | •7 |
| Approximately 1.1 miles upstream of Mill Pond Road | •10 |
| Pamlico County (Unincorporated Areas) | |
| *Pamlico River:* | |
| Area within Goose Creek State Refuge | •6 |
| Area within Goose Creek State Refuge | •7 |
| Pamlico County (Unincorporated Areas) | |
| *Possum Swamp:* | |
| At the confluence with Upper Broad Creek | •17 |
| Approximately 0.9 mile upstream of the confluence of Savannah Bridge Swamp | •24 |
| Pamlico County (Unincorporated Areas) | |
| *Sasses Branch:* | |
| At the confluence with Upper Broad Creek | •8 |
| Approximately 0.9 mile upstream of the confluence with Upper Broad Creek | •9 |
| Pamlico County (Unincorporated Areas) | |
| *Savannah Bridge Swamp:* | |
| At the confluence with Possum Swamp | •19 |
| Approximately 0.5 mile upstream of the confluence with Possum Swamp | •23 |
| Pamlico County (Unincorporated Areas) | |
| *South Prong Bay River:* | |
| Approximately 1.0 mile upstream of Cooper Road | •9 |
| Approximately 1.6 miles upstream of Cooper Road | •9 |
| Pamlico County (Unincorporated Areas), Town of Alliance, Town of Grantsboro | |
| *Southwest Fork Trent Creek:* | |
| Approximately 0.5 mile upstream of confluence with Trent Creek | •6 |
| Approximately 0.7 mile upstream of Isabelle Road | •7 |
| Pamlico County (Unincorporated Areas) | |
| *Trent Creek:* | |
| At Highway 55 | •6 |
| Approximately 2.2 miles upstream of confluence of Fork Run 1 | •7 |

| Source of flooding and location | #Depth in feet above ground *Elevation in feet (NGVD) •Elevation in feet (NAVD) |
|---|---|
| Pamlico County (Unincorporated Areas) | |
| *Upper Broad Creek (Neuse Basin):* | |
| At Lee Landing Road | •8 |
| Approximately 3.2 miles upstream of Old Cross Road | •29 |
| Pamlico County (Unincorporated Areas) | |
| *Upper Broad Creek (Tar-Pamlico Basin):* | |
| At the Beaufort/Pamlico County boundary | •31 |
| Approximately 1.8 miles downstream of the Beaufort/ Pamlico County boundary | •37 |
| Pamlico County (Unincorporated Areas) | |
| *Wheeler Gut:* | |
| At the confluence with Fork Run | •8 |
| Approximately 0.5 mile upstream of the confluence with Fork Run | •9 |
| Pamlico County (Unincorporated Areas) | |
| **Town of Alliance** | |
| **Maps available for inspection** at the Pamlico County Building Inspectors Office, 202 Main Street, Bayboro, North Carolina. | |
| **Town of Grantsboro** | |
| **Maps available for inspection** at the Pamlico County Building Inspectors Office, 202 Main Street, Bayboro, North Carolina and the Grantsboro Town Hall, Highway 55, Grantsboro, North Carolina. | |
| **City of Mesic** | |
| **Maps available for inspection** at the Pamlico County Building Inspectors Office, 202 Main Street, Bayboro, North Carolina. | |
| **Pamlico County Unincorporated Areas** | |
| **Maps available for inspection** at the Pamlico County Building Inspectors Office, 202 Main Street, Bayboro, North Carolina. | |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: February 3, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–2794 Filed 2–9–04; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

### Final Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**EFFECTIVE DATES:** The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

**ADDRESSES:** The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate, has resolved any appeals resulting from this notification.

This final rule is issued in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR Part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR Part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

**National Environmental Policy Act**

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

**Regulatory Flexibility Act**

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

**Regulatory Classification**

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

**Executive Order 12612, Federalism**

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

**Executive Order 12778, Civil Justice Reform**

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, flood insurance, reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended as follows:

## PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.11 [Amended]**

■ 2. The tables published under the authority of § 67.11 are amended as follows:

| Source of flooding and location | #Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) |
|---|---|
| **FLORIDA** | |
| **Collier County (Unincorporated Areas) (FEMA Docket No. D–7524)** | |
| *Gulf of Mexico:* | |
| Approximately 300 feet west of the intersection of Commerce Street and Gulf Shore Drive | •18 |
| At the intersection of Seagull Avenue and Vanderbilt Drive | •13 |
| Approximately 800 feet southwest of the intersection of Glendale Avenue and Venetian Way | •13 |
| At the intersection of Guava Drive and Coconut Circle South | •6 |
| **Maps available for inspection** at the Collier County Administrative Building, 3301 Tamiami Trail, Naples, Florida. | |
| **Everglades (City), Collier County (FEMA Docket No. D–7524)** | |
| *Gulf of Mexico:* | |
| At the intersection of Jasmine Street and Storter Avenue | •8 |
| At the intersection of Evergreen Street and Copeland Avenue | •7 |
| At end of Airport Road, where it meets Everglade Airport | •10 |
| At intersection of Begonia Street and Buckner Avenue | •7 |
| **Maps available for inspection** at the Everglades City Hall, 102 Broadway, Everglades, Florida. | |
| **Marco Island (City), Collier County (FEMA Docket No. D–7524)** | |
| *Gulf of Mexico:* | |
| At intersection of Crescent Street and Thrush Court | •8 |
| At the intersection of Honduras Avenue and Stillwater Court | •7 |
| Approximately 2,000 feet west of the intersection of Huron Court and Swallow Avenue | •10 |
| Approximately 900 feet southwest of intersection of South Barfield Drive and Heights Court | •16 |
| **Maps available for inspection** at the Marco Island City Hall, 50 Bald Eagle Drive, Marco Island, Florida. | |
| **Naples (City), Collier County (FEMA Docket No. D–7524)** | |
| *Gulf of Mexico:* | |
| Approximately 600 feet west of intersection of Yucca Road and Gulf Shore Boulevard North | •16 |
| At the intersection of Gordon Drive and Champney Bay Court | •13 |
| At the intersection of Yucca Road and Banyan Boulevard | •10 |
| **Maps available for inspection** at the Naples City Hall, 735 8th Street South, Naples, Florida. | |
| **ILLINOIS** | |
| **Albers (Village), Clinton County (FEMA Docket No. D–7564)** | |
| *Grassy Branch:* | |
| Upstream side of County Road 8 | *421 |
| Approximately 0.64 mile upstream of County Road 800 | *421 |
| *Sugar Creek:* | |
| Approximately 200 feet upstream of Southern Railway | *422 |
| Approximately 1,550 feet upstream of State Route 161 | *425 |
| **Maps available for inspection** at the Albers Village Hall, 206 West Dwight, Albers, Illinois. | |
| **Carlyle (City), Clinton County (FEMA Docket No. D–7564)** | |
| *Carlyle Lake:* | |
| Approximately 0.7 mile northeast of the intersection of 12th Street and Eula Mae Parkway | *463 |
| **Maps available for inspection** at the Carlyle City Hall, 850 Franklin Street, Carlyle, Illinois. | |
| **Clinton County (Unincorporated Areas) (FEMA Docket No. D–7564)** | |
| *Grassy Branch:* | |
| At confluence with Sugar Creek | *421 |
| Approximately 0.91 mile upstream of County Road 800 | *422 |
| *Kaskaskia River:* | |
| At downstream county boundary | *402 |
| Approximately 5.45 miles upstream of confluence of Shoal Creek | *413 |
| *Shoal Creek:* | |
| At confluence with Kaskaskia River | *411 |
| Approximately 0.5 mile upstream of Southern Railway bridge | *423 |
| *Sugar Creek:* | |
| At confluence with Kaskaskia River | *409 |
| Approximately 0.3 mile upstream of State Route 161 | *425 |
| *Lake Branch:* | |
| At Alberson Road | *428 |
| Approximately 1.2 miles upstream of Wayne Road | *500 |
| *Carlyle Lake:* | |
| Entire shoreline | *463 |
| **Maps available for inspection** at the Clinton County Courthouse, 850 Fairfax, Carlyle, Illinois. | |
| **Damiansville (Village), Clinton County (FEMA Docket No. D–7564)** | |
| *Sugar Creek:* | |
| Upstream side of Interstate Route 64 | *417 |
| Approximately 4,000 feet upstream of Interstate Route 64 | *419 |
| **Maps available for inspection** at the Damiansville Village Hall, 225 East Main, Damiansville, Illinois. | |
| **Germantown (Village), Clinton County (FEMA Docket No. D–7564)** | |
| *Shoal Creek:* | |
| Approximately 0.02 mile downstream of State Route 161 | *420 |
| At Southern Railway | *422 |
| **Maps available for inspection** at the Germantown Village Hall, 306 Prairie, Germantown, Illinois. | |

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: February 3, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–2793 Filed 2–9–04; 8:45 am]

BILLING CODE 9110–12–P

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### 45 CFR Parts 2531 and 2533

**RIN 3045–AA40**

### Innovative and Demonstration Programs and National Service Fellowships

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Final rule.

**SUMMARY:** The Corporation for National and Community Service (hereinafter the "Corporation") hereby amends its regulations that require the Corporation to announce in the **Federal Register** its grant application procedures, selection criteria, timing, and other requirements. The Grants.gov FIND module is now used by all Federal agencies to post electronically synopses of funding opportunities under Federal financial assistance programs that award discretionary grants and cooperative agreements. In addition, each agency must post the full announcement electronically. (See 68 FR 58146, October 8, 2003) The Corporation fulfills this requirement by posting its grant announcements on its Web site: *http://www.cns.gov.whatshot/notices.html*. These revisions will eliminate provisions in certain regulations that state that the Corporation will publish announcements in the **Federal Register**.

Because the Corporation is required to post its funding opportunities on Grants.gov, and post its full funding announcement electronically on its Web-site (68 FR 58146), the Corporation considers these changes to be administrative in nature. Further, this rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**DATES:** These changes are effective as of February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. William L. Hudson, Telephone: (202) 606–5000 ext. 265 or via Internet: *whudson@cns.gov*.

**SUPPLEMENTARY INFORMATION:**

**List of Subjects**

*45 CFR Part 2531*

Grant programs-social programs, Volunteers.

*45 CFR Part 2533*

Scholarships and fellowships, Volunteers.

■ For the reasons discussed in the Summary, the Corporation for National and Community Service amends Parts 2531 and 2533 of title 45 of the Code of Federal Regulations as follows:

## PART 2531—INNOVATIVE AND SPECIAL DEMONSTRATION PROGRAMS

■ 1. The authority citation for Part 2531 continues to read as follows:

**Authority:** 42 U.S.C. 12501 *et seq.*

**§ 2531.30 Other innovative and model programs.**

■ 2. In § 2531.30, remove paragraph (c).

## PART 2533—SPECIAL ACTIVITIES

■ 1. The authority citation for Part 2533 continues to read as follows:

**Authority:** 42 U.S.C. 12501 *et seq.*

■ 2. Revise § 2533.10 to read as follows:

**§ 2533.10 National service fellowships.**

The Corporation may award national service fellowships on a competitive basis.

Dated: February 4, 2004.

**Frank R. Trinity,**

*General Counsel.*

[FR Doc. 04–2799 Filed 2–9–04; 8:45 am]

**BILLING CODE 6050–$$–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 54

**[CC Docket No. 02–6; FCC 03–323]**

### Schools and Libraries Universal Service Support Mechanism

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission addresses several matters related to the administration of the schools and libraries universal service mechanism (also known as the e-rate program). The adopted rules will advance the goals of the schools and libraries program by making support for internal connections regularly available to a larger number of applicants and by discouraging waste, fraud, and abuse. The Commission also adopts rules that provides additional certainty to applicants by clarifying existing rules and procedures.

**DATES:** Effective March 11, 2004 except for § 54.513(c) which contains information collection requirements that have not been approved by the Office of Management Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of that paragraph.

**FOR FURTHER INFORMATION CONTACT:** Kathy Tofigh, Attorney, at (202) 418–1553, Karen Franklin, Attorney, at (202) 418–7706, or Jennifer Schneider, Attorney, at (202) 418–0425 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Third Report and Order in CC Docket No. 02–6; FCC 03–323, released on December 23, 2003. There was also a Companion Second Further Notice of Proposed Rulemaking released in CC Docket No. 02–6; FCC 03–323, on December 23, 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 and Summary

1. In this Third Report and Order, we address several matters related to the administration of the schools and libraries universal service mechanism (also known as the e-rate program). First, we adopt rules that will limit the ability of schools and libraries to engage in wasteful or fraudulent practices when obtaining internal connections. Specifically, we conclude that eligible entities should be precluded from upgrading or replacing internal connections on a yearly basis. Instead, our rules will permit a particular eligible entity to receive support for discounted internal connections services no more than twice in every five years. We will permit, however, entities to receive discounts on basic maintenance associated with internal connections on a yearly basis, but clarify our rules regarding permissible maintenance costs to ensure that such discounts are appropriately narrow. We also prohibit a school or library from transferring equipment purchased with universal service discounts, as part of eligible internal connections services, for a period of three years except in limited circumstances. These rules will advance the goals of the schools and libraries program by making support for internal connections regularly available to a larger number of applicants and by discouraging waste, fraud, and abuse. We also adopt a rule creating a more formal process for updating annually the list of services eligible for support. In addition, we codify the Universal Service Administrative Company's (USAC or the Administrator) current

practices for allocating costs of services between eligible and ineligible components consistent with Commission rules and requirements, codify a prohibition on the provision of free services to entities receiving discounts, and codify with one modification procedures for service substitutions. We also clarify existing requirements for eligibility of certain equipment and services. Finally, we adopt rules to implement our prior decision to carry forward unused funds from the schools and libraries mechanism for use in subsequent funding years. All rule changes and clarifications shall be implemented upon the effective date of this Order, unless specified otherwise.

2. This Order is one of a series of orders designed to simplify program administration, ensure equitable distribution of funds, and protect against waste, fraud, and abuse. In taking these additional steps today, we draw on information from a number of sources, including issues raised in a public forum held in May 2003 on ways to improve the schools and libraries support mechanism, the Office of the Inspector General's semi-annual reports, beneficiary audit reports, and the recommendations of USAC's Waste, Fraud, and Abuse Task Force. We remain committed to making ongoing changes to ensure that this program continues to benefit school children and library patrons across America.

## II. Third Report and Order

### *A. Limits on Use of Internal Connections*

3. In this Order, we adopt a rule limiting each eligible entity's receipt of discounts on internal connections to twice every five funding years. We exempt basic maintenance services from this restriction. We also clarify the types of maintenance services that are eligible for discounts. In addition, we adopt a rule that limits an entity's ability to transfer equipment purchased with universal service funds.

4. *Frequency of Discounts.* We conclude that each eligible entity may receive commitments for discounts on Priority Two services, except as discussed further, no more than twice every five funding years. The practical effect of this rule will be to permit applicants to receive funding once every three years for internal connections, as supported by the record, but will allow applicants to obtain internal connections in two consecutive years as part of a staged implementation of internal connections. In order to give applicants sufficient planning time, we conclude that this rule will become effective beginning with support received in Funding Year 2005. Commitments for Priority Two services received in years prior to Funding Year 2005 will not be considered in determining an applicant's eligibility to receive support for Priority Two services.

5. For the purpose of determining whether an applicant is eligible to receive a funding commitment for Priority Two services under this rule, the five-year period begins in any year, starting with Funding Year 2005, in which the entity receives discounted Priority Two services. The rule is applicable to discounts for services that are site-specific to the entity and for services that are shared by the entity with other entities. Thus, if an entity receives support only for shared services in a particular funding year, that funding will be counted as one of the two years out of five that it may receive support. The restriction does not apply to consortium members who do not actually receive Priority Two funding when other members of the consortium receive discounts in specific funding periods.

6. We find that, by limiting the frequency in which applicants may receive Priority Two discounts, funds will be made available to more eligible schools and libraries on a regular basis. Specifically, we find that the twice-every-five-years rule we adopt balances this goal with the need to ensure that the most disadvantaged schools and libraries are able to maintain functioning internal connections networks. Permitting applicants to receive support more often than twice every five years would not make funds available to significantly more eligible schools and libraries, while limiting applicants to support less frequently than twice every five years could prevent applicants from updating their internal connections as necessary.

7. We are not persuaded by those commenters that assert that the most disadvantaged applicants will suffer from a policy restricting receipt of internal connections discounts. The Commission remains committed to ensuring that discounts continue to flow to schools and libraries that are economically disadvantaged. Indeed, program rules continue to provide greater discounts for the most economically disadvantaged schools and libraries. We recognize, however, that many applicants below the very highest discount levels are also economically disadvantaged and also unable to acquire internal connections without universal service support. We also recognize that demand for universal service discounts will likely continue to exceed the annual funding cap. Thus, we agree with commenters that without revising our existing policies, some economically disadvantaged applicants will continue to be denied Priority Two funding. We find that the twice-every-five-years restriction is appropriate and necessary to make advanced technologies more accessible to all schools and libraries. We further find that the twice-every-five-years policy will increase the mechanism's funding reach to a greater number of economically disadvantaged schools and libraries.

8. It is important to note that even with this revised policy on the funding of internal connections, funding commitments will continue to be made in accordance with the annual funding cap. Thus, it is conceivable that an applicant may be eligible to apply for discounts on Priority Two services and still be denied funding because demand for discounts exceeds available funding. In this instance, we encourage applicants to reapply for discounts during the following funding year. We further note that it is the receipt of support for Priority Two services, rather than the application for support, that counts toward the limitation that an entity may receive in only two out of five years.

9. Furthermore, we conclude that, by precluding a particular entity from receiving support for Priority Two discounts every year, our modified rule strengthens incentives for applicants to fully use equipment purchased with universal service funds. Our current rules permit applicants in the highest discount bands to upgrade their equipment on a yearly basis, even when existing equipment continues to have a useful life. By limiting each eligible entity's ability to receive support for internal connections, recipients will have greater incentive not to waste program resources by replacing or upgrading equipment on an annual basis.

10. A few commenters maintain that limiting funding of internal connections will disrupt applicants' planning and budgets. We recognize that our modified rule will limit applicant flexibility to some extent, particularly for those applicants that wish to make modest infrastructure investments on a yearly basis. But, we conclude that the benefits of the rule—namely, making support available to more applicants on a regular basis and preventing wasteful and abusive practices—outweigh the potential impact on such applicants. We find that the twice-every-five-years restriction provides sufficient flexibility

for applicants to make efficient use of Priority Two funding, and thus is reasonable. In particular, we recognize that for a variety of different reasons, an applicant may not be able to make efficient use of program discounts in a single year. For example, an applicant's annual resources may require the applicant to extend its costs over a period of years. Our modified rule allows an applicant to seek internal connections discounts in two consecutive years, thus, enabling an entity to spread its costs over two funding years. We conclude that providing applicants the flexibility to implement internal connections over two consecutive years is sufficient to accommodate the differing planning and budgetary needs of most applicants. We expect applicants to assume the responsibility of adequately planning and budgeting to make the most effective use of discounts available to them.

11. USAC also suggests that in an effort to counter funding limitations, some applicants may request more funding than they will be able to use in a given funding year. We emphasize that existing program rules require applicants to examine their technology needs and budgetary resources before making funding requests to ensure that applicants make effective use of any discounted services that they receive. Failure to have an approved technology plan is a violation of our current rules. We expect funding requests to be based on an applicant's technology plan, not based on a scheme to maximize funding. A funding request that is not reasonably based on a technology plan does not constitute a *bona fide* request for services. Further, the Administrator's review and enforcement of the necessary resources certification must and will continue to serve as a safeguard against unreasonable funding requests.

12. *Maintenance Costs.* We agree with commenters that maintenance costs should be exempt from the twice-every-five-years restriction. The *Universal Service Order*, 62 FR 32862, June 17, 1997, provides that support for internal connections includes "basic maintenance." Maintenance costs associated with internal connections services are currently eligible for discounts as a Priority Two service. Proper maintenance of internal connections products ensures that equipment functions properly, thereby limiting uneconomical replacement of equipment. We therefore continue to allow applicants to apply for discounts for maintenance of equipment each funding year.

13. We instruct USAC to revise Block 5 of the FCC Form 471 to include a separate category of service for maintenance requests, with this form change to take effect for Funding Year 2005. Maintenance requests will continue to be funded as Priority Two funding. However, maintenance requests will be considered for funding separately from other requests for Priority Two funding and, therefore, will not be subject to the twice-every-five years funding rule we adopt in this Order. The revision of the FCC Form 471 will allow efficient review of the Priority Two funding requests.

14. In response to allegations of waste, fraud, and abuse, we prospectively clarify the services eligible for Priority Two support as basic maintenance costs for internal connections. Although the *Universal Service Order* allows support for those internal connections services that are "necessary to transport information all the way to individual classrooms" and public areas of a library, and specifically authorizes support for "basic maintenance services" that are "necessary to the operation of the internal connections network," our rules do not expressly specify the types of maintenance costs that are eligible for support. In light of our concerns about allegations of waste, fraud, and abuse in this area and our changes, we conclude that we should provide further clarity on what maintenance services are "necessary" under the terms of the *Universal Service Order*, and thus eligible for support and exempt from the twice-every-five-years rule.

15. Basic maintenance services are "necessary" if, but for the maintenance at issue, the connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services without e-rate discounts. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information. For example, basic maintenance will include repair and upkeep of previously purchased eligible hardware, wire and cable maintenance, and basic technical support, including configuration changes. On-site technical support is not necessary to the operation of the internal connection network when off-site technical support can provide basic maintenance on an as-needed basis. Services such as 24-hour network monitoring and management also do not constitute basic maintenance. Such services are therefore ineligible for discounts under the schools and libraries universal service mechanism.

16. We also provide greater clarity as to how USAC should address requests for discounts on technical support for internal connections. When confronted with products or services that contain both eligible and ineligible functions, USAC, in the past, has utilized cost allocation to determine what portion of the product price may receive discounts. We generally endorse this practice as a reasonable means of addressing mixed use products and services. At the same time, however, we are concerned that it is administratively difficult and burdensome to derive reasonable cost allocations for the eligible portions of services provided under a technical support contract. In a rapidly-changing marketplace, with vendors supplying complex packages of services, it simply is not administratively feasible to determine what portion of a technical support contract is directed to basic maintenance. Therefore, we hereby clarify prospectively that technical support, including on-site Help Desks, is not eligible under our rules if it provides any ineligible features or functions. A Help Desk system typically goes beyond the level of support authorized by the Commission in the *Universal Service Order*, which stated that "[s]upport should be available to fund discounts on such items as routers, hubs, network file services, and wireless LANs and their installation and *basic* maintenance * * *." There is no language in the *Universal Service Order* that contemplates the provision of discounts for the comprehensive level of support typically provided by a Help Desk. On the contrary, the *Universal Service Order* indicates that support will be provided for a product or service "only if it is necessary to transport information all the way to individual classrooms. That is, if the service is an essential element in the transmission of information within the school or library * * *." We conclude that if a technical support contract provides more than basic maintenance, it shall be ineligible for discounts under our modified rules. We instruct USAC to review and fund requests for discounts on maintenance services in accordance with this clarification, as of the effective date of this Order.

17. *Equipment Transfers.* We also find it appropriate to amend our rules expressly to prohibit, except as provided below, the transfer of equipment purchased with discounts from the schools and libraries universal

service support mechanism. The Act prohibits the sale or transfer of equipment purchased with discounts from the universal service program in consideration of money or anything else of value. Here, in order to promote the goal of preventing waste, fraud, and abuse, we extend that prohibition to all transfers, without regard to whether money or anything of value has been received in return for a period of three years after purchase.

18. Recipients of support are expected to use all equipment purchased with universal service discounts at the particular location, for the specified purpose for a reasonable period of time. Purchasing equipment with universal service discounts and then replacing or upgrading that equipment annually or almost annually is unnecessary and not economically rational. Unnecessary replacement of equipment suggests that entities are not fully utilizing the equipment purchased with universal service discounts. We agree with commenters that such practices deprive other eligible entities of the full benefits of the schools and libraries universal services program. Moreover, the practice of purchasing equipment with universal service funds, then transferring that equipment to other schools and libraries with lower discount rates would undermine the intent of the Commission's priority rules, and is therefore prohibited. We find, however, that it would be wasteful to prevent recipients from transferring equipment that, after a reasonable period of time, has been replaced or upgraded. We therefore permit recipients freely to transfer equipment to other eligible entities three years or more after the purchase of such equipment. Consistent with the Act, however, such transfers must not be in consideration of money or anything else of value.

19. We agree also with commenters that argue that applicants may have legitimate reasons to transfer internal connections equipment due to the closing of a school or other eligible facilities. For example, due to a natural disaster, a school district may conclude that its needs are best served by temporarily or permanently closing a particular school and transferring its students, as well as any valuable equipment purchased with supported discounts, to other locations. Similarly, a school district may choose to close, remodel, or consolidate a particular school to meet changing demographic needs or fiscal realities, and thereby transfer the students and useable school property to a nearby school. Likewise, a county or municipality may choose to close a library branch for financial reasons. Under these circumstances, we find that it would be economically rational and consistent with the goals of the schools and libraries program for the support recipient to transfer any equipment it has purchased with universal service discounts to another eligible location where the equipment may be used effectively. We therefore conclude that a recipient may transfer equipment purchased with universal service discounts to other eligible entities if the particular location where the equipment was originally installed is permanently or temporarily closed. In these limited circumstances, we note that it is not necessary for the transferring and receiving entities to have comparable discount levels, as long as each is eligible under the schools and libraries program.

20. In the event that a recipient is permanently or temporarily closed and equipment is transferred, the transferring entity must notify the Administrator of the transfer, and both the transferring and receiving entities must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years. We instruct the Administrator to verify compliance with this requirement as part of its beneficiary audit reviews. In order to enable the Administrator to verify compliance with this transfer prohibition, we require all recipients of internal connections support to maintain asset and inventory records for a period of five years sufficient to verify the actual location of such equipment.

21. This rule change shall be implemented upon the effective date of this Order. To facilitate enforcement of this rule, we will amend the FCC Form 471 for Funding Year 2005 to include a reasonable use certification. In order to receive discounts, applicants must certify that they will use all equipment purchased with universal service discounts at the particular location for the specified purpose. Applicants will thereafter be held accountable for their compliance with the reasonable use certification.

22. We decline to institute useful life criteria for equipment purchased with universal service funds. Useful life criteria could provide a more equitable distribution of Priority Two funding and ensure that more applicants receive the full benefit of the program by ensuring that applicants did not replace equipment components of internal connections services more frequently than necessary. We believe, however, that measures adopted, including the restriction of transfers and our revised policy governing the funding of Priority Two equipment, will provide similar results in achieving these goals. We also conclude that developing and enforcing useful life criteria would add a significant degree of complexity to the program, which would result in increased administrative costs and burden for both recipients and USAC.

*B. Eligible Services*

23. Although the current cost allocation approach used by the Administrator reasonably implements the Commission's rules and requirement regarding eligible and ineligible services, we conclude that administration of the schools and libraries support mechanism would benefit from an explicit rule regarding the cost allocation for services with mixed eligibility. We also conclude that the eligibility process would be improved by adopting a rule for the yearly updating of the eligible services list. Additionally, we codify rules prohibiting the provision of "free" services to recipient schools and libraries by service providers that also provide supported services to those schools and libraries and codify procedures for applicants to modify funding requests that have been granted but not yet funded. Finally, we provide additional guidance on the provision of discounts on services that include the lease of on-premises equipment.

24. *Cost Allocation.* We specifically amend our rules to make clear how applicants and service providers should allocate costs of a service or product that, although generally eligible for universal service support, contains both eligible and ineligible components. In the *Universal Service Order*, the Commission concluded that, when a school or library signs a contract for both eligible and ineligible services, the contract must break out the price of eligible services separately from ineligible services. Since that time, the marketplace has seen an evolution of products and services that contain both eligible and ineligible features but which are not commercially available on an unbundled basis. Thus, the issue has evolved from merely separately listing eligible services and products from ineligible services and products to one of determining what components or features of an otherwise eligible service or product may be ineligible when the service or product is not commercially available on an unbundled basis. Consistent with the Commission's directive to separate these costs, the Administrator has generally required schools, libraries, or the service provider to separate the costs of an ineligible component from what generally would be an eligible service or

product. As explained, the Administrator has provided reasonable guidance, consistent with Commission rules and requirements, to schools, libraries, and service providers in determining the allocation approach.

25. As part of our efforts to improve the operation of the eligibility determination process, we explicitly amend our rules to include cost allocation rules for services and products that contain mixed eligible and ineligible components, features, or functions to provide greater clarity in this area. Under these rules, if a product or service contains ineligible components, costs should be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The clear delineation must have a tangible basis and the price for the eligible portion must be the most cost-effective means of receiving the eligible service. If the ineligible functionality is ancillary, the costs need not be allocated to the ineligible functionality. An ineligible functionality may be considered "ancillary" if (1) a price for the ineligible component that is separate and independent from the price of the eligible components cannot be determined, and (2) the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.

26. These cost allocation rules address the widespread availability of products and services with mixed eligibility and are fully consistent with the overriding requirement that support be provided for eligible services, while preventing support for ineligible services. By providing service providers and applicants a means of allocating costs between eligible and ineligible components, features or functions of what would otherwise be an eligible service, the cost allocation method increases the variety of service options available to schools and libraries, improving each school or library's ability to purchase the most useful and cost-effective service possible. Without this cost allocation approach, applicants may fail to pursue the purchase of certain advanced telecommunications and information services, contrary to the intent of section 254. Our E-rate rules should not drive the development of communications services and technologies, but rather should permit the marketplace to flourish and innovate in ways that meet consumer needs and facilitate access to these innovations. Schools and libraries should continue to allocate eligible and ineligible costs in their contracts with service providers. In the interests of ensuring that support be provided only for eligible services, the Administrator also should continue to employ the use of the cost allocation method when necessary.

27. The Commission recently addressed those circumstances where an applicant erroneously identifies certain costs as eligible for support by adopting the 30 percent rule. Specifically, we concluded in the *Second Report and Order*, 68 FR 36931, June 20, 2003, that where less than 30 percent of a request for support is ineligible, the Administrator is permitted to grant support, reduced by the amount of ineligible services. We clarify that the Administrator may rely on the cost allocation methods we adopt today in applying the 30 percent rule and performing any resulting adjustments.

28. *Eligible Services List.* We now adopt a more formalized process for updating the eligible services list, beginning with Funding Year 2005. Under the new rule, USAC will be required to submit by June 30 of each year a draft of its updated eligible services list for the following funding year. The Commission will issue a Public Notice seeking comment on USAC's proposed eligible services list. At least sixty days prior to the opening of the window for the following funding year, the Commission will then issue a public notice attaching the final eligible services list for the upcoming funding year. The Commission anticipates that this public notice will be released on or before September 15 of each year. This process will provide greater transparency to the development of the eligible services list. The yearly updated list will interpret what may be funded under current rules, and will represent a safe harbor that all applicants can rely on in preparing their applications for the coming funding year. It will provide interested parties, both recipients and service providers, an opportunity to bring to the Commission's attention areas of ambiguity in the application of current rules in a rapidly changing marketplace. Currently, the only way an applicant can determine whether a particular service or product is eligible under our current rules is to seek funding for that service or product, and then seek review of the Administrator's decision to deny discounts. The rule we adopt today will simplify program administration and facilitate the ability of both vendors and applicants to determine what services are eligible for discounts.

29. *Prohibition of "Free" Services.* We also take this opportunity to clarify and amend our rules to codify a prohibition on the provision of free services to an eligible entity by a service provider that is also providing discounted services to the entity. The Commission requires that an entity must pay the entire undiscounted portion of the cost of any services it receives through the schools and libraries program. For the purpose of this program, the provision of unrelated free services by the service provider to the entity constitutes a rebate of the undiscounted portion of the costs, a violation of the Commission's rules. Codifying this existing restriction will clarify the obligations of schools and libraries that receive discounted services under the schools and libraries program and improve the ability of the Commission to take appropriate enforcement action.

30. *Service Substitution.* Again, as part of our efforts to improve the operation of the schools and libraries support mechanism, we also formally adopt and codify the Administrator's current procedures relating to requests for service or equipment changes. These procedures provide flexibility to applicants where it has become necessary to make a minor modification to their original funding request. We find that the Administrator's service substitution procedures are consistent with the Commission's goal of affording schools and libraries maximum flexibility to choose the offering that meets their needs most effectively and efficiently. We conclude that codifying these existing procedures in our rules will facilitate USAC's administration of the schools and libraries support mechanism. In codifying USAC's procedures in our rules, we make one modification, however. USAC's current procedures permit a service substitution only if the substitution does not result in an increase in the pre-discount price of the eligible service. We will permit applicants to substitute an eligible service with a higher pre-discount price, but will provide support based on the lower, original price, rather than the higher price for the substituted service. We agree with commenters that this will further maximize flexibility for schools and libraries to meet their needs effectively and efficiently, without additional cost to the E-rate program.

31. Accordingly, we amend our rules to specify that service change requests will be granted for a substitute service or product where (1) that service or product has the same functionality; (2) the substitution does not violate any contract provisions or state or local procurement laws; (3) the substitution does not result in an increase in the percentage of ineligible services or functions, but (4) support shall be provided based on the lesser of the pre-

discount price of the original service or the substitute service. In order to ensure the integrity of the competitive bidding process, we require the applicant's request for a service change to include a certification that the requested change in service is within the scope of the controlling Form 470, including any associated Requests for Proposal (RFP), for the original services. We also require that support not be provided in excess of the amount for which the applicant originally would have been eligible. By adopting these procedures as rules, we recognize that events may occur between the time of the original funding request and the time when commitments are made that make the original funding request impractical or even impossible to fulfill.

32. *Eligibility of On-Premises Equipment as Part of Priority One Service.* In the *Schools and Libraries NPRM*, 67 FR 7327, February 19, 2002, the Commission sought comment on whether to modify its policies regarding the funding of Priority One services (telecommunications service and Internet access) that include service provider charges for capital investments for wide area networks. Those policies were established in the *1999 Tennessee Order* and the *Brooklyn Order*.

33. We decline at this time to modify our existing policies in this area, and in the companion Further Notice of Proposed Rulemaking seek more focused comment on specific rule changes that would limit the availability of discounts for service provider charges that recoup the cost of significant infrastructure investment. We do, however, clarify the scope of the existing requirements in this area to facilitate USAC's processing of applications.

34. In the *1999 Tennessee Order*, the Commission addressed the issue of whether certain facilities located on the applicant's premises (namely, routers and hubs) are part of an end-to-end Internet access service or part of internal connections. The Commission determined that facilities located on an applicant's premises should be presumed to be internal connections, but that an applicant may rebut that presumption. In analyzing the facts presented in the *1999 Tennessee Order*, the Commission concluded that this presumption had been rebutted. In support of the rebuttal, the Commission noted that the hub sites at issue constituted the Internet access provider's points of presence and that the applicant's internal connections networks would continue to function without the hub sites, indicating that the hub sites were not necessary to transport information within the schools' instructional buildings on a single campus. Further, the Commission found that other indicia—the ownership of the facility, the lack of a lease-purchase arrangement, the lack of an exclusivity arrangement, and the fact that the service provider was responsible for its maintenance—supported its conclusion that, on balance, the facilities should be deemed part of an end-to-end service. The Commission found that these factors weighed against a finding of internal connections, even though the cost of leasing those facilities represented nearly 67 percent of the total funding request. The decision was based on the facts presented; the Commission did not establish a per se requirement that an applicant must meet all factors in order to receive discounts on service provider charges for the cost of leasing on-premises equipment.

35. We conclude it is administratively efficient for USAC to use the factors relied upon in the *1999 Tennessee Order* as a processing standard. USAC has posted an advisory on its website providing guidance to help applicants and service providers understand how it has implemented the *1999 Tennessee Order*. Specifically, USAC has provided guidance that a private branch exchange (PBX) that routes calls within a school or library is not eligible for support as Priority One on-premises equipment. This guidance is consistent with our *1999 Tennessee Order* because a PBX, like most on-premises equipment, is presumed to be Priority Two internal connections. Moreover, it is unlikely that an applicant would be able to establish a rebuttal to that presumption, because the PBX functions to transmit information from and between multiple locations within a local network. If the PBX were removed from a school, the school would lose its ability to route phone calls within the building or campus, but could maintain its access to the public switched telephone network. In other words, the PBX is necessary to maintain the internal communications network, but not its end-to-end access to telecommunications services.

36. We now clarify that the *1999 Tennessee Order* does not preclude the provision of support for on-premises equipment that constitutes basic termination equipment. Accordingly, an applicant may receive a discount for the lease of a cable modem as part of Priority One Internet access. A cable modem is a type of basic terminating component. It is analogous to a channel service unit/data service unit (CSU/DSU) or a network interface device (NID) in that it functions as the termination point for a Priority One service. The language in the *1999 Tennessee Order* stating that facilities located on the school premises are presumed to be internal connections was enunciated in the context of considering the status of network hubs and routers, and should not be read to encompass basic termination equipment. A basic terminating component, though normally located on a customer's premises, is necessary to receive the end-to-end Internet access service because it provides translation of the digital transmission using the appropriate protocols. In the case of a cable modem, it would not be possible to receive the Internet access service in question without the cable modem on the customer's premises. Conversely, the internal connections on the site would continue to function without the cable modem. Moreover, while customers may obtain cable modems from other sources, providers of cable modem service typically offer customers the opportunity to lease a cable modem in conjunction with the provision of cable modem service. We also note that the cost of leasing a cable modem is a relatively low proportion of the yearly cost of the service. The fact that technical limitations would, as a practical matter, preclude the service provider from using the cable modem to deliver service to other customers, creating a *de facto* exclusivity arrangement, in our view does not support a finding that such equipment must be viewed as internal connections. Rather, we conclude that it is appropriate to provide discounts on the lease of a single basic terminating component used at a site as a Priority One service.

37. We also clarify that it is appropriate to provide Priority One discounts on service provider charges to recoup the cost of leasing optical equipment to light fiber, when that optical equipment is the single basic terminating component of an end-to-end network and it is necessary to provide an end-to-end telecommunications or Internet access service. We reach that conclusion even though the optical equipment on the customer's end, as a technical matter, is dedicated to the customer's sole use.

### C. Carryover of Funds

38. We adopt the procedures for carrying forward unused funds for the schools and libraries program proposed in the *Schools and Libraries Further Notice*, 68 FR 36961, June 20, 2003. Specifically, we amend our rules to require the Administrator to provide quarterly estimates to the Commission

regarding the amount of unused funds that will be available for carryover in the subsequent full funding year. We further amend our rules so that the Commission will carry forward available unused funds from prior years on an annual basis. We find that, in light of the high demand for discounts, such action is consistent with section 254 and the public interest, as well as the framework established in the *Schools and Libraries Order*, 67 FR 41862, June 20, 2002. Accordingly, we amend § 54.507(a) of our rules.

39. The Administrator shall continue to estimate unused funds as the difference between the amount of funds collected, or made available for that particular funding year, and the amount of funds disbursed or to be disbursed. We note that the Administrator already considers the remaining appeals for a funding year when identifying unused funds. Therefore, we do not believe that the carryover of unused funds will detract from the funding of outstanding appeals.

40. Consistent with the proposed rules in the *Schools and Libraries Further Notice*, we also amend the rules to require the Administrator to file with the Commission quarterly estimates of unused funds from prior years of the schools and libraries support mechanism when it submits its projection of schools and libraries program demand for the upcoming quarter. This amendment codifies the Administrator's existing reporting practice and reporting cycle. The quarterly estimate serves to prepare the Administrator for the annual release of carryover funds and provides schools and libraries with general notice regarding the amount of unused funds that may be made available in the subsequent year. We disagree with the National Association of Independent Schools (NAIS) that the quarterly reporting procedure would become too cumbersome and hinder the "overall integrity of the program." We do not believe that the Administrator will be overburdened by this requirement because it has been reporting quarterly estimates of unused funds for six quarters without a problem.

41. We further amend the rules to make unused funds available annually in the second quarter of each calendar year for use in the next full funding year of the schools and libraries mechanism. Based on the estimates provided by the Administrator, the Commission will announce a specific amount of unused funds from prior funding years to be carried forward in accordance with the public interest to increase funds for the next full funding year in excess of the annual funding cap. For example, the Commission will carry forward the unused funds as of second quarter 2004 for use in the Schools and Libraries Funding Year 2004, thereby increasing the available funds in Funding Year 2004 above the annual funding cap of $2.25 billion. The Wireline Competition Bureau will announce the availability of carryover funds during the second quarter of the calendar year, when it announces the universal service contribution factor for the third quarter of each year. The amount of unused funds to be carried forward will be deemed approved by the Commission if it takes no action within 14 days of release of the public notice announcing the contribution factor and the amount of unused funds.

42. We determine that it is in the public interest to carry forward unused funds for disbursement on an annual basis in the second quarter of the calendar year. Distribution of unused funds on an annual basis allows the Administrator to refine its calculation of available funds over four reporting quarters as the funding year progresses starting with the third quarter of the calendar year. The annual carryover of funds during the second quarter of the calendar year also coincides with the time of year the Administrator begins making funding commitment decisions for the upcoming funding year. We believe that the timing of this process provides certainty regarding when unused funds will be carried forward for use in the schools and libraries program with minimal disruption to the administration of the program.

43. In order to implement the Commission's prior decision to carry over funds beginning April 1, 2003, we modify the schedule for this year only in order to implement the process for Funding Year 2003. We direct the Administrator to carry forward unused funds as projected for the first quarter of 2004 for use during the remainder of Funding Year 2003. While there will be an increase in the amount of funds available in Funding Year 2003, we note that no decisions previously made by USAC concerning the distribution of funds for Funding Year 2003 will be reversed or revisited. Only funding requests that are currently pending will be considered for the Funding Year 2003 carryover funding. Henceforth, starting with the second quarter of 2004, funds will be carried over on an annual basis as described in the previous paragraph.

44. Finally, we take this opportunity to revise § 54.509(b) of the Commission's rules to conform to the *Fifth Order on Reconsideration*, 63 FR 43088, August 12, 1998. Section 54.509(b) provides that, if the estimates of future funding needs of schools and libraries lead to a prediction by the Administrator that total funding requests will exceed available funding for a funding year, the Administrator shall adjust the discount matrix by calculating a percentage reduction of support to all schools and libraries, except those in the two most disadvantaged categories, in order to permit all requests in the next funding year to be fully funded. The technical correction we make to § 54.509(b) clarifies that the reduction in percentage discounts explained in § 54.509(b) does not apply within a filing window or period, as described in § 54.507(c). Priority within a filing window is determined in accordance with § 54.507(g)(1) of the rules. Thus, § 54.509(b) applies only during a funding year in which the Administrator is acting in accordance with § 54.507(g)(2). We find that the rule change is exempt from the notice and comment requirements of the Administrative Procedure Act because it concerns a non-substantive technical change to the existing rules.

## III. Procedural Matters

### *A. Paperwork Reduction Act Analysis*

45. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA. Specifically, § 54.513(c) will go into effect upon announcement in the **Federal Register** of OMB approval, to the extent OMB approval is required.

### *B. Final Regulatory Flexibility Analysis*

46. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Schools and Libraries NPRM*. The Commission sought written public comment on the proposals in the *Schools and Libraries NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for, and Objectives of, the Third Report and Order

47. In this *Third Report and Order*, we adopt rules whereby eligible entities

may receive discount rates for internal connections services, except for certain basic maintenance services, twice every five years and that prohibit a school or library from transferring equipment purchased with universal service discounts, except in limited circumstances. These rules will advance the goals of the schools and libraries program by making support for internal connections regularly available to a larger number of applicants and by reducing the likelihood of waste, fraud, and abuse.

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

48. There were no comments filed specifically in response to the IRFA. Nevertheless, the agency has considered the potential impact of the rules proposed in the IRFA on small entities. Based on analysis of the relevant data, the Commission concludes the new rules limit the burdens on small entities and result in a de minimis recordkeeping requirement. The Commission also concludes that the new rules will positively impact schools and libraries, including small ones, seeking universal service support.

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

49. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 1992, there were approximately 275,801 small organizations. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." As of 1997, there were about 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

50. The Commission has determined that the group of small entities directly affected by the rules herein includes eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs) and vendors of internal connections. Further descriptions of these entities are provided. In addition, the Universal Service Administrative Company is a small organization (non-profit) under the RFA, and we believe that circumstances triggering the new reporting requirement will be limited and does not constitute a significant economic impact on that entity.

a. Schools and Libraries

51. As noted, "small entity" includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally "a non-profit institutional day or residential school that provides elementary education, as determined under state law." A secondary school is generally defined as "a non-profit institutional day or residential school that provides secondary education, as determined under state law," and not offering education beyond grade 12. For-profit schools and libraries, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from any schools. Certain other statutory definitions apply as well. The SBA has defined for-profit, elementary and secondary schools and libraries having $6 million or less in annual receipts as small entities. In Funding Year 2 (July 1, 1999 to June 20, 2000) approximately 83,700 schools and 9,000 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 83,700 schools and 9,000 libraries might be affected annually by our action, under current operation of the program.

b. Telecommunications Service Providers

52. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

53. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,337 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

54. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs) and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers." The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 35

carriers reported that they were "Other Local Exchange Carriers." Of the 35 "Other Local Exchange Carriers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

55. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to the Commission's most recent data, 261 companies reported that their primary telecommunications service activity was the provision of payphone services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 48 have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

56. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless small businesses within the two separate categories of *Paging and Cellular and Other Wireless Telecommunications.* Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. According to the Commission's most recent data, 1,761 companies reported that they were engaged in the provision of wireless service. Of these 1,761 companies, an estimated 1,175 have 1,500 or fewer employees and 586 have more than 1,500 employees. Consequently, the Commission estimates that most wireless service providers are small entities that may be affected by the rules and policies adopted herein.

57. *Private and Common Carrier Paging.* In the *Paging Third Report and Order*, 62 FR 16004, April 3, 1997, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to Commission data, 474 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services. Of those, the Commission estimates that 457 are small, under the SBA approved small business size standard.

c. Internet Service Providers

58. *Internet Service Providers.* The SBA has developed a small business size standard for "On-Line Information Services," North American Industry Classification System (NAICS) code 514191. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others." Under this small business size standard, a small business is one having annual receipts of $18 million or less. Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA's $18 million size standard for this category code. Although some of these Internet Service Providers (ISPs) might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA's small business size standard. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected by this analysis.

d. Vendors of Internal Connections

59. The Commission has not developed a small business size standard specifically directed toward manufacturers of internal network connections. The closest applicable definitions of a small entity are the size standards under the SBA rules applicable to manufacturers of "Radio and Television Broadcasting and Communications Equipment" (RTB) and "Other Communications Equipment." According to the SBA's regulations, manufacturers of RTB or other communications equipment must have 750 or fewer employees in order to qualify as a small business. The most recent available Census Bureau data indicates that there are 1,187 establishments with fewer than 1,000 employees in the United States that manufacture radio and television broadcasting and communications equipment, and 271 companies with less than 1,000 employees that manufacture other communications equipment. Some of these manufacturers might not be independently owned and operated. Consequently, we estimate that the majority of the 1,458 internal connections manufacturers are small.

e. Miscellaneous Entities

60. *Wireless Communications Equipment Manufacturers.* The SBA has established a small business size standard for radio and television broadcasting and wireless communications equipment manufacturing. Under this standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%, so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. The Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

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

61. In this *Third Report and Order*, we adopt a rule that prohibits the transfer of equipment purchased with universal service discount, except in limited circumstances. Further, we provide that the excepted, limited circumstances consist of a discount recipient temporarily or permanently closing its operations where the original equipment was installed. In that instance, we require a recipient, who closes permanently or temporarily and transfers equipment to another eligible entity, to notify the Administrator of a transfer and require the transferring and receiving entities to maintain detailed records of the transfer consistent with the Commission's recordkeeping requirements for five years. We do not believe that these reporting and

recordkeeping requirements will result in a significant economic impact.

62. The rule adopted today, limiting the frequency of receiving discount rates for internal connections, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. Similarly, the rule adopted in this *Third Report and Order,* creating a more formal process for annually updating the list of services eligible for support, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. The rules adopted governing cost allocation between eligible and ineligible services, provision of free services, and service substitution do not impose additional reporting, recordkeeping, or compliance requirements for small entities. Finally, the rules regarding carryover of unused funds do not require additional reporting or recordkeeping for small entities participating in the schools and libraries universal support mechanism.

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

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

64. Although we received no IRFA comments, we considered alternatives to the proposed recordkeeping requirements for small entities. In creating the narrow exception to the equipment transfer policy adopted in this *Third Report and Order,* we recognize the Commission's need to protect the integrity of the schools and libraries support mechanism by curbing waste, fraud, and abuse while acknowledging circumstances that justify permitting the transfer of discounted equipment received by a program beneficiary, small or large. We recognize that we must require certain recordkeeping to verify the appropriate use of universal service funds. Consideration was afforded to having the recipient file equipment transfer records with USAC and having USAC maintain the records. However, we conclude that requiring a filing with USAC would be more burdensome for the recipient than having the recipient collect and maintain its equipment transfer records. Complying with the processes promulgated by USAC would be more burdensome than requiring each beneficiary to retain its own files because the beneficiary would have to do more than send the documents to USAC. The beneficiary would have to comply with the procedural scheme devised by USAC for compiling, and mailing or delivering the records, and quality control measures for assuring that the records submitted were properly identified with the correct beneficiary. In the RFA, an exemption of small entities from the recordkeeping requirements is listed as a possible alternative. In this instance, exemption from the recordkeeping requirement would impede the Commission's ability to account for funds distributed through the schools and libraries program and would undermine the Commission's efforts to prevent waste, fraud, and abuse.

65. Report to Congress: The Commission will send a copy of the Order, including this 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 Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

## IV. Ordering Clauses

66. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, this Third Report and Order is adopted.

67. Part 54 of the Commission's rules, is amended as set forth, effective March 11, 2004 except for § 54.513(c) which contains information collection requirements that have not been approved by the Office of Management Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of that section.

68. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Third 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 Part 54

Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

## PART 54—UNIVERSAL SERVICE

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

**Authority:** 47 U.S.C. 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

■ 2. Amend § 54.504 by revising paragraph (b)(2)(iii) and by adding paragraphs (f) and (g) to read as follows:

**§ 54.504 Requests for services.**

* * * * *

(b) * * *

(2) * * *

(iii) The services will not be sold, resold, or transferred in consideration for money or any other thing of value, and will not be transferred, with or without consideration for money or any other thing of value, except as permitted by the Commission's rules;

* * * * *

(f) *Service substitution.* (1) The Administrator shall grant a request by an applicant to substitute a service or product for one identified on its FCC Form 471 where:

(i) The service or product has the same functionality;

(ii) The substitution does not violate any contract provisions or state or local procurement laws;

(iii) The substitution does not result in an increase in the percentage of ineligible services or functions; and

(iv) The applicant certifies that the requested change is within the scope of the controlling FCC Form 470, including any associated Requests for Proposal, for the original services.

(2) In the event that a service substitution results in a change in the pre-discount price for the supported service, support shall be based on the lower of either the pre-discount price of the service for which support was originally requested or the pre-discount price of the new, substituted service.

(3) For purposes of this rule, the broad categories of eligible services (telecommunications service, Internet access, and internal connections) are not deemed to have the same functionality with one another.

(g) *Mixed eligibility services.* A request for discounts for a product or service that includes both eligible and ineligible components must allocate the cost of the contract to eligible and ineligible components.

(1) *Ineligible components.* If a product or service contains ineligible components, costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.

(2) *Ancillary ineligible components.* If a product or service contains ineligible components that are ancillary to the eligible components, and the product or service is the most cost-effective means of receiving the eligible component functionality, without regard to the value of the ineligible component, costs need not be allocated between the eligible and ineligible components. Discounts shall be provided on the full cost of the product or service. An ineligible component is "ancillary" if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.

(3) The Administrator shall utilize the cost allocation requirements of this subparagraph in evaluating mixed eligibility requests under § 54.504(d)(1).

■ 3. Section § 54.506 is revised to read as follows:

**§ 54.506 Internal connections.**

(a) A service is eligible for support as a component of an institution's internal connections if such service is necessary to transport information within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch. Discounts are not available for internal connections in non-instructional buildings of a school or school district, or in administrative buildings of a library, to the extent that a library system has separate administrative buildings, unless those internal connections are essential for the effective transport of information to an instructional building of a school or to a non-administrative building of a library. Internal connections do not include connections that extend beyond a single school campus or single library branch. There is a rebuttable presumption that a connection does not constitute an internal connection if it crosses a public right-of-way.

(b) *Basic maintenance services.* Basic maintenance services shall be eligible as an internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information.

(c) *Frequency of discounts for internal connections services.* Each eligible school or library shall be eligible for support for internal connections services, except basic maintenance services, no more than twice every five funding years. For the purpose of determining eligibility, the five-year period begins in any funding year, starting with Funding Year 2005, in which the school or library receives discounted internal connections services other than basic maintenance services. If a school or library receives internal connections services other than basic maintenance services that are shared with other schools or libraries (for example, as part of a consortium), the shared services will be attributed the school or library in determining whether it is eligible for support.

■ 4. Amend § 54.507 by adding paragraphs (a)(1) and (a)(2) to read as follows:

**§ 54.507 Cap.**

(a) * * *

(1) *Amount of unused funds.* The Administrator shall report to the Commission, on a quarterly basis, funding that is unused from prior years of the schools and libraries support mechanism.

(2) *Application of unused funds.* On an annual basis, in the second quarter of each calendar year, all funds that are collected and that are unused from prior years shall be available for use in the next full funding year of the schools and libraries mechanism in accordance with the public interest and notwithstanding the annual cap, as described in paragraph (a) of this section.

* * * * *

■ 5. Amend § 54.509 by revising paragraph (b) to read as follows:

**§ 54.509 Adjustments to the discount matrix.**

* * * * *

(b) Reduction in percentage discounts. At all times other than within a filing period described in § 54.507(c), if the estimates schools and libraries make of their future funding needs lead the Administrator to predict that total funding request for a funding year will exceed the available funding, the Administrator shall calculate the percentage reduction to all schools and libraries, except those in the two most disadvantaged categories, necessary to permit all requests in the next funding year to be fully funded.

* * * * *

■ 6. In § 54.513, revise the section heading and add paragraph (c) to read as follows:

**§ 54.513 Resale and transfer of services.**

* * * * *

(c) Eligible services and equipment components of eligible services purchased at a discount under this subpart shall not be transferred, with or without consideration of money or any other thing of value, for a period of three years after purchase, except that eligible services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed. If an eligible service or equipment component of a service is transferred due to the permanent or temporary closure of a school or library, the transferor must notify the Administrator of the transfer, and both the transferor and recipient must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years.

■ 7. Amend § 54.516 by adding a second sentence to paragraph (a) to read as follows:

**§ 54.516 Auditing.**

(a) * * * Schools and libraries shall be required to maintain asset and inventory records of equipment purchased as components of supported internal connections services sufficient to verify the actual location of such equipment for a period of five years after purchase.

* * * * *

■ 8. Add § 54.522 to subpart F to read as follows:

**§ 54.522 Eligible services list.**

The Administrator shall submit by June 30 of each year a draft list of services eligible for support, based on the Commission's rules, in the following funding year. The Commission will issue a Public Notice seeking comment on the Administrator's proposed eligible

services list. At least 60 days prior to the opening of the window for the following funding year, the Commission shall release a Public Notice attaching the final eligible services list for the upcoming funding year.

■ 9. Add § 54.523 to subpart F to read as follows:

**§ 54.523 Payment for the non-discount portion of supported services.**

An eligible school, library, or consortium must pay the non-discount portion of services or products purchased with universal service discounts. An eligible school, library, or consortium may not receive rebates for services or products purchased with universal service discounts. For the purpose of this rule, the provision, by the provider of a supported service, of free services or products unrelated to the supported service or product constitutes a rebate of the non-discount portion of the supported services.

[FR Doc. 04–2732 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–29; MM Docket No. 02–14; RM–10358; RM–10764]**

### Radio Broadcasting Services; Castle Dale, UT, Coalville, UT; Huntsville, UT, Jerome, ID, Ketchum, ID, Naples, UT, Parowan, UT, Payson, UT, Rupert, ID, and South Jordan, Salina, Tooele, Wellington, UT

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In response to a counterproposal in this proceeding filed jointly by Millcreek Broadcasting, L.L.C., Community Wireless of Park City, Inc., and George S. Flinn, Jr., this document modifies the respective authorizations of Station KUUU to specify operation on Channel 223C2 at South Jordan, Utah, Station KCUA to specify operation on Channel 223C at Naples, Utah, and Station KPED to specify operation on Channel 276C at Coalville, Utah. To accommodate these modifications, this document modifies the licenses of Station KKMV, Rupert, Idaho, to specify operation on Channel 291C0 and Station KTCE, Payson, Utah, to specify operation on Channel 221A. To accommodate Channel 221A at Payson, this document substitutes Channel 237C3 at Wellington, Utah, and Channel 271C3 at Castle Dale, Utah. See 67 FR 5961, February 8, 2002. The reference coordinates for the Channel 223C2 allotment at South Jordan, Utah, are 40–39–35 and 112–12–05.The reference coordinates for the Channel 223C allotment at Naples, Utah, are 40–35–08 and 109–42–08. The reference coordinates for the Channel 276C allotment at Coalville, Utah, are 40–55–46 and 111–00–26. The reference coordinates for the Channel 291C0 allotment at Rupert, Idaho, are 42–23–40 and 113–42–05. The reference coordinates for the Channel 221A allotment at Payson, Utah, are 40–03–20 and 111–49–43. The reference coordinates for the Channel 237C3 allotment at Wellington, Utah, are 39–32–33 and 110–44–05. The reference coordinates for the Channel 271C3 allotment at Castle Dale, Utah, are 39–12–48 and 111–01–18.

**DATES:** Effective March 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Robert Hayne, Media Bureau, (202) 418–2177.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the *Report and Order* in MB Docket No.02–14 adopted January 14, 2004, and Released January 16, 2004. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualixint@aol.com*.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of the Code of Federal Regulations is amended as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by removing Channel 223C and adding Channel 291C0 at Rupert.

■ 3. Section 73.202(b), the Table of FM Allotments under Utah, is amended by removing Channel 237C3 and adding Channel 271C3 at Castle Dale, by removing Channel 223C3 and by adding Channel 276C at Coalville, by removing Huntsville, Channel 276C3, by adding Naples, Channel 223C2, by removing Channel 222A and adding Channel 221A at Payson, by adding South Jordan, Channel 223C2, by removing Tooele, Channel 221C3, by removing Channel 221C3 and adding Channel 237C3 at Wellington.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2841 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–30; MB Docket No. 03–164; RM–10737]**

### Radio Broadcasting Services; Marmet and Montgomery, WV

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In response to a *Notice of Proposed Rule Making*, 68 FR 43704 (July 24, 2003), this document reallots Channel 227A from Montgomery, West Virginia, to Marmet, West Virginia, and provides Marmet with its first local aural transmission service. The coordinates for Channel 227A at Marmet are 38°13′09″ North Latitude and 81°25′05″ West Longitude, with a site restriction of 13.4 kilometers (8.3 miles) east of Marmet, West Virginia.

**DATES:** Effective March 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** R. Barthen Gorman, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 03–164, adopted January 14, 2004, and released January 16, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 reads as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under West Virginia, is amended by adding Marmet, Channel 227A, and removing Montgomery, Channel 227A.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2840 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–87; MB Docket No. 03–26; RM–10638]**

### Radio Broadcasting Services; Shawnee and Topeka, KS

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Cumulus Licensing Corp., licensee of FM Station KMAJ, Channel 299C, Topeka, Kansas, removes Channel 299C at Topeka, Kansas, from the FM Table of Allotments, allots Channel 299C1 at Shawnee, Kansas, as the community's first local FM service, and modifies the license of FM Station KMAJ to specify operation on Channel 299C1 at Shawnee. Channel 299C1 can be allotted to Shawnee, Kansas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 41.3 km (25.6 miles) west of Shawnee. The coordinates for Channel 299C1 at Shawnee, Kansas, are 39°09′06″ North Latitude and 95°09′28″ West Longitude.

**DATES:** Effective March 8, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order*, MB Docket No. 03–26, adopted January 20, 2004, and released January 23, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com*.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Kansas, is amended by adding Shawnee, Channel 299C1 and by removing Channel 299C at Topeka.

Federal Communications Commission

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2839 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 03–4120; MM Docket No. 00–102, RM–9888]**

### Radio Broadcasting Services; Charlotte Amalie, Christiansted, and Frederiksted, VI

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the joint request of Ocean FM Media and Island Prime Media, allots Channel 257A at Charlotte Amalie, Virgin Islands, as the community's ninth local FM transmission service. Additionally, we allot Channel 258A at Frederiksted, Virgin Islands, as the community's fourth local FM transmission service. To accommodate the allotments, we also substitute Channel 293B for Channel 258B at Christiansted, Virgin Islands, and modify Station WVIQ–FM's license accordingly. *See* 65 FR 37754, June 16, 2000. Channel 257A can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.2 kilometers (2.6 miles) west to avoid a short-spacing to the allotment site for Channel 258A at Frederiksted, Virgin Islands. The coordinates for Channel 257A at Charlotte Amalie are 18–21–25 North Latitude and 64–58–00 West Longitude. *See* **SUPPLEMENTARY INFORMATION**, *infra*.

**DATES:** Effective March 1, 2004. A filing window for Channel 257A at Charlotte Amalie, Virgin Islands, and Channel 258A at Frederiksted, Virgin Islands, will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent Order. Since these allotments require the substitution of Channel 293B for Channel 258B at Christiansted, Virgin Islands, any requisite conditions for the channel change will be stipulated in said Order.

**FOR FURTHER INFORMATION CONTACT:** Sharon P. McDonald, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 00–102, adopted December 31, 2003, and released January 16, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054.

Additionally, Channel 258A can be allotted to Frederiksted in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The coordinates for Channel 258A at Frederiksted are 17–42–48 North Latitude and 64–53–00 West Longitude. To accommodate the allotments, Channel 293B can be substituted at Christiansted in compliance with the Commission's minimum distance separation requirements at Station WVIQ–FM's presently licensed site. The coordinates for Channel 293B at Christiansted are 17–44–07 North Latitude and 64–40–46 West Longitude.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 54, 303, 334, 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Virgin Islands, is amended by adding Channel 257A at Charlotte Amalie; by adding Channel 258A at Frederiksted; and by removing Channel 258B and adding Channel 293B at Christiansted.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2838 Filed 2–9–04; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 03–4122; MB Docket No. 02–251,RM–10315; MB Docket No. 02–254, RM–10550; MB Docket No. 02–370, RM–10612]**

### Radio Broadcasting Services; Big Lake, Muleshoe and Turkey, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document grants three proposals that allot new FM channels to Muleshoe, Texas; Big Lake, Texas; and Turkey, Texas. The Audio Division allots, at the request of Linda Crawford, Channel 227C1 at Muleshoe, Texas, as the community's second local FM service. *See* 67 FR 57203, September 9, 2002. Channel 227C1 can be allotted to Muleshoe, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 35.8 km (22.3 miles) southwest of Muleshoe. The coordinates for Channel 227C1 at Muleshoe, Texas, are 34–02–03 North Latitude and 103–02–08 West Longitude. A filing window for Channel 227C1 at Muleshoe, Texas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order. *See* **SUPPLEMENTARY INFORMATION** *infra.*

**DATES:** Effective March 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket Nos. 02–251, 02–254, and 02–370, adopted December 31, 2003, and released January 16, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com.*

The Audio Division further allots, at the request of Linda Crawford, Channel 296C2 at Big Lake, Texas, as the community's fourth local FM service. *See* 67 FR 57203, September 9, 2002. Channel 296C2 can be allotted to Big Lake, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 26.9 km (16.7 miles) south of Big Lake. The coordinates for Channel 296C2 at Big Lake, Texas, are 30–57–18 North Latitude and 101–23–48 West Longitude. A filing window for Channel 296C2 at Big Lake, Texas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

The Audio Division further allots, at the request of Linda Crawford, Channel 269A at Turkey, Texas, as the community's second local FM service. *See* 67 FR 78402, December 24, 2002. Channel 269A can be allotted to Turkey, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.5 km (9.0 miles) southwest of Turkey. The coordinates for Channel 269A at Turkey, Texas, are 34–17–32 North Latitude and 100–59–52 West Longitude. A filing window for Channel 269A at Turkey, Texas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 227C1 at Muleshoe, Channel 296C2 at Big Lake, and Channel 269A at Turkey.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2837 Filed 2–9–04; 8:45 am].

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 03–4121, MM Docket No. 96–100; RM–9963]**

### Radio Broadcasting Services; Amherst and Lynchburg, VA

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** At the request of Greater Lynchburg Stereo Broadcasters, this document allots Channel 229A to Lynchburg, Virginia, and denies a proposal to allot Channel 294A to Amherst, Virginia. *See* 65 FR 59164, published October 4, 2000. The reference coordinates for the Channel 229A allotment at Lynchburg, Virginia, are 37–21–33 and 79–09–37.

**DATES:** Effective March 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Robert Hayne, Media Bureau (202) 418–2177.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order* in MM Docket No. 96–100, adopted December 31, 2003, and released January 16, 2004. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals ll, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com.*

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Virginia, is amended by adding Channel 229A at Lynchburg.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2836 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### 49 CFR Parts 107, 171, 176, and 177

**[Docket No. RSPA–03–14982 (HM–232C)]**

**RIN 2137–AD79**

## Hazardous Materials: Enhancing Hazardous Materials Transportation Security

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the procedures for applying for an exemption from the Hazardous Materials Regulations, adopted in an interim final rule published May 5, 2003, to require certain applicants to certify compliance with provisions of the Safe Explosives Act. In addition, this final rule adopts without change provisions in the interim final rule that require motor carriers and vessel operators to comply with applicable licensing requirements for drivers and crewmen, respectively.

**EFFECTIVE DATE:** This final rule is effective March 11, 2004.

**FOR FURTHER INFORMATION CONTACT:** Susan Gorsky, (202) 366–8553, Office of Hazardous Materials Standards, Research and Special Programs Administration.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On May 5, 2003, the Research and Special Programs Administration (RSPA, we) published an interim final rule (IFR) to enhance hazardous materials transportation security (68 FR 23832). The IFR described the current system of regulations applicable to the transportation of hazardous materials in commerce, and reviewed Department of Transportation (DOT) activities to enhance the security of hazardous materials shipments. In addition, the rule summarized the requirements of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act; Pub. L. 107–56, October 25, 2001, 115 Stat. 272) and regulations adopted by the Transportation Security Administration (TSA) and the Federal Motor Carrier Safety Administration (FMCSA) to implement the background check provisions of the Act. Further, the IFR described actions taken by the Federal Aviation Administration (FAA), TSA, and the U.S. Coast Guard to address security issues associated with the transportation of hazardous materials by air and vessel. The IFR also incorporated into the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) a requirement that shippers and transporters of hazardous materials comply with applicable Federal security regulations and revised the procedures for applying for an exemption from the HMR to require applicants to certify compliance with applicable Federal transportation security laws and regulations. Finally, DOT, in consultation with TSA, determined that these regulations adequately address the security risks posed by persons engaged in the transportation of explosives in commerce, and, accordingly, the provisions of 18 U.S.C. 842(i), which address categories of persons who are prohibited from possessing explosives, do not apply to persons while they are engaged in the transportation of explosives in commerce by motor carrier, aircraft, or vessel.

### II. Response to Comments Received on IFR

We received six comments on the IFR—from the Institute of Makers of Explosives (IME), the Dangerous Goods Advisory Council (DGAC), the Pennsylvania Department of Transportation (Pennsylvania DOT), the Texas Department of Public Safety (Texas), Transportation Trades Department (TTD), and a joint comment from the Wisconsin Federation of Cooperatives and the Minnesota Association of Cooperatives (Wisconsin-Minnesota Cooperatives). These comments are summarized below.

In response to the comments submitted, we are revising the procedures adopted in the IFR for persons applying for an exemption to transport certain explosives in commerce by aircraft. The revisions are minor and do not affect the security risks posed by such transportation. Therefore, the determinations made in the IFR concerning the applicability of 18 U.S.C. 842(i) to the transportation of explosives in commerce continue in effect.

*A. Comments Beyond the Scope of the HM–232C Rulemaking*

The May 5, 2003 IFR amended Part 177 of the HMR to require motor carriers who transport hazardous materials in commerce to comply with Part 383 of the Federal Motor Carrier Safety Regulations (FMCSRs). Part 383 establishes commercial driver license requirements. On May 5, 2003, TSA published regulations to establish procedures for making determinations as to whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a commercial driver's license (interim final rule; 68 FR 23851). Also on May 5, 2003, FMCSA amended Part 383 to prohibit states from issuing a commercial driver's license with a hazardous materials endorsement unless the Attorney General has conducted a background records check of the applicant and TSA has determined that the applicant does not pose a security threat warranting denial of the hazardous materials endorsement (interim final rule; 68 FR 23843).

Wisconsin-Minnesota Cooperatives, Texas, and TTD express concern about various aspects of the background check requirements in the TSA and FMCSA regulations. These comments are beyond the scope of this rulemaking. We have placed the comments in the appropriate TSA and FMCSA dockets to be addressed as those agencies finalize the interim final rules they adopted on May 5, 2003.

The FMCSA IFR amended Part 383 of the FMCSRs to require commercial drivers of motor vehicles used to transport select agents regulated by the Centers for Disease Control and Prevention under 42 CFR part 73 to obtain a commercial driver's license with a hazardous materials endorsement. Pennsylvania DOT suggests that motor vehicles used to transport select agents should be placarded. Again, this comment is beyond the scope of this rulemaking. We considered whether placarding for certain infectious substances should be required under Docket HM–226 (ANPRM published September 2, 1998, 63 FR 46843; NPRM published January 22, 2001, 66 FR 6941; final rule published August 14, 2002, 67 FR 53118). For the reasons outlined in the HM–226 NPRM (66 FR 6946), we determined that current hazard communication requirements for infectious substances shipments are sufficient to enable transportation workers and emergency response

personnel to identity and address any potential hazards and, thus, decided against a placarding requirement.

IME offers a number of comments concerning the application of regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to the transportation of explosives. These comments are beyond the scope of this rulemaking and are appropriately addressed by ATF.

*B. Procedures for Adopting IFRs*

DGAC suggests that RSPA has no procedures for adopting interim final rules and asks if the requirements adopted in the IFR are intended to be temporary. DGAC is not correct that there are no procedures for adopting IFRs. Section 553(b) of the Administrative Procedure Act (5 U.S.C. 500 *et seq.*) permits an agency to issue a rule without prior notice and comment when the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest. Section 106.35 of 49 CFR part 106 sets forth the procedures for issuing an interim final rule that were adopted by RSPA in a final rule published July 25, 2002 (67 FR 42947). Section 106.35 explains that, consistent with section 553(b) of the Administrative Procedure Act, RSPA may issue an IFR without first publishing a notice of proposed rulemaking and accepting public comments if the agency finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest. After considering comments received on an IFR, § 106.35 provides that the agency may revise the interim final rule and issue a final rule. In this rulemaking, we are doing precisely that.

*C. Determinations Made in the IFR*

IME is the only commenter that addressed the determinations made in the preamble to the May 5 IFR and is generally supportive of those determinations. The IFR provides an exception, pursuant to 18 U.S.C. 845(a)(1), to the prohibited persons provisions in 18 U.S.C. 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air, which are regulated by the United States Department of Transportation (DOT) and agencies thereof, and which pertain to safety."

IME requests that we clarify the effect of the transportation exception in 18 U.S.C. 842(i) on motor private carriers and their personnel. The TSA and FMCSA regulations implementing the USA PATRIOT Act and incorporated into the HMR in the May 5, 2003 IFR apply to the transport of placarded and non-placarded amounts of explosives by common, contract, or private motor carriers within the meaning of 18 U.S.C. 845(a)(1), and the provisions of 18 U.S.C. 842(i), accordingly, do not apply to persons engaged in such transportation in commerce.

IME also requests that we clarify the effect of the transportation exception in 18 U.S.C. 842(i) on non-driver/crew employees of companies that offer for transportation or transport explosives in commerce. As explained in the preamble to the May 5, 2003 IFR, DOT has determined that non-placarded shipments of explosives do not present a sufficient security risk to justify detailed background check or other security requirements at this time; in light of this determination, the provisions of 18 U.S.C. 842(i) do not apply to persons engaged in such transportation in commerce. For placarded shipments of explosives, the determinations explained in the preamble to the May 5, 2003 IFR with regard to the transportation by common/contract motor carriers, vessel, and air and the determinations concerning rail transportation of explosives explained in a notice published jointly by FRA, RSPA, and TSA on June 9, 2003 (68 FR 34470) apply to drivers employed by motor carriers and crews employed by vessel, air, and rail carriers.

Non-driver employees of motor carriers were not specifically addressed in the May 5, 2003 IFR. DOT and TSA have assessed the security risks posed by these individuals and have determined that no further regulation is needed at this time. Accordingly, the provisions of 18 U.S.C. 842(i) do not apply to non-driver employees of motor carriers when they are performing transportation functions regulated under the HMR. As defined in a final rule published October 30, 2003 (68 FR 61906)), transportation functions are functions performed as part of the actual movement of a hazardous material in commerce and include certain loading, unloading, and storage operations. (See the October 30, 2003 final rule for a complete discussion of the applicability of the HMR to specific transportation functions.)

The exemption under 18 U.S.C. 845(a)(1) does not apply to non-driver employees of Federal explosives licensees and permittees regulated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). In fact, all persons who are employed by Federal explosives licensees and permittees and who possess explosives in the course of their employment are subject to 18 U.S.C. 842(i) prohibitions (with the limited exception of employee drivers).

*D. Procedures for Applying for an Exemption*

The May 5, 2003 IFR adopted two new requirements for applicants seeking an exemption from the HMR. First, the IFR requires an applicant for an exemption to certify compliance with transportation security laws and regulations. Second, the IFR requires an applicant for an exemption to transport otherwise prohibited explosives on passenger or cargo-only aircraft to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material.

In their comments, DGAC and IME express concern about the first requirement. DGAC notes that the text in § 107.105(c)(10) is inconsistent with the summary and preamble of the IFR in that it does not limit the certification requirement to Federal transportation security laws and regulations. Both DGAC and IME note that the requirement is quite broad and could be read to include state or local transportation security laws and regulations; DGAC makes the additional point that the IFR could be interpreted to apply to packaging manufacturers in addition to persons who offer or transport hazardous materials for transportation.

Our intention in adopting the general certification requirement for exemption applicants was to assure that they were aware of and in compliance with applicable Federal security requirements, including security requirements promulgated by agencies outside DOT. We agree with commenters that the requirement in the IFR is not clear as to its applicability. Upon further consideration, moreover, we have determined that the requirement is not necessary to assure that exemption holders comply with applicable security regulations. Instead of requiring applicants to certify compliance with applicable Federal security laws and regulations, we will include in the actual exemption document, where applicable, an indication that the exemption does not exempt the holder from compliance with the security plan requirements in Subpart I of Part 172 of the HMR, the security training requirements in § 172.704 of the HMR, and other specific Federal requirements that may apply to the exemption holder's operations. Therefore, in this final rule, the requirement for an applicant for an exemption to certify compliance with

transportation security laws and regulations is deleted.

IME also expresses concern that the IFR requires applicants seeking an exemption for the transportation of explosives that are otherwise prohibited for air transportation to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material. IME notes that exemption applicants must demonstrate an equivalent level of safety, including security, and suggests that this should be sufficient to assure the security of explosives shipped under exemption.

As explained in the May 5 IFR, we have issued a limited number of exemptions that permit the transportation of explosives that would be placarded if transported by highway or rail, including Division 1.1 and 1.2 explosives. All but one of these exemptions were issued to operators that are subject to TSA security requirements, including finger-print based background checks for all flightcrew members. The exception is an exemption that was issued for the transportation of explosives on aircraft with a maximum certificated takeoff weight of less than 12,500 pounds; aircraft with a certificated takeoff weight under 12,500 pounds are not subject to the TSA security requirements. IME is correct that exemption applicants who are subject to TSA security requirements should not also need to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material. However, for applicants for exemptions to transport explosives who are not subject to TSA security requirements, the certification requirement will help to assure that prohibited persons under 18 U.S.C. 842(i) are not involved in the transportation of the explosives. In this final rule, we are modifying the certification requirement to clarify that it applies only to applicants for exemptions to transport explosives in amounts that would otherwise be prohibited for air transportation using aircraft with a maximum certificated weight of less than 12,500 pounds. The certification requirement is not necessary for flight crews on aircraft with a maximum certificated takeoff of 12,500 pounds or more because all such individuals are subject to the TSA security requirements.

The May 5, 2003 IFR inadvertently omitted adding the new certification requirement for applicants for party status to existing exemptions. Therefore, in this final rule we are amending 49 CFR 107.107 to require applicants seeking to be parties to existing exemptions to transport explosives in amounts that would otherwise be prohibited for air transportation using aircraft with a maximum certificated weight of less than 12,500 pounds to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material.

## III. IFR Provisions Adopted Without Change

The May 5, 2003 IFR adopted several provisions designed to assure that shippers and carriers comply with security requirements promulgated by other Federal agencies, as appropriate. First, the IFR amended § 171.12a to require rail and motor carriers transporting Class 1 materials from Canada into the United States to comply with TSA regulations applicable to such transportation. Second, the IFR added a new § 176.7 to require vessel owners and operators to assure that vessel personnel are licensed or documented as required under U.S. Coast Guard regulations. Third, the IFR amended § 177.804 to require motor carriers to comply with driver licensing requirements in the Federal Motor Carrier Safety Regulations. No persons commented on these provisions. They are adopted without change in this final rule.

## IV. Regulatory Analyses and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not a significant regulatory action under Executive Order 12866 and the regulatory policies or procedures of the Department of Transportation (44 FR 11034). This final rule imposes minimal new compliance costs on the regulated industry. The self-certification requirement for certain applicants for exemptions from the HMR will apply to one or two applicants each year.

### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. This final rule imposes minimal new compliance costs on the regulated industry. I hereby certify that the requirements of this final rule will not have a significant impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

### *C. Executive Order 13132*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule preempts State, local, and Indian tribe requirements but does not impose any regulation with substantial direct effects on the States, the relationship between the National government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

### *D. Executive Order 13175*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13175 do not apply and a tribal summary impact statement is not required.

### *E. Unfunded Mandates Reform Act of 1995*

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in annual costs of $100 million or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector.

### *F. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number. RSPA has a current information collection approval under OMB No. 2137–0051, "Rulemaking, Exemption, and Preemption Requirements" with 4,219 burden hours, which includes information collection estimates for the exemptions application process. The Office of Management and Budget approved the extension of this information collection on May 16, 2003, with an expiration date of May 31, 2006.

We estimate that an application for an exemption requires 5 hours to complete. An application to renew an exemption requires one hour to complete. The addition of a security certification as part of an exemption application will not add any appreciable time to this process.

Requests for a copy of the information collection should be directed to Deborah Boothe or T. Glenn Foster, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW., Washington, DC 20590–0001, telephone (202) 366–8553.

*G. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

*H. Environmental Assessment*

There are no significant environmental impacts associated with this final rule. It imposes a self-certification requirement for certain applicants for exemptions from the HMR.

*I. Privacy Act*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov*.

**List of Subjects**

*49 CFR Part 107*

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

*49 CFR Part 171*

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

*49 CFR Part 176*

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

*49 CFR Part 177*

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

■ Accordingly, the interim final rule amending 49 CFR parts 107, 171, 176, and 177 that was published at 68 FR 23832 on May 5, 2003, is adopted as a final rule with the following changes:

## PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

■ 1. The authority citation for part 107 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5127, 44701; Section 212–213, Pub. L. 104–121, 110 Stat. 857; 49 CFR 1.45, 1.53.

■ 2. In § 107.105, revise paragraph (c)(10) to read as follows:

**§ 107.105 Application for exemption.**

* * * * *

(c) * * *

(10) When a Class 1 material is forbidden for transportation by aircraft except under an exemption (see Columns 9A and 9B in the table in 49 CFR 172.101), an applicant for an exemption to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

* * * * *

■ 3. In § 107.107, revise paragraphs (b)(3) and (b)(4) and add paragraph (b)(5), to read as follows:

**§ 107.107 Application for party status.**

* * * * *

(b) * * *

(3) State the name, street and mailing addresses, e-mail address (optional), and telephone number of the applicant; if the applicant is not an individual, state the name, street and mailing addresses, e-mail address (optional), and telephone number of an individual designated as the applicant's agent for all purposes related to the application;

(4) If the applicant is not a resident of the United States, provide a designation of agent for service in accordance with § 105.40 of this subchapter; and

(5) For a Class 1 material that is forbidden for transportation by aircraft except under an exemption (see Columns 9A and 9B in the table in 49 CFR 172.101), an applicant for party status to an exemption to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

* * * * *

■ 4. In § 107.109, revise paragraph (a)(6) to read as follows:

**§ 107.109 Application for renewal.**

(a) * * *

(6) When a Class 1 material is forbidden for transportation by aircraft except under an exemption (see Columns 9A and 9B in the table in 49 CFR 172.101), an applicant to renew an exemption to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

* * * * *

Issued in Washington DC on February 3, 2004, under authority delegated in 49 CFR Part 1.

**Samuel G. Bonasso,**

*Deputy Administrator, Research and Special Programs Administration.*

[FR Doc. 04–2751 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–60–U

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

[Docket No. 030808196–4036–03; I. D. 062403C]

RIN 0648–AR13

### Fisheries of the Exclusive Economic Zone (EEZ) Off Alaska; Provisions of the American Fisheries Act (AFA)

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

**ACTION:** Final rule; removal of expiration date.

**SUMMARY:** NMFS issues a final rule to remove the expiration date of regulations published in the **Federal Register** on December 30, 2002, implementing the AFA. The AFA final rule inadvertently specified a period of effectiveness that will expire December 31, 2007. This rule will make the amendments to the AFA rule permanent, as originally intended. This

action is necessary to implement the AFA consistent with statutory requirements, and is intended to do so in a manner consistent with the objectives of the Magnuson-Stevens Conservation and Management Act (Magnuson-Stevens Act) and other applicable laws.

**DATES:** The December 31, 2007, expiration date is removed from the rule published December 30, 2002, at 67 FR 79692, except for § 679.50, which still expires on December 31, 2007.

**ADDRESSES:** The Final Environmental Impact Statement/Regulatory Impact Review/Final Regulatory Flexibility Analysis (FEIS/RIR/FRFA) prepared for Amendments 61/61/13/8 is available in the NEPA section of the NMFS Alaska Region home page at *http:/www.fakr.noaa.gov*. Paper copies may be obtained from the NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Durall, 907-586-7247.

**FOR FURTHER INFORMATION CONTACT:** Patsy A. Bearden, NMFS, 907–586–7228 or *patsy.bearden@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** The background regarding this action is detailed in the preamble to the proposed rule (68 FR 51147, August 25, 2003). This action is necessary to make the regulations implementing the AFA consistent with statutory requirements. The AFA implementing regulations were published on December 30, 2002 (67 FR 79692), became effective January 29, 2003, and were corrected on August 18, 2003 (68 FR 49374).

NMFS manages the groundfish fishery in the Gulf of Alaska (GOA) Exclusive Economic Zone in accordance with the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMPs). The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Act. While the FMPs are implemented by regulations at 50 CFR part 679, general regulations pertaining to these fisheries are codified in subpart H of 50 CFR part 600.

The fisheries in the BSAI are subject to observer requirements under regulations at § 679.50. These observer requirements have an independent sunset date of December 31, 2007. The AFA implementing regulations (67 FR 79692, December 30, 2002) made changes to the observer regulations. While the DATES section to that action contained a reference to the sunset date for these observer requirements, the sunset date was mistakenly applied to the entire final rule. This action corrects that error by stating that the phrase "effective through December 31, 2007" applies only to those paragraphs dealing with the observer program (*i.e.*, § 679.50), and that the other provisions in the final rule are effective indefinitely.

### Comments and Responses

NMFS received one written comment on the proposed rule.

*Comment.* Any regulations promulgated by NMFS are not to be trusted because the fishery management councils that recommend regulatory changes to NMFS are composed of representatives who seek to enlarge their profits instead of being concerned about the overall health of marine life. NMFS should act in the best interests of the American people as a whole, and not only the commercial fishing public.

*Response.* The commenter's concerns are noted. However, the comment does not specifically address the purpose of this rule, which is to make an administrative change to an effective date as required by statute. Rather, the comment indicates a general mistrust for the fishery management process. This rule is not intended to make any substantive changes to the conservation and management of fishery stocks.

### Classification

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not prepared.

### List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: February 4, 2004.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 04–2870 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[I.D. 020204C]**

## Fisheries of the Exclusive Economic Zone Off Alaska; Sablefish Managed Under the Individual Fishing Quota Program

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

**ACTION:** Notice of fishing season dates.

**SUMMARY:** NMFS is opening directed fishing for sablefish with fixed gear managed under the Individual Fishing Quota (IFQ) program. The season will open 1200 hrs, Alaska local time (A.l.t.), February 29, 2004, and will close 1200 hrs, A.l.t., November 15, 2004. This period is the same as the 2004 IFQ and Community Development Quota season for Pacific halibut adopted by the International Pacific Halibut Commission (IPHC). The IFQ halibut season is specified by a separate publication in the **Federal Register** of annual management measures pursuant to 50 CFR 300.62.

**DATES:** Effective 1200 hrs, A.l.t., February 29, 2004, until 1200 hrs, A.l.t., November 15, 2004.

**FOR FURTHER INFORMATION CONTACT:** Glenn Merrill, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** Beginning in 1995, fishing for Pacific halibut (*Hippoglossus stenolepis*) and sablefish (*Anoplopoma fimbria*) with fixed gear in the IFQ regulatory areas defined in § 679.2 has been managed under the IFQ Program. The IFQ Program is a regulatory regime designed to promote the conservation and management of these fisheries and to further the objectives of the Magnuson-Stevens Fishery Conservation and Management Act and the Northern Pacific Halibut Act. Persons holding quota share receive an annual allocation of IFQ. Persons receiving an annual allocation of IFQ are authorized to harvest IFQ species within specified limitations. Further information on the implementation of the IFQ Program, and the rationale supporting it, are contained in the preamble to the final rule implementing the IFQ Program published in the **Federal Register**, November 9, 1993 (58 FR 59375) and subsequent amendments.

This announcement is consistent with § 679.23(g)(1), which requires that the directed fishing season for sablefish

managed under the IFQ program be specified by the Administrator, Alaska Region, and announced by publication in the **Federal Register**. This method of season announcement was selected to facilitate coordination between the sablefish season, chosen by the Administrator, Alaska Region, and the halibut season, chosen by the IPHC. The directed fishing season for sablefish with fixed gear managed under the IFQ program will open 1200 hrs, A.l.t., February 29, 2004, and will close 1200 hrs, A.l.t., November 15, 2004. This period runs concurrently with the IFQ season for Pacific halibut announced by the IPHC. The IFQ halibut season will be specified by a separate publication in the **Federal Register** of annual management measures pursuant to 50 CFR 300.62.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent the Agency from responding to the most recent fisheries data in a timely fashion and would delay the opening of the sablefish fishery thereby increasing bycatch and regulatory discards between the sablefish fishery and the halibut fishery, and preventing the accomplishment of the management objective for simultaneous opening of these two fisheries.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.23(g)(1) and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: February 4, 2004.

**Bruce C. Morehead,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 04–2871 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 69, No. 27
Tuesday, February 10, 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 AGRICULTURE

### Commodity Credit Corporation

### 7 CFR Part 1423

**RIN 0560–AE50**

### Standards for Approval of Warehouses for CCC Interest Commodity Storage

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Proposed rule; reopening and extension of comment period.

**SUMMARY:** The Commodity Credit Corporation (CCC) is reopening and extending the comment period for the proposed rulemaking, "Standards for Approval of Warehouses for CCC Interest Commodity Storage." The original comment period for the proposed rule closed on January 20, 2004, and CCC is reopening and extending it for 30 days. This action responds to requests from warehouse operators to provide more time to comment on the proposed rule.

**DATES:** Comments are due March 11, 2004.

**ADDRESSES:** Comments and requests for additional information should be directed to Howard Froehlich, Chief, Program Development Branch, Warehouse and Inventory Division, Farm Service Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., STOP 0553, Washington, DC 20250–0553, telephone: (202) 720–7398, FAX: (202) 690–3123, e-mail: *Howard_Froehlich@wdc.fsa.usda.gov*. Persons with disabilities who require alternative means for communication for regulatory information (braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:** On November 20, 2003, CCC published a proposed rule, "Standards for Approval of Warehouses for CCC Interest Commodity Storage" in the **Federal Register** (68 FR 65412). The rule proposed to revise regulations covering the storage of commodities in which CCC has an interest. For the most part, those commodities are acquired in connection with non-recourse commodity loan programs that benefit farmers. The rule will consolidate the regulations for all commodities stored by CCC into one set of regulations. In addition, the rule would, in some instances, revise the substantive provisions that are in effect under the existing regulations.

The Agency believes that the request for additional time to comment on the proposed rule is reasonable and will still allow the rulemaking to proceed in a timely manner. As a result of the reopening and extension, the comment period for the proposed rule will close on March 11, 2004.

Signed in Washington, DC, January 23, 2004.

**James R. Little,**

*Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 04–2785 Filed 2–9–04; 8:45 am]

**BILLING CODE 3410–05–P**

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### 12 CFR Part 502

**[No. 2004–06]**

**RIN 1550–AB47**

### Assessments and Fees

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of Thrift Supervision (OTS) is proposing to amend its rules on assessments and fees. The proposed rule would replace examination fees for savings and loan holding companies (SLHCs) with semi-annual assessments on top-tier SLHCs. OTS would charge a base assessment amount on all top-tier SLHCs, and would add up to three additional components to this base amount. The three components would be based on the risk or complexity of the SLHC's business, its organizational form, and its condition. OTS is also considering assessing certain SLHCs that are large and complex enterprises (conglomerates) under a separate assessment procedure and solicits comments on these assessment procedures.

OTS also proposes to amend the existing rules governing the calculation of savings association semi-annual assessments. Specifically, OTS proposes to eliminate the alternative calculation for the asset size component currently available to small "qualifying savings associations."

**DATES:** Comments must be received on or before March 26, 2004.

**ADDRESSES:** *Mail:* Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2004–06. Commenters should be aware that there have been some unpredictable and lengthy delays in postal deliveries to the Washington, DC area and may prefer to make their comments via facsimile, e-mail, or hand delivery.

*Delivery:* Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, No. 2004–06.

*Facsimiles:* Send facsimile transmissions to Fax Number (202) 906–6518, Attention: No. 2004–06.

*E-Mail:* Send e-mails to *regs.comments@ots.treas.gov,* Attention: No. 2004–06, and include your name and telephone number.

*Availability of comments:* OTS will post comments and the related index on the OTS Internet Site at *www.ots.treas.gov*. You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755. (Please identify the materials you would like to inspect to assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the business day after the date we receive a request.

**FOR FURTHER INFORMATION CONTACT:** Donna Deale, Manager, Affiliates and Holding Company Supervision, (202) 906–7488; or Karen Osterloh, Special Counsel, Regulations and Legislation Division, Chief Counsel's Office, (202)

906–6639; Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Home Owners' Loan Act (HOLA) authorizes the OTS Director to assess fees against savings associations and holding companies to fund OTS's direct and indirect expenses as the Director deems necessary or appropriate.[1] OTS also may assess savings associations and affiliates of savings associations for the costs of conducting examinations.[2]

OTS has promulgated regulations implementing this authority at 12 CFR part 502. Under these rules, OTS currently charges each savings association a semi-annual assessment, which includes a size component, a condition component, and a complexity component. In addition, OTS charges an examination fee for thrifts that have trust assets that are under the $1 billion complexity component threshold. OTS also charges SLHCs and other thrift affiliates fees for investigating and examining their operations. These examination-related fees are assessed at an hourly rate for examiner time spent performing the examination.

## II. Description of the Proposal

OTS proposes to revise its current rules to more accurately apportion the cost of OTS supervision among savings associations, SLHCs, and other affiliates. The agency has three primary goals: (1) Keep charges as low as possible while providing the agency with the resources essential to effectively supervise a changing industry; (2) tailor its charges to more accurately reflect the agency's costs of supervising institutions and their affiliates; and (3) provide institutions and their affiliates with consistent and predictable assessments to facilitate financial planning.

Consistent with these principles, OTS is proposing several amendments to its existing assessments rule. OTS expects to implement the proposed changes in the July 2004 semi-annual assessment.

OTS proposes the following changes. First, OTS proposes to eliminate most examination fees for SLHCs and instead charge semi-annual assessments to these entities. In addition, OTS proposes to revise the assessment procedures for savings associations by eliminating the alternative calculation for the asset size component currently available to small "qualifying savings associations."

### *A. SLHC Semi-Annual Assessment*

Under the existing assessment regulation at 12 CFR 502.50, OTS may assess fees for examining or investigating savings association affiliates, including SLHCs. OTS currently charges SLHCs for time spent conducting on-site examinations and working on off-site examination related issues.

As SLHCs have become more complex in both structure and nature of operations, OTS staff has spent substantially more off-site time addressing supervisory and examination related issues, as well as monitoring the financial condition of SLHCs. To attempt to better capture off-site time spent on these supervisory issues, OTS enhanced its system for tracking time devoted by regional and headquarters staff to specific SLHCs, and issued a Thrift Bulletin stating that OTS would bill SLHCs directly for these off-site services. Thrift Bulletin 48–19 (September 23, 2003).

Following the publication of the Thrift Bulletin, various members of the industry contacted OTS to discuss the proposed assessment of off-site examination hours. In addition to industry feedback, OTS conducted an analysis of off-site examination time records and collected input from staff on the process of collecting and tracking off-site examination time. Based on the industry and staff feedback, OTS has determined that the administrative burden of collecting and billing off-site hours outweighs the cost-recovery benefit.

In response to these developments, OTS is proposing a revision of its assessment regulation to permit OTS to recoup supervisory expenses related to the examination of SLHCs through semi-annual assessments rather than to directly bill for OTS hours. In connection with this change, OTS will cease charging most fees connected with staff time spent on SLHC and affiliate examination related issues.[3]

OTS's goal is to tailor its charges in relation to its supervisory efforts and to provide transparency and predictability to the industry regarding costs. The current system primarily bases SLHC fees on on-site examiner hours. This method does not capture the significant amount of OTS staff time devoted to off-site monitoring and supervision of SLHCs. Moreover, the current system can result in sharply fluctuating or unexpected examination billings. As conditions and activities at the SLHC change from year-to-year, OTS attempts to adjust its examination scope to conduct its work in a risk-focused manner. Therefore, examiners do not spend the same amount of time at a particular SLHC during each examination. The time spent on-site can also vary considerably depending upon the amount of time spent off-site both in preparation for and concluding the examination. OTS believes that the recovery of supervisory costs based on regular assessments offers a measure of predictability as to the amount and the timing of payments and will aid SLHCs in their budgetary planning processes.

OTS believes that the proposed change will better support our risk-focused examination and supervisory processes and encourage efforts to perform exam related SLHC work off premise, when possible. With SLHC assessment fees set at fixed rates based on a variety of factors, staff will be encouraged to conduct its SLHC supervision in the most effective and efficient manner based on each SHLC's overall profile. With fixed assessments, staff will not feel undue pressure to expand or restrict on-site examination time due to concerns about the potential examination charges.

In today's rulemaking, OTS proposes to eliminate most examination related fees for SLHCs, and substitute semi-annual assessments. In establishing the proposed assessment structure, OTS is aware that every type of SLHC does not require an equal amount of supervisory attention. Accordingly, OTS has developed a rule that considers important factors, such as the complexity and risk of the SLHC enterprise, the total amount of SLHC assets, the organizational form of the SLHC, and the condition of SLHCs in the holding company structure.

#### 1. Assessment of Top-Tier SLHCs

In most cases, OTS performs only one examination of each SLHC structure, even though the examination often includes a review of multiple tiers of direct and indirect thrift ownership. Because our SLHC examination and supervisory efforts consider the entire holding company structure, OTS does not propose to assess any charge on intermediate-level SLHCs in a holding company structure. Instead, the proposed rule would institute a semi-annual assessment only on the top-tier SLHC. The top-tier SLHC is defined as

[1] 12 U.S.C. 1467(k). *See also* 12 U.S.C. 1462a, 1463, 1467, 1467a.

[2] 12 U.S.C. 1467(a) and (b) and 1467a(b)(4). *See also* 12 U.S.C. 1467(d) (trust examinations of savings associations).

[3] OTS will, however, retain the authority to charge a fee to recover extraordinary expenses related to examination, investigation, regulation, or supervision of savings associations and their affiliates. 12 CFR 502.60(e). OTS will also continue to charge application fees as outlined in TB 48–19 (September 23, 2003).

the highest level of ownership by a registered holding company in the holding company structure.

Occasionally two or more SLHCs own a controlling interest in a savings association. This occurs, for example, where two companies each directly owns 50 percent of the savings association's voting stock. Where there are two or more distinct controlling interests in a savings association, OTS examines each ownership structure separately. Accordingly, OTS would impose a semi-annual assessment on the top-tier SLHC in each ownership path. OTS would *not* reduce the amount of the assessment to reflect overlaps in these ownership structures.

In some cases, a top-tier SLHC is a trust that holds a controlling interest in an intermediate-tier SLHC. When OTS examines such structures, the vast majority of its efforts are expended in the review of the intermediate tier SLHC. OTS specifically requests comment on whether it should assess the intermediate SLHC, rather than the top-tier SLHC, in these instances.

2. Calculation of Semi-Annual Assessment

OTS intends to calculate the semi-annual assessments for most SLHC enterprises under the procedures described at section II.A.2.a. of this preamble. OTS is also considering assessing those SLHCs that are large and particularly complex enterprises (conglomerates) under a separate assessment procedure described at section II.A.2.b. of this preamble.

a. *Calculation of Semi-Annual Assessment—In General.* OTS intends to calculate the semi-annual assessments for most SLHC enterprises as follows. First, OTS would impose a base assessment amount on top-tier SLHCs. OTS would then add up to three components to this base assessment amount. These three components would be based on the risk or complexity of the SLHC's business, its organizational form, and its condition. *See* proposed § 502.26. The calculation of the base charge and the three components is discussed below.

*Base Charge.* As noted above, OTS will establish the amount of the base assessment charge for top-tier SLHCs. The amount of the charge will reflect OTS's estimate of the base cost of conducting on- and off-site supervision of small low risk, noncomplex SLHCs. OTS anticipates that these costs will reflect the costs of conducting on-site examinations using the abbreviated holding company examination program,[4] conducting off-site activities in preparation for such an examination,[5] and performing off-site monitoring between examinations.[6] OTS also will recover a portion of its operating costs, such as the cost of OTS facilities and examination support personnel allocated to these activities.

OTS is currently considering establishing a fixed charge of $ 3,000 for each semi-annual assessment. This charge would equate to approximately 21 hours at OTS's current billing rate of $145 per hour. OTS will separately publish the amount of the final fixed charge in a Thrift Bulletin. We specifically request comment on the amount of this base charge.[7]

*Risk and Complexity Component.* The first component of the general SLHC semi-annual assessment is the risk and complexity component. OTS will compute the amount of this component using schedules that set out charges based on OTS holding company risk classifications and total consolidated holding company assets.

Currently, OTS classifies SLHCs into two categories.[8] This process distinguishes low risk or noncomplex holding company enterprises (Category I) from those that have complex operations or structures or exhibit a higher risk profile (Category II). To recognize that OTS spends greater resources to supervise Category II SLHCs, the proposed rule would permit OTS to establish separate risk and complexity component schedules for different categories of SLHCs.[9]

In assigning a particular SLHC to a risk category, OTS assesses the following factors:

- *SLHC financial condition.* OTS will review whether the SLHC lacks a consistent source of reliable cash flow and stable earnings from operations, other than proceeds from the thrift or affiliates that are regulated financial entities; is significantly leveraged, either with high debt levels, hybrid instruments with debt-like features, or highly volatile instruments; has major investments that can rapidly require significant cash expenditures; is in a cyclical industry that is distressed or experiencing adverse trends; has a history of volatile operations; or has recently had a downgrade in debt rating by a major debt rating agency.
- *Financial independence.* OTS will consider whether the savings association or affiliates that are regulated financial entities are dependent on the SLHC for access to capital markets and whether they are unlikely to survive the financial collapse of the SLHC or a major SLHC affiliate.
- *Operational independence.* OTS will determine whether the management and board of the savings association or affiliates that are regulated financial entities consistently act in a manner beholden to the SLHC; their operational systems are dependent on the SLHC or any affiliate; the thrift or affiliates that are regulated financial entities have few full time employees dedicated to them; audit functions are consolidated within the SLHC, rather than in a separate audit department; key functions are performed by the SLHC or any other affiliate; the compensation of employees is tied directly or indirectly to the performance of the SLHC; or there are significant or abusive inter-company or insider transactions.
- *Reputational risk.* In reviewing this factor, OTS reviews whether the public identity of the thrift or affiliates that are regulated financial entities are linked to the SLHC through similar names or marketing strategies; whether there is significant cross-selling of proprietary products; whether the thrift and affiliates that are regulated financial entities serve only to facilitate the sales of SLHC services and products; or whether all assets or liabilities of the thrift or affiliates that are regulated financial entities come from the SLHC or other affiliates.
- *Management experience.* In reviewing this factor, OTS considers the management experience of the SLHC in

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[4] *See* Holding Company Handbook, Section 720, Abbreviated Holding Company Examination Program.

[5] This would include, for example, the costs of completing pre-examination procedures and the risk classification checklist for a low risk, noncomplex SLHC. *See* Holding Company Handbook, Section 710 Holding Company Administrative Program.

[6] These costs would include the costs to review and analyze basic reports filed by the savings association and SLHCs (*e.g.*, Schedule HC of the Thrift Financial Report (TFR), the SLHC's quarterly H–(b)11 reports, and relevant private sector information).

[7] The amounts included as examples in this preamble are subject to change in the Thrift Bulletin implementing the final rule. These amounts reflect OTS's current costs and the proposed assessment structure. Because OTS cannot predict what its final rule will look like, OTS cannot determine with certainty what assessment amounts will appear in the implementing Thrift Bulletin. At the same time, OTS wants to be as informative as possible about potential assessments under the proposed rule. It hopes that SLHCs will find the proposed amounts useful in determining how the proposed regulation may affect them.

[8] *See* Holding Companies Handbook, Section 100, Supervisory Approach, and Section 710, Administrative Program.

[9] There is also a limited, select number of large and complex enterprises (conglomerates), which OTS will assess under a separate assessment procedure described at section II.A.2.b. of this preamble.

running regulated financial entities; whether the thrift (or affiliates that are regulated financial entities) are *de novo* entities or have existing management with a proven track record; whether the SLHC is newly established or has a record of successful operation; or whether the SLHC is engaged in a significantly different business other than financial services.

If a holding company enterprise is classified as Category I, OTS considers the structure to be noncomplex and to have relatively low risk. OTS examination and supervision of these entities requires limited OTS resources. Typically, OTS will examine these entities using an abbreviated examination program, although the examination staff may also apply some of the more detailed procedures from the CORE Holding Company Examination Program.[10] OTS intends to assess these enterprises a lower amount under the risk and complexity component.

Category II holding company structures, on the other hand, include complex structures and entities that exhibit characteristics that present a higher degree of risk. OTS examinations of these entities generally require greater resources in order to review the current and prospective risks that the entity may pose to the thrift. Usually, OTS will examine these entities using the CORE Holding Company Examination Program, although all CORE procedures may not be required.

Similar to the size component currently assessed on thrifts, amounts assessed under the risk and complexity component would increase as the amount of the total consolidated SLHC assets increase.[11] This would reflect the fact that OTS's supervisory efforts and related costs typically increase as the overall size of the top-tier SLHC increases. Because a flat rate for all asset sizes would fail to reflect economies of scale in the supervision of larger structures, the scheduled amounts established under this section would also reflect marginal assessment rates that decrease as asset size increases.

OTS will establish and publish these schedules in a Thrift Bulletin. To assist commenters in assessing the impact of the proposed rule, OTS is considering establishing the following schedules under the risk and complexity component:[12]

SCHEDULE FOR CATEGORY I SLHCS

| If you are a top-tier Category I SLHC and your total consolidated assets are . . . | | Your risk and complexity component is . . . | | |
|---|---|---|---|---|
| Over . . . | But not over . . . | This amount . . . | Plus—this marginal rate . . . | Of assets over . . . |
| $0 | $150 Million | $0 | N/A | $0. |
| $150 Million | $250 Million | 0 | 0.000007500000 | $150 Million. |
| $250 Million | $500 Million | 750 | 0.000003000000 | $250 Million. |
| $500 Million | $1 Billion | 1,500 | 0.000002000000 | $500 Million. |
| $1 Billion | $5 Billion | 2,500 | 0.000000500000 | $1 Billion. |
| $5 Billion | $50 Billion | 4,500 | 0.000000055556 | $5 Billion. |
| $50 Billion | $100 Billion | 7,000 | 0.000000040000 | $50 Billion. |
| $100 Billion | $300 Billion | 9,000 | 0.000000017500 | $100 Billion. |
| Over $300 Billion | | 12,500 | 0.000000007857 | $300 Billion. |

SCHEDULE FOR CATEGORY II SLHCS

| If you are a top-tier Category II SLHC and your total consolidated assets are . . . | | Your risk and complexity component is . . . | | |
|---|---|---|---|---|
| Over . . . | But not over . . . | This amount . . . | Plus—this marginal rate . . . | Of assets over . . . |
| $0 | $150 Million | $1,000 | 0.00001333335 | $0. |
| $150 Million | $250 Million | 3,000 | 0.00001000000 | $150 Million. |
| $250 Million | $500 Million | 4,000 | 0.00000800000 | $250 Million. |
| $500 Million | $1 Billion | 6,000 | 0.00000600000 | $500 Million. |
| $1 Billion | $5 Billion | 9,000 | 0.00000225000 | $1 Billion. |
| $5 Billion | $50 Billion | 18,000 | 0.00000017778 | $5 Billion. |
| $50 Billion | $100 Billion | 26,000 | 0.00000014000 | $50 Billion. |
| $100 Billion | $300 Billion | 33,000 | 0.00000006000 | $100 Billion. |
| Over $300 Billion | | 45,000 | 0.00000002000 | $300 Billion. |

In applying the assessment schedules, OTS will use the most recent risk classification assigned by OTS of which a SLHC enterprise has been notified in writing before an assessment's due date. OTS does not currently inform SLHC enterprises whether they are identified as a Category I or Category II holding company. At publication, approximately 80 percent of SLHCs are Category I. To assist commenters in responding to the issues raised in this proposed rulemaking, OTS regional staff will inform SLHC enterprises of their risk classification category upon request.

Using the proposed schedule, the risk and complexity component for a Category I SLHC with total consolidated assets of $1.0 billion is $2,500. Assuming the organizational form

[10] The CORE Holding Company Examination Program focuses on four primary areas of review: Capital, Organizational Structure, Relationship and Earnings. Holding Company Handbook, Section 730, CORE Holding Company Examination Program.

[11] OTS would use total consolidated top-tier SLHC assets, as reported in Schedule HC of the TFR. Where the depository institution does not submit Schedule HC, OTS would use consolidated assets reported on the quarterly report H–(b)11. OTS would use the September 30 TFR or report H–(b)11 to determine amounts due at the January 31 assessment; and the March 31 TFR or report H–(b)11 to determine amounts due at the July 31 assessment.

[12] *See* footnote 7.

component and condition component do not apply to the SLHC, OTS would add the base assessment amount ($3,000) and the risk and complexity component ($2,500), and would impose a semi-annual assessment of $5,500 on this SLHC.

*Organizational Form Component.* The second component of the general SLHC semi-annual assessment is the organizational form component. OTS-regulated SLHCs can own thrifts in a variety of forms, including stock holding companies, mutual holding companies, and trust holding companies. Certain SLHCs own thrifts that operate as trust only institutions and do not accept insured deposits from the public. In addition, OTS regulates certain holding companies under section 10(l) of the HOLA, which permits a state savings bank (or state cooperative bank) to elect to be treated as a savings association for the purposes of regulating the holding company.[13]

OTS may incur different supervisory costs to properly supervise SLHC with a particular organizational form. To allow OTS to tailor its assessments to these costs of supervising a particular form of SLHC, the proposed rule would permit OTS to modify the amount of the assessment charged under the organizational form component. OTS would compute the amount of the organizational form component by adding the base assessment to the risk and complexity component, and multiplying this total by a factor (positive or negative) established for the particular organizational form. OTS would establish the applicable factors in a Thrift Bulletin. *See* proposed § 502.28.

OTS is currently considering applying this component only to section 10(l) holding companies. OTS regulation of section 10(l) holding companies presents many challenges. OTS's primary regulatory goal for section 10(l) holding companies is the same as its regulatory goal for SLHCs—to understand how holding company operations may affect the operations of the subsidiary depository institution. When OTS examines a SLHC that controls a savings association, it already has a thorough knowledge of thrift operations because it has examined the thrift. As a result, OTS can focus its primary efforts on understanding the operations of the SLHC. When it undertakes the examination of a section 10(l) holding company, however, OTS has little direct information on the operations of the state subsidiary depository institution and must undertake a more extensive review to understand those operations. OTS is also responsible for ensuring that the state subsidiary depository institution complies with a number of requirements applicable under section 10 of the HOLA. For example, a state savings bank (or a cooperative bank) that is deemed to be a savings association for purposes of section 10 of the HOLA must comply with section 10(d) of the HOLA, which subjects it to additional transactions with affiliate restrictions.[14] In addition, section 10(f) of the HOLA requires the subsidiary insured institution to file advance notices of dividend declarations with OTS. OTS must also ensure that the state savings bank (or a cooperative bank) meets the requirements of a qualified thrift lender. *See* 12 U.S.C. 1467a(l)(2).

This review also requires OTS to work closely with other federal and state regulators. For example, OTS examiners must communicate with these regulators to determine whether they have any special concerns with the depository subsidiary/holding company relationship. They must also obtain data from one or more of 50 state regulators, which may or may not be in an automated format readily transferable and usable by OTS. OTS also attempts to coordinate with appropriate regulators to conduct its examination of section 10(l) holding companies in conjunction with the examination of the subsidiary depository institution.

To assist commenters in assessing the impact of the proposed rule, OTS is considering establishing an organizational form component multipler of 50 percent for section 10(l) holding companies.[15] Building on the example described above, the base assessment ($3,000) plus the risk and complexity component for a Category I SLHC with consolidated assets of $1.0 billion ($2,500) would total $5,500. If this SLHC is a section 10(l) holding company, its complexity component would be an additional $2,750 (50 percent times $5,500). Assuming the SLHC was not subject to the condition component discussed below, its semi-annual assessment would be $8,250.

OTS specifically requests comment whether the organizational form component should apply to other types of SLHCs. For example, OTS supervises several large insurance companies and securities firms that control savings associations that provide only trust services and do not accept insured deposits from the public. Because the proposed assessment is based on the amount of consolidated holding company assets, OTS is concerned that the assessment for these companies, as calculated under the proposed rule, may not correspond to the actual costs of supervision. Under the proposed rule, an organizational form component may be a positive or negative amount. In these instances, it may be appropriate to calculate a negative amount under the organizational component. Accordingly, OTS specifically requests comment on how it should treat SLHCs where the sole savings association in the structure is a trust-only institution.

*Condition Component.* The third component of the general SLHC assessment is the condition component. Under proposed § 502.29, OTS would add an additional amount to an assessment if the most recent examination rating assigned to the top-tier SLHC (or the most recent examination rating assigned to any savings and loan holding company directly or indirectly controlled by the top-tier SLHC) was "unsatisfactory."[16] OTS will use the most recent examination rating of which the SLHC has been notified in writing before an assessment due date.

Under OTS's holding company rating system, an unsatisfactory rating is reserved for SLHCs that have a detrimental or burdensome effect on the thrift. These companies typically exhibit troublesome operating weaknesses. Either the SLHC inordinately relies on the thrift for cash flow, revenue, or dividends, or the thrift is inordinately reliant upon the SLHC for critical operating systems. Without immediate corrective action, the thrift's viability may be impaired.

Historically, OTS has not frequently assigned unsatisfactory ratings to SLHCs. Currently, only 11 SLHCs have unsatisfactory ratings.[17] Nonetheless, OTS must devote considerably more resources to the supervision of these few SLHC structures than it devotes to SLHCs with satisfactory or above average ratings. For similar reasons, OTS imposes an additional assessment amount on savings associations that receive a "3," "4," or "5" rating under the Uniform Financial Institutions Rating System (UFIRS) (also referred to

[13] By making such an election, the holding company is regulated by OTS as a SLHC for purposes of section 10 of the HOLA, rather than by the Federal Reserve Board as a bank holding company. However, another appropriate federal banking regulator and the appropriate State regulator, not OTS, continue to be the primary regulators of the subsidiary state bank or cooperative bank.

[14] *See* section 11 of the HOLA. 12 U.S.C. 1468.

[15] *See* footnote 7.

[16] *See* Holding Companies Handbook page 200.8.

[17] These numbers are based on ratings data as of December 6, 2003.

as the CAMELS rating system). *See* 12 CFR 502.20.

Under the proposed rule, the condition component of the SLHC assessment would be equal to 100 percent of the total of the base assessment, the risk and complexity component, and the organizational component. As a result, the semi-annual assessment for a SLHC rated as unsatisfactory would be twice as much as a similar SLHC rated as satisfactory. Building on the example described more fully above, the semi-annual assessment for an unsatisfactory-rated, section 10(l) SLHC in Category I with consolidated assets of $1.0 billion would be $16,500.

b. *Calculation of Semi-Annual Assessment— Conglomerates.* OTS also supervises a limited, select number of large and particularly complex enterprises (conglomerates) that are made up of a number of different companies, or legal entities that operate in diversified fields. Unlike traditional SLHCs, these conglomerates are often highly integrated and are managed with less regard for separate corporate existence and with more focus on product lines or geographic areas. OTS examines and supervises these SLHCs along functional or centralized lines in order to match the SLHC's business practices. OTS's supervision of these entities often involves increased planning and off-site monitoring; a more formalized supervisory process that focuses OTS's efforts on major risk areas and evaluates the enterprise across business lines; and substantial coordination with other domestic and foreign regulators. *See* Holding Company Handbook, Section 940, Large and Complex Enterprises (Conglomerates). The examination and regulation of these conglomerates consume a disproportionate amount of agency resources vis a vis other SLHCs.

One of the goals of the proposed rule is to closely tailor OTS charges to the actual costs of supervision. To ensure that the costs of supervision for conglomerates are not subsidized by other SLHCs, OTS intends to assess complex conglomerates (*i.e.*, those SLHCs examined under section 940 of the Holding Company Handbook) under separate assessment procedures. OTS anticipates that these assessments will substantially exceed the amounts prescribed for other SLHCs under the proposed rule. OTS has not included rule text addressing these procedures as part of today's rulemaking because it believes that information gathered through the public comment process will be critical in crafting these procedures. However, OTS intends to describe the possible assessment procedures in sufficient detail to permit their codification in the final rule.

OTS is considering various approaches to calculating assessments for complex conglomerates.[18] For example, OTS may impose:

- A set charge or flat fee.
- A variable charge that is based upon a percentage of the total holding company assets or some other financial measure. The applicable percentage may vary as the size of holding company assets (or other financial measure) increases or may represent a multiple of the Category II SLHC assessment schedule.
- An additional charge for complex multinational conglomerates with activities that require a high degree of coordination with other regulators. *See e.g.*, Holding Company Handbook, Section 940A, Financial Activities in the European Union.
- A fee structure that combines some of the elements listed above. For example, OTS may include a flat fee for each complex conglomerate and an additional charge based on a percentage of total holding company assets.

OTS requests comment on these possible calculations and any alternative methods for calculating semi-annual assessments for complex conglomerates.

3. Collection of Semi-Annual SLHC Assessments

Under the proposed rule, OTS will bill SLHCs using the same procedures it uses to bill the semi-annual assessments from savings associations. OTS will bill each SLHC enterprise semi-annually for assessments. Assessments would be due January 31 and July 31 of each year. At least seven days before the assessment is due, OTS will mail the top-tier of the SLHC enterprise a notice that indicates the amount of the assessment, explains how OTS calculated the amount, and specifies when payment is due. *See* proposed § 502.25. The proposed rule would clarify that where an assessment due date is a Saturday, Sunday, or Federal holiday, assessments would be due on the first day preceding the due date that is not also a Saturday, Sunday or Federal holiday.

Proposed § 502.35(b) would permit a SLHC to establish an account at an insured depository institution and authorize OTS to debit the account for the semi-annual SLHC assessment. If the top-tier SLHC does not establish such an account or does not maintain funds in the account sufficient to pay the semi-annual assessment when it is due, the proposed rule would permit OTS to charge the SLHC a fee to cover OTS administrative costs of collecting and billing for the assessment. This fee is in addition to interest on delinquent assessments charged under proposed § 502.45. Like other fees and assessments, OTS will establish the amount of the fee and publish the amount of the fee in a Thrift Bulletin.[19]

While OTS anticipates that it will have its new SLHC assessment structure in place for the July 2004 semi-annual assessment, it does not believe that it will be prepared to directly debit SLHC accounts at insured depository institutions until the January 2005 semi-annual assessment. Accordingly, OTS will not assess a fee for a SLHC's failure to establish the direct debit account until the January 2005 semi-annual assessment.

Proposed § 502.45(a) states that an assessment is delinquent if it is not paid by the due date. OTS will charge interest on delinquent assessments that accrues at a rate (that OTS will determine quarterly) equal to 150 percent of the average of the bond-equivalent rates of 13-week Treasury bills auctioned during the calendar quarter preceding the assessment.

Pursuant to the authority in section 9(c) of the HOLA, proposed § 502.45(b) states that if a SLHC fails to pay an assessment within 60 days of the due date, OTS may assess and collect the assessment with interest from a subsidiary savings association. If a SLHC controls more than one savings association, the Director may assess and collect the assessment from each savings association as the Director may prescribe.[20]

*B. Savings Association Semi-Annual Assessment*

Under 12 CFR part 502, OTS currently charges each savings association a semi-

[18] In addition to this separate assessment procedure, OTS may still exercise its existing authority to recover extraordinary expenses related to the examination, investigation, regulation, or supervision of complex conglomerates and their affiliates under 12 CFR 502.60(e).

[19] OTS has also made a clarifying amendment to existing § 502.25(a). This rule requires every savings association that is a member of a Federal Home Loan Bank (FHLB) to maintain a demand deposit account at the FHLB with sufficient funds to pay the assessment. Some FLHBs no longer offer demand deposit accounts to their members. Accordingly, the proposed rule would require these thrifts to maintain an account at the association. OTS will directly debit these accounts for the amount of the assessment. *See* proposed § 502.25(a)(1) and (2).

[20] This provision is based on existing § 502.75 and 12 U.S.C. 1467(c). If OTS collects the SLHC assessment from the thrift in this manner, the thrift's payment will be considered to be an unsecured loan to the SLHC and would raise issues under sections 23A and 23B of the Federal Reserve Act. 12 U.S.C. 371c and 371c–1.

annual assessment. OTS determines each institution's semi-annual assessment by totaling three components. These components address the following factors:

- *Asset size.* To compute the asset size component, OTS applies an assessment rate to the total asset size of the institution as reported on the TFR. The applicable rate schedule incorporates OTS fixed rates as an explicit fixed charge and marginal assessment rates that decrease in size as the asset size increases. OTS provides a lower alternate asset size component for certain small savings associations ("qualifying savings associations").
- *Condition.* OTS assesses an additional assessment amount based on the condition of the institution, as determined by the most recent composite rating under the CAMELS rating system. This additional amount is equal to 50% of the size component for 3-rated institutions, and 100% percent of the size component for 4- or 5-rated institutions.
- *Complexity.* The complexity component addresses certain complex assets or activities, including trust assets administered by a thrift, assets covered by a thrift's recourse obligations or direct credit substitutes, and loans serviced by the thrift for others. OTS applies the complexity component only where the thrift exceeds $1 billion in an asset category.

As noted above, OTS provides an alternate asset size component calculation for qualifying savings associations. To be eligible for this calculation, a savings association must have been a savings association as of January 1, 1999, and its total assets must not exceed $100 million at the end of the current or any previous quarter. Under the alternate calculation, the asset size component for a qualifying savings association is its assessment calculated under pre-1998 assessment tables.

OTS developed the alternative asset size component in its 1998 rulemaking. 63 FR 65663 (November 30, 1998). One of the primary purposes of the 1998 rule changes was to make OTS assessments more equitable for institutions of all sizes. In analyzing the effects of various assessment rates, however, OTS feared that its changes to the asset size component would have a disproportionate impact on the smallest institutions, which might not have been in a position to absorb new costs. 63 FR 65665.

OTS is proposing to abandon the alternative asset size computation for qualifying savings associations. OTS's assessment regulation, to the maximum extent possible, attempts to tailor rates and charges to the agency's costs of supervising particular institutions. While OTS believes that it may have been appropriate to provide qualifying savings associations with an initial period to adjust to the 1998 assessment regime, OTS questions whether it is equitable to continue to require non-qualifying savings associations to carry some of the cost burdens for qualifying savings associations.

Non-qualifying savings associations, which include some small savings associations,[21] have now carried an extra burden for qualifying institutions for five years. The burden has not remained static, but rather has increased over the five-year period, as a result of two factors.

First, more savings associations use the alternative computation method. The alternative computation did not initially benefit all qualifying savings associations. Based on the assessment rates for the January 1999 semi-annual assessment, only qualifying savings associations with less than $67.5 million in assets benefited from lower assessments under the alternative asset size computation. As a result of subsequent revisions to OTS's assessment schedules reflecting inflation and increased costs, all qualifying savings associations now benefit from the alternative computation.

In addition, non-qualifying savings associations have shouldered, and in the absence of regulatory change will continue to shoulder, an increasing burden as OTS modifies its assessment schedule to adjust for increases in costs. As noted above, assessments computed using the alternative asset size computation remain fixed at 1998 levels, even as OTS has periodically increased the base assessment rate and marginal rates to reflect inflation.[22] As a result, qualifying savings associations now receive a much greater reduction to their assessment. For example, the asset size component computed under the standard method for an institution with $67 million in assets was $11,584 for the January 1999 semi-annual assessment. The alternate computation reduced the asset size component to $11,575, a net reduction of only $9. *See* TB 48–15 (November 30, 1998). For the January 2004 semi-annual assessment, however, the asset size component computed under the standard method for a $67 million institution is $13,252. The alternate computation reduced the asset component to $11,575, a net reduction of $1,677. Because the alternate computation remains fixed at 1998 levels, the amount of this disparity under the alternative computation will become more pronounced as OTS revises its assessment schedules upward over time.

OTS believes that all institutions, even small institutions, should be able to plan for, adjust to, and carry the burden of inflation-related and cost changes to the assessments schedule. Accordingly, OTS does not believe that it is appropriate to hold assessments for certain institutions at pre-1998 levels, and compel other institutions to carry an increased burden. Accordingly, OTS proposes to delete the alternative computation under the asset size computation.

To help interested persons understand this proposal and to provide the greatest opportunity to review the probable assessment rates that will apply to all savings associations, OTS is publishing the asset size schedule that will apply if the proposed rule is finalized without substantive changes. This schedule reflects the rates for non-qualifying small institutions contained in TB 48–20 (December 2, 2003).

| If total assets (SC60) is: | | The size component is: | | |
|---|---|---|---|---|
| Over: | But not over: | This amount: | Plus: | Of excess over: |
| $0 | $67 million | $2,042 | .000116731 | $0. |
| $67 million | $215 million | 13,252 | .000111160 | $67 million. |
| $215 million | $1 billion | 29,769 | .00008928 | $215 million. |
| $1 billion | $6.03 billion | 99,853 | .00007142 | $1 billion. |

[21] While the alternate asset size calculation was originally promulgated to relieve the disproportionate impact of the size component on small institutions, this calculation does not benefit all small institutions. Savings associations organized after 1998 may not take advantage of the changes and institutions that go over $100 million in assets do not qualify for the alternative program, even when their asset size returns to below $100 million.

[22] *See* TB 48–20 (December 2, 2003).

| If total assets (SC60) is: | | The size component is: | | |
|---|---|---|---|---|
| Over: | But not over: | This amount: | Plus: | Of excess over: |
| $6.03 million | $18 billion | 459,096 | .00006126 | $6.03 billion. |
| $18 billion | $35 billion | 1,192,378 | .00004518 | $18 billion. |
| $35 billion | | 1,960,438 | .00003388 | $35 billion. |

By contrast, the alternative size assessment schedule for qualifying small institutions proposed for deletion in this rule is as follows:

| Alternative size assessment schedule for qualifying small institutions | | | | |
|---|---|---|---|---|
| Over: | But not over: | This amount: | Plus: | Of excess over: |
| $0 | $67 million | $0 | .000172761 | $0. |
| $67 million | $100 million | 11,575 | .000133872 | $67 million. |

OTS encourages comments on all aspects of this proposal.[23]

## III. Solicitation of Comments Regarding the Use of Plain Language

Section 722 of the Gramm-Leach Bliley Act (12 U.S.C. 4809) requires federalbanking agencies to use "plain language" in all proposed and final rules published after January 1, 2000. OTS invites comments on how to make this proposed rule easier to understand. For example:

(1) Have we organized the material to suit your needs? If not, how could the material be better organized?

(2) Do we clearly state the requirements in the rule? If not, how could the rule be more clearly stated?

(3) Does the rule contain technical language or jargon that is not clear? If so, what language requires clarification?

(4) Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes to the format would make the rule easier to understand?

## IV. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

## V. Regulatory Flexibility Act Analysis

Under section 605(b) of the Regulatory Flexibility Act of 1980,[24] OTS has evaluated the impact that this final rule will have on small businesses, small organizations, and small governmental jurisdictions. As required, OTS has prepared the following initial regulatory flexibility analysis (IRFA).

[23] *See* footnote 7.

[24] 5 U.S.C. 605(b).

*A. Legal Basis for the Rule; Objectives of the Rule*

The HOLA authorizes the Director to assess fees against savings associations and holding companies to fund OTS's direct and indirect expenses as the Director deems necessary or appropriate.[25] OTS also may assess savings associations and affiliates of savings associations for the costs of conducting examinations.[26]

OTS has promulgated regulations implementing this authority at 12 CFR part 502. Under these rules, OTS currently charges each savings association a semi-annual assessment, which includes a size component, a condition component, and a complexity component. In addition, OTS charges thrifts an examination fee for thrifts that have trust assets that are under the $1 billion complexity component threshold. OTS also charges SLHCs and other thrift affiliates fees for investigating and examining their operations. These examination related fees are assessed at an hourly rate for examiner time spent preparing for and conducting the examination.

OTS is proposing this rule to more accurately apportion the cost of OTS supervision among savings associations, SLHCs, and other affiliates. The agency has three primary goals: (1) Keep charges as low as possible while providing the agency with the resources essential to effectively supervise a changing industry; (2) tailor its charges to more accurately reflect the agency's costs of supervising institutions and their affiliates; and (3) providing institutions and their affiliates with consistent and predictable assessments to facilitate financial planning.

[25] 12 U.S.C. 1467(k). *See also* 12 U.S.C. 1462a, 1463, 1467, 1467a.

[26] 12 U.S.C. 1467(a) and (b) and 1467a(b)(4). *See also* 12 U.S.C. 1467(d) (trust examinations of savings associations).

*B. Impact of the Rule*

The proposed rule would affect small savings associations and small SLHCs. It would not affect other small businesses, small organizations, or small governmental jurisdictions. OTS addresses the impact of the rule on small savings associations and small SLHCs below. OTS also considered various alternatives to the proposed rule to reduce the impact of the rule on small savings associations and small SLHCs. These alternatives are also discussed below.

1. Effect on Small SLHCs

a. *Size standard for small SLHCs.* The Small Business Administration (SBA) prescribes size standards for various economic activities and industries using the North American Industry Classification System (NAICS).[27] Under the SBA's standards, companies that are primarily engaged in holding securities of (or other equity interests in) depository institutions for the purpose of controlling those companies are addressed at NAICS Codes 551111 and 551112 (Office of Bank Holding Companies and Offices of Other Holding Companies). Companies within this group are considered to be small if they have annual receipts of $6 million or less. Companies that are primarily engaged in holding the securities of depository institutions and *operating* these entities are classified under NAICS Codes 522110–522190. Companies classified in this group are considered to be small if their total assets are less than $150 million.

In this IRFA, OTS has analyzed the impact of this rule using both the $150 million asset size standard and the $6 million annual receipts standard. OTS specifically requests comment on its use of these standards. Commenters are

[27] 13 CFR part 121.

invited to address whether these or other size standards are appropriate.

b. *Impact on small SLHCs.* The proposed rule would replace examination fees for SLHCs with semi-annual assessments on each top-tier SLHC. For small SLHCs, OTS would impose a base assessment amount, and would add up to three components to this base amount. The three components would be based on the risk and complexity of the SLHC's business, its organizational form, and its condition. No small SLHC would be subject to the alternative assessment on conglomerate enterprises.

OTS calculates that there are 946 OTS-regulated SLHCs, including many intermediate holding companies within a single ownership structure. The proposed rule would charge semi-annual assessment fees only on the top-tier SLHC in each holding company structure. OTS regulates 509 top tier SLHCs. Of these 509 top tier SLHCs, 163 have total consolidated assets of less than $150 million and are considered to be small under the asset size standard. OTS estimates that 103 top-tier SLHCs have annual receipts of $6 million or less and would be considered to be small under the annual receipts standard.[28]

The proposed assessment amount would affect all of these small SLHCs in varying degrees. Specifically, the various aspects of the rule would have the following impacts:

*Base assessment charge.* The base assessment charge will affect all small SLHCs. Under the current proposal, these small SLHCs would be assessed a charge of $3,000 for each semi-annual assessment (or $6,000 per year).

*Risk and complexity component.* Under the anticipated schedules, OTS is not proposing to impose any additional charge on small Category I SLHCs under the risk and complexity component. Small Category II SLHCs, however, would be assessed an additional semi-annual charge of $1,000 to $3,000 (or $2,000 to $6,000 per year) under the anticipated schedules, depending on total consolidated assets.

There are 147 small Category I SLHCs and 16 small Category II SLHCs under the asset size standard. OTS estimates that there are 93 small Category I SLHCs and 10 small Category II SLHCs under the annual receipts standard.[29]

*Organizational form component.* The proposed organizational form component would apply only to section 10(l) SLHCs. For small section 10(l) holding companies that are Category I SLHCs, this component would increase the semi-annual assessment by an additional 50 percent or $1,500 ($3,000 per year).[30] For small section 10(l) holding companies that are Category II SLHCs, this component would also increase the semi-annual assessment by 50 percent. The increase to the semi-annual assessment for these SLHCs under this component would range from $2,000 to $3,000 ($4,000 to $6,000 per year).[31] The actual amount of the increase will depend upon total consolidated SLHC assets.

OTS regulates 47 section 10(l) SLHCs. Nineteen of these section 10(l) SLHCs are small under the asset size standard. Of these 19 small section 10(l) SLHCs, 14 are Category I and 5 are Category II. OTS estimates that 12 section 10(l) SLHCs are small under the annual receipts standard, and that 9 of these small SLHCs are Category I and 3 of these SLHCs are Category II.

*Condition component.* The proposed rule would impose an additional charge on SLHCs that are rated "unsatisfactory." For these small SLHCs, the proposed condition component would increase the assessment by 100 percent. Applying the asset size standard, only 5 small SLHCs are rated unsatisfactory. Under the annual receipts standard, only 3 small SLHC are rated unsatisfactory.[32]

The following chart summarizes the impact of the proposed rule on the semi-annual assessment for small SLHCs:

| | Number of small SLHCs | A | B | C | D |
|---|---|---|---|---|---|
| | | Base assessment amount[33] | Risk and complexity component[34] | Organizational form component[35] | Total semi-annual assessment[36] |
| Small Category I SLHCs that are not section 10(l) SLHCs. | 133 (asset size standard)<br>84 (receipts standard) | $3,000 | $0 | N/A | $3,000 |
| Small Category II SLHCs that are not section 10(l) SLHCs. | 11 (asset size standard)<br>7 (receipts standard) | 3,000 | *3,000 | N/A | *6,000 |
| Small Category I SLHCs that are section 10(l) SLHCs. | 14 (asset size standard)<br>9 (receipts standard) | 3,000 | 0 | $1,500 | 4,500 |
| Small Category II SLHCs that are section 10(l) SLHCs. | 5 (asset size standard)<br>3 (receipts standard) | 3,000 | *3,000 | *3,000 | *9,000 |

* Maximum.
[33] OTS has proposed a $3,000 base semi-annual assessment amount for all SLHCs.
[34] Amounts in Column B are from the proposed schedule for the risk and complexity component.
[35] Amounts in Column C are 50% of the total of Column A + Column B.
[36] Amounts in Column D equal Column A + Column B + Column C.

As noted above, for the five SLHCs that are rated unsatisfactory, the amount of the semi-annual assessment is doubled.

The amounts charged under the new assessments rule for SLHC would be

[28] OTS electronically collects information on total consolidated assets held by most SLHCs. However, it does not electronically collect annual receipts data. OTS has estimated the number of small SLHCs under the annual receipts standard by analyzing actual trailing 12-month revenues reported for 277 publicly traded SLHCs for the fiscal/calendar year ending December 31, 2003. Source: SNLDataSource. Using total revenue figures, OTS has concluded that approximately 20.2% of the 509 holding company structures are small under the annual receipts standard.

[29] As noted above, OTS does not electronically collect annual receipts data for SLHCs. OTS has estimated the number of small Category I and II SLHCs, small section 10(l) SLHCs, and small unsatisfactorily rated SLHCs under the annual revenues standard by applying the proportion of small SLHCs in these categories under the asset size standard.

[30] The additional semi-annual organizational charge of $1,500 is 50 percent times the total of the base assessment component ($3,000) plus the risk and complexity component for Category I SLHCs ($0).

[31] This $2,000 to $3,000 range for the semi-annual organizational component is 50 percent times the total of the base charge ($3,000) plus the risk and complexity component for a Category II SLHC. As noted above, the risk and complexity component for a Category II SLHC will range from $1,000 to 3,000.

[32] OTS cannot provide a more specific breakdown regarding the impact of the condition component on each of these small SLHCs because such information may result in the public disclosure of sensitive and privileged supervisory rating information for specific SLHCs. *See* 12 CFR 510.5.

offset by the elimination of the periodic SLHC examination fees. Although the amount of this offset will vary from SLHC-to-SLHC, OTS estimates that the average examination for a small SLHC is conducted every 18 months, and consumes approximately 39 examiner hours. At the current OTS billing rate of $145 per hour, OTS estimates that the average small SLHC will avoid on-site examination charges of $5,655 or an annualized charge of $3,770 per year.

In any event, OTS has considered alternatives to the proposed assessment rule. OTS considered, for example, assessing all SLHCs the same base assessment amount; computing the semi-annual assessment amount for all SLHCs using the same asset-based assessment schedule; and continuing to assess only on-site examination and off-site examination related fees rather than semi-annual assessments.

OTS does not believe that the first two alternatives would further the goal of tailoring OTS charges more closely to the costs of supervising various types of SLHCs, and could result in some SLHCs subsidizing the increased costs of supervising others.[37] For the reasons set forth in the preamble, OTS further believes that continuing to assess examination fees would not provide SLHCs with consistency and predictability of assessments to facilitate financial planning.

OTS specifically requests comments on each of these alternatives, and any other alternatives that may minimize the impact of the rule on small SLHCs consistent with the goals of this rulemaking.

2. Effect on Small Savings Associations

This proposed rule would effect small savings associations by eliminating the alternative calculation of the size component currently available to certain small savings associations. To be eligible for this calculation, a savings association must have been a savings association as of January 1, 1999, and its total assets must not exceed $100 million at the end of the current or any previous quarter.

Small savings associations are defined as institutions with assets under $150 million.[38] OTS estimates that it regulates approximately 478 small savings associations and that 289 of these small savings associations will take advantage of the alternative size calculation for the January 2004 assessment.

Under the alternate calculation, the asset size component for a qualifying savings association is its assessment calculated under pre-1998 assessment schedules, rather than the current assessment schedules. Unlike the pre-1998 assessment schedules, the current assessment schedules use rates that have been adjusted for inflation and include a base charge for certain fixed costs that are the same or nearly the same for all institutions. Because the amount of the size component varies with the size of the institution, the impact of the proposed change on the 289 small thrifts will vary. Using the most recent assessment table published in TB 48–20 for the January 2004 semi-annual assessment, the asset size component computed under the standard method and the alternative methods for institutions of various selected sizes is illustrated by the following chart:

IMPACT OF THE ALTERNATIVE SIZE COMPUTATION ON INSTITUTIONS OF SELECTED SIZES

| Asset size | Asset size component computed under TB 48–20 schedules | Alternative asset size component computation | Net reduction of assessment |
|---|---|---|---|
| $0 Million | $2,042 | $0 | $2,042 |
| $35 Million | 7,898 | 6,046 | 1,852 |
| $67 Million | 13,252 | 11,575 | 1,677 |
| $100 Million | 16,935 | 15,993 | 942 |

Approximately 20 of the 289 small savings associations are currently rated "3" and are subject to an additional assessment under the condition component. This additional assessment is equal to 50 percent of the size component. For these 20 thrifts, the overall benefit of the alternative size calculation is 150 percent of the amount in the final column of the chart. Thus, the overall semi-annual benefit from the alternative size calculation for any individual 3-rated savings association will range from $1,413 to $3,063, depending on the institution's asset size. Three small savings associations are rated "4" or "5" and are subject to an additional assessment under the condition component that is equal to 100 percent of the size component. For these three institutions, the overall benefit of the alternative size calculation is 200 percent of figure in the final column of the chart. The overall semi-annual benefit from the alternative size calculation for any individual 4- or 5-rated savings association will range from $1,884 to $4,084, depending on the institution's asset size.[39]

OTS considered various alternatives to the proposed rule. For example, it considered retaining the alternative asset size component for qualifying savings associations, prescribing a separate asset size schedule for smaller institutions with a lower base assessment rate or lower rates for smaller institutions, or phasing out the alternative schedule over time.

OTS's assessment regulation, to the maximum extent possible, attempts to tailor rates and charges to the agency's costs of supervising particular institutions. While it may have been appropriate to provide qualifying savings associations with an initial period to adjust to the assessment regulation originally adopted in 1998, it is not equitable to continue to require non-qualifying savings associations to carry the cost burdens for qualifying savings associations. Non-qualifying savings associations, which include many small savings associations,[40] have carried an extra burden for qualifying institutions for five years. As described

[37] Moreover, OTS believes that requiring unsatisfactory-rated SLHCs to pay for their extra supervisory costs will provide an added incentive for those SLHCs to promptly address the supervisory concerns that could adversely impact the depository subsidiary and to take other actions to improve their ratings.

[38] 13 CFR 121.201.

[39] *See* 12 CFR 502.20. These numbers are based on ratings data as of December 6, 2003. OTS cannot provide a more specific breakdown regarding the impact of the condition component on each of these small savings associations because such information may result in the public disclosure of sensitive and privileged supervisory rating information for specific institutions. *See* 12 CFR 510.5.

[40] OTS estimates that 189 of the 478 institutions with assets under $150 million are not qualifying savings associations.

above at Section II.B.1., the burden has not remained static, but rather has increased over the five-year period. OTS believes that all institutions, even small institutions, should be able to plan for, adjust to, and carry the burden of inflation-related and cost changes reflected in OTS's assessments schedule. Accordingly, OTS does not believe that it is appropriate to compel other institutions to continue to carry an increased burden.

OTS specifically requests comments on each of these alternatives, and any other alternatives that may minimize the impact of the rule on small savings associations consistent with the goals of this rulemaking.

*C. Other Matters*

The proposed rule imposes no reporting, recordkeeping, or other compliance requirements. The current savings association assessment and the new SLHC assessment would be based on information contained in TFRs or in report H–(b)11, which savings associations and their SLHCs otherwise must file with OTS. While state-regulated depository institutions held by section 10(l) SLHCs do not currently submit holding company asset size information to OTS in Schedule HC of the TFR, OTS is considering revising its TFR filing requirements to collect this information electronically through Schedule HC filings.

OTS will continue to use its current collection procedures for savings associations and would use similar procedures for billing and collecting semi-annual assessments from SLHCs.

No federal rules duplicate, overlap, or conflict with this final rule.

**VI. Unfunded Mandates Act of 1995**

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

**List of Subjects in 12 CFR Part 502**

Assessments, Federal home loan banks, Reporting and recordkeeping requirements, Savings associations.

Accordingly, the Office of Thrift Supervision proposes to amend part 502, chapter V, title 12, Code of Federal Regulations as set forth below.

**PART 502—ASSESSMENTS AND FEES**

1. The authority citation for part 502 continues to read as follows:

**Authority:** 12 U.S.C. 1462a, 1463, 1467, 1467a.

2. In § 502.5, revise paragraphs (b) and (c) to read as follows:

**§ 502.5 Who must pay assessments and fees?**

* * * * *

(b) *Assessments.* If you are a savings association or a top-tier savings and loan holding company, and OTS regulates you on the last day of January or on the last day of July of each year, you must pay a semi-annual assessment due on that day. Subpart A of this part describes OTS's assessment procedures and requirements.

(c) *Fees.* If you make a filing with OTS or use OTS services, the Director may require you to pay a fee to cover the costs of processing your submission or providing those services. The Director may charge a fee for any filing including notices, applications, and securities filings. The Director may charge a fee for any service including publications, seminars, certifications for official copies of agency documents, and records or services requested by other agencies. The Director also assesses fees for examining and investigating savings associations that administer trust assets of $1 billion or less, and savings association affiliates. If OTS incurs extraordinary expenses related to examination, investigation, regulation, or supervision of a savings association or its affiliate, the Director may charge the savings association or the affiliate a fee to fund those expenses. Subpart B of this part describes OTS's fee procedures and requirements.

3. Revise part 502, subpart A to read as follows:

**Subpart A—Assessments**

**Savings Associations—Calculation of Assessments**

**§ 502.10 How does OTS calculate the semi-annual assessment for savings associations?**

(a) If you are a savings association, OTS determines your semi-annual assessment by totaling three components: Your size, your condition, and the complexity of your business. OTS determines the amounts of each component under §§ 502.15 through 502.25 of this part.

(b) OTS uses the September 30 Thrift Financial Report to determine amounts due at the January 31 assessment; and the March 31 Thrift Financial Report to determine amounts due at the July 31 assessment. For purposes of §§ 502.10 through 502.25 of this part, total assets are your total assets as reported on Thrift Financial Reports filed with OTS.

**§ 502.15 How does OTS determine my size component?**

(a) *Chart.* If you are a savings association, OTS uses the following chart to calculate your size component:

| If your total assets are: | | Your size component is: | | |
|---|---|---|---|---|
| Over– | But not over– | This amount–base assessment amount | Plus–marginal rate | Of assets over—class floor |
| Column A | Column B | Column C | Column D | Column E |
| 0 | $67 million | C1 | D1 | 0. |
| $67 million | 215 million | C2 | D2 | $67 million. |
| 215 million | 1 billion | C3 | D3 | 215 million. |
| 1 billion | 6.03 billion | C4 | D4 | 1 billion. |
| 6.03 billion | 18 billion | C5 | D5 | 6.03 billion. |
| 18 billion | 35 billion | C6 | D6 | 18 billion. |
| 35 billion | | C7 | D7 | 35 billion. |

(b) *Calculation.* To calculate your size component, find the row in Columns A and B that describes your total assets. Reading across in that same row, find your base assessment amount in Column C, your marginal rate in Column D, and your class floor in Column E. Calculate how much your total assets exceed your Column E class floor. Multiply this number by your Column D marginal rate. Add this number to your Column C base assessment amount. The total is your size component. OTS will establish the base assessment amounts and the marginal rates in columns C and D in a Thrift Bulletin.

**§ 502.20 How does OTS determine my condition component?**

(a) If you are a savings association, OTS uses the following chart to determine your condition component:

| If your composite rating is: | Then your condition component is: |
|---|---|
| 1 or 2 | Zero. |
| 3 | 50 percent of your size component. |
| 4 or 5 | 100 percent of your size component. |

(b) For the purposes of this section, OTS uses the most recent composite rating, as defined in 12 CFR part 516, of which you have been notified in writing before an assessment's due date.

**§ 502.25 How does OTS determine my complexity component?**

If you are a savings association and your portfolio exceeds any of the thresholds in paragraph (a) of this section, OTS will calculate your complexity component according to paragraph (c) of this section. If your portfolio does not exceed any of the thresholds in paragraph (a) of this section, your complexity component is zero.

(a) *Thresholds for complexity component.* OTS uses three separate thresholds in calculating your complexity component. You exceed a threshold if you have more than $1 billion in any of the following:

(1) Trust assets that you administer.

(2) The outstanding principal balances of assets that are covered, fully or partially, by your recourse obligations or direct credit substitutes.

(3) The principal amount of loans that you service for others.

(b) *Assessment rates.* OTS will establish one or more assessment rates for each of the types of activities listed in paragraph (a) of this section. OTS will publish those assessment rates in a Thrift Bulletin.

(c) *Calculation of complexity component.* OTS separately considers each of the thresholds in paragraph (a) of this section in calculating your complexity component. OTS first calculates the amount by which you exceed any of those thresholds. OTS multiplies the amount by which you exceed any thresholds in paragraph (a) of this section by the applicable assessment rate(s) under paragraph (b) of this section. OTS then totals the results. This total is your complexity component.

## Savings and Loan Holding Companies—Calculation of Assessments

**§ 502.26 How does OTS calculate the semi-annual assessment for savings and loan holding companies?**

(a) OTS will assess a base assessment amount on all top-tier savings and loan holding companies. The base assessment amount will reflect OTS's estimate of the base costs of conducting on- and off-site supervision of a noncomplex, low risk savings and loan holding company. OTS will establish the amount of the base assessment component in a Thrift Bulletin.

(b) OTS will add three components to the base assessment amount to compute the amount of the semi-annual assessment for top-tier savings and loan holding companies: a component based on the risk and complexity of the savings and loan holding company's business, a component based on its organizational form, and a component based on its condition. OTS determines the amount of each component under §§ 502.27 through 502.29 of this part.

(c) For purposes of the semi-annual assessment of savings and loan holding companies:

(1) The top-tier holding company is the highest level of ownership by a registered holding company in the holding company structure.

(2) Total consolidated holding company assets are the total assets as reported on Thrift Financial Reports, Schedule HC. If Schedule HC is unavailable, OTS will use total assets reported on report H–(b)11. OTS uses information contained in the September 30 Thrift Financial Report or report H–(b)11 to determine amounts due at the January 31 assessment; and the March 31 Thrift Financial Report or report H–(b)11 to determine amounts due at the July 31 assessment.

**§ 502.27 How does OTS determine the risk and complexity component for a savings and loan holding company?**

(a) OTS computes the risk and complexity component for top-tier savings and loan holding companies using schedules that set out charges based on OTS holding company risk classifications and total consolidated holding company assets. OTS will establish these schedules in a Thrift Bulletin.

(b) For the purposes of this section, the holding company risk classification is the most recent risk classification assigned by OTS of which the savings and loan holding company has been notified in writing before an assessment's due date. OTS holding company risk classifications reflect OTS's assessment of a holding company's financial condition, financial independence, operational independence, reputational risk, and management experience, as more fully described in OTS Holding Company Handbook.

(c) OTS uses the following chart to compute the risk and complexity component under this section. OTS will establish the amounts in column C and D in the Thrift Bulletin.

| If your total consolidated assets are . . . | | Your risk and complexity component is . . . | | |
|---|---|---|---|---|
| Over . . . | But not over . . . | This amount . . . | Plus—this marginal rate . . . | Of assets over . . . |
| Column A | Column B | Column C | Column D | Colume E |
| $0 | $150 Million | | | $0. |
| $150 Million | $250 Million | | | $150 Million. |
| $250 Million | $500 Million | | | $250 Million. |
| $500 Million | $1 Billion | | | $500 Million. |
| $1 Billion | $5 Billion | | | $1 Billion. |
| $5 Billion | $50 Billion | | | $5 Billion. |
| $50 Billion | $100 Billion | | | $50 Billion. |

| If your total consolidated assets are . . . | | Your risk and complexity component is . . . | | |
|---|---|---|---|---|
| Over . . . | But not over . . . | This amount . . . | Plus—this marginal rate . . . | Of assets over . . . |
| Column A | Column B | Column C | Column D | Colume E |
| $100 Billion | $300 Billion | | | $100 Billion. |
| Over $300 Billion | | | | $300 Billion. |

(d) To compute your risk and complexity component, find the row in the appropriate schedule that describes your total consolidated assets by referring to the amounts in Columns A and B. In that row, calculate how much your total consolidated assets exceed the class floor (Column E); multiply this number by your marginal rate (Column D); and add the product to the amount in Columu C. The total is your risk and complexity component.

**§ 502.28 How does OTS determine the organizational form component for a savings and loan holding company?**

(a) OTS may determine that a particular organizational form used by savings and loan holding companies causes OTS to incur different supervisory costs, and may modify the assessment charged to such top-tier savings and loan holding companies under the organizational form component.

(b) OTS computes the organizational form component for top-tier savings and loan holding companies by adding the base assessment to the risk and complexity component, and multiplying this amount times a factor (positive or negative) established for the particular organizational form.

(c) OTS will establish applicable factors in a Thrift Bulletin. OTS may establish different factors for different organizational forms and based on the amount of total consolidated holding company assets.

**§ 502.29 How does OTS determine the condition component for a savings and loan holding company?**

(a) If the most recent examination rating assigned to a top-tier savings and loan holding company (or the most recent examination rating assigned to a savings and loan holding company controlled by the top-tier savings and loan holding company) was "unsatisfactory," OTS will assess a charge under the condition component. The amount of the condition component is equal to 100 percent of the assessment amounts computed under §§ 502.26 through 502.28 of this part.

(b) For the purposes of this section, examination ratings are the ratings that OTS assigns under the OTS holding company rating system. OTS uses the most recent rating of which the savings and loan holding company has been notified in writing before an assessment's due date.

**Payment of Assessments**

**§ 502.30 When must I pay my assessment?**

OTS will bill you semi-annually for your assessments. Assessments are due January 31 and July 31 of each year, unless that date is a Saturday, Sunday, or Federal holiday. If the due date is a Saturday, Sunday or Federal holiday, your assessment is due on the first day preceding the due date that is not a Saturday, Sunday or Federal holiday. At least seven days before your assessment is due, the Director will mail you a notice that indicates the amount of your assessment, explains how OTS calculated the amount, and specifies when payment is due.

**§ 502.35 How do I pay my assessment?**

(a) *Savings associations.* (1) If you are a member of a Federal Home Loan Bank that offers demand deposit accounts, you must maintain a demand deposit account at your Federal Home Loan Bank with sufficient funds to pay your assessment when due. OTS will notify your Federal Home Loan Bank of the amount of your assessment. OTS will debit your account for your assessments.

(2) If paragraph (a)(1) of this section does not apply to you, OTS will directly debit an account you must maintain at your association.

(b) *Savings and loan holding companies.* You may establish an account at an insured depository institution and authorize OTS to debit the account for your semi-annual assessment. If you do not establish an account and maintain funds in the account sufficient to pay the semi-annual assessment when due, OTS may charge you a fee to cover its administrative costs of collecting and billing your assessment. This fee is in addition to interest on delinquent assessments charged under § 502.45 of this part. OTS will establish the amount of the administrative fee and publish the amount of the fee in a Thrift Bulletin.

**§ 502.40 Will OTS refund or prorate my assessment?**

(a) OTS will not refund or prorate your assessment, even if you cease to be a savings association or a savings and loan holding company.

(b) If you are a savings association for whom a conservator or receiver has been appointed, you must continue to pay assessments in accordance with this part. OTS will not increase or decrease your assessment based on events that occur after the date of the Thrift Financial Report upon which your assessment is based.

**§ 502.45 What will happen if I do not pay my assessment on time.**

(a) Your assessment is delinquent if you do not pay it on the date it is due under § 502.30 of this part. The Director will charge interest on delinquent assessments. Interest will accrue at a rate (that OTS will determine quarterly) equal to 150 percent of the average of the bond-equivalent rates of 13-week Treasury bills auctioned during the calendar quarter preceding the assessment.

(b) If a savings and loan holding company fails to pay an assessment within 60 days of the date it is due under § 502.30 of this part, the Director may assess and collect the assessment with interest from a subsidiary savings association. If a savings and loan holding company controls more than one savings association, the Director may assess and collect the assessment from each savings association as the Director may prescribe.

4. Revise § 502.50 to read as follows:

**§ 502.50 What fees does OTS charge?**

(a) The Director assesses fees for examining or investigating savings associations that administer trust assets of $1 billion or less, and saving association affiliates. Because OTS recovers the ordinary costs of examining and investigating savings and loan holding companies through the semi-annual assessment under §§ 502.25 through 502.29 of this part, the Director will not generally charge an examination fee to a savings and loan holding company. "Affiliate" has the meaning in 12 U.S.C. 1462(9), except that, for this part only, "affiliate" does

not include any entity that is consolidated with a savings association on the Consolidated Statement of the Condition of the Thrift Financial Report.

(b) The Director assesses fees for processing notices, applications, securities filings, and requests, and for providing other services.

5. Revise § 502.75(b) to read as follows:

**§ 502.75 What will happen if I do not pay my fees on time?**

* * * * *

(b) *Failure to pay.* If you are a savings association and your holding company, affiliate, or subsidiary fails to pay any fee within 60 days of the date specified in a bill, the Director may assess and collect that fee, with interest, from you. If the holding company, affiliate, or subsidiary is related to more than one savings association, the Director may assess the fee against and collect it from each savings association as the Director may prescribe.

Dated: February 4, 2004.

By the Office of Thrift Supervision.

**Richard M. Riccobono,**

*Deputy Director.*

[FR Doc. 04–2846 Filed 2–9–04; 8:45 am]

BILLING CODE 6720–01–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2003–SW–38–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Eurocopter Deutschland Model MBB–BK 117 A–1, A–3, A–4, B–1, B–2, and C–1

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes adopting a new airworthiness directive (AD) for the specified Eurocopter Deutschland (ECD) model helicopters. This proposal would require inspecting the vertical fin skin paneling to determine if it was manufactured with the correct wall thickness. This proposal is prompted by a report from the manufacturer that some vertical fins may have been produced with the wrong vertical fin skin thickness. The actions specified by this proposed AD are intended to prevent failure of the vertical fin and subsequent loss of control of the helicopter.

**DATES:** Comments must be received on or before April 12, 2004.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2003–SW–38–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: 9-asw-*adcomments@faa.gov*. Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Richard Monschke, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5116, fax (817) 222–5961.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 2003–SW–38–AD." The postcard will be date stamped and returned to the commenter.

### Discussion

The Luftfahrt-Bundesamt (LBA), the airworthiness authority for the Federal Republic of Germany, notified the FAA that an unsafe condition may exist on ECD Model MBB–BK117 helicopters, Model A–1 up to B–2, serial number (S/N) all, and Model C–1, S/N 7500 up to 7545. The LBA advises that during tail boom production, metal sheeting of 0.6-millimeter (mm) thickness was found instead of the specified 0.8-mm thickness for the skin paneling of several tail booms.

ECD has issued Alert Service Bulletin No. ASB–MBB–BK117–30–109, Revision 1, dated July 3, 2003, which specifies measuring the wall thickness of the skin paneling of the vertical fin to determine the thickness. The LBA classified this service bulletin as mandatory and issued AD No. 2003–219, dated August 21, 2003, to ensure the continued airworthiness of these helicopters in the Federal Republic of Germany.

This helicopter model is manufactured in the Federal Republic of Germany and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, the LBA has kept the FAA informed of the situation described above. The FAA has examined the findings of the LBA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

This previously described unsafe condition is likely to exist or develop on other helicopters of the same type design registered in the United States. Therefore, the proposed AD would require, within 100 hours time-in-service, using external calipers, measuring the wall thickness, including primer coating, of the skin paneling of the vertical fin. If the wall thickness, including the primer coating, of the paneling is less than 0.778 millimeter (0.03063 inch) at any of the measured locations, this proposed AD would also require replacing the vertical fin with an airworthy part before further flight.

The FAA estimates that this proposed AD would affect 132 helicopters of U.S. registry and the proposed actions would take approximately 1 hour per helicopter to accomplish at an average labor rate of $65 per work hour. Based on these figures, we estimate the total cost impact of the proposed AD on U.S. operators to be $8580 assuming no vertical fins will need to be replaced.

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal

would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

**Eurocopter Deutschland:** Docket No. 2003–SW–38–AD.

*Applicability:* Model MBB–BK 117 A–1, A–3, A–4, B–1, and B–2, all serial numbers (S/N), and Model C–1, S/N 7500 through 7545, certificated in any category.

*Compliance:* Required within 100 hours time in service, unless accomplished previously.

To prevent failure of the vertical fin and subsequent loss of control of the helicopter, do the following:

(a) Using external calipers, measure the wall thickness, including primer coating, of the skin paneling of the vertical fin at the locations shown in Figure 1 of this AD.

**Note 1:** Eurocopter Deutschland (ECD) Alert Service Bulletin No. ASB–MBB–BK117–30–109, Revision 1, dated July 3, 2003, pertains to the subject of this AD.

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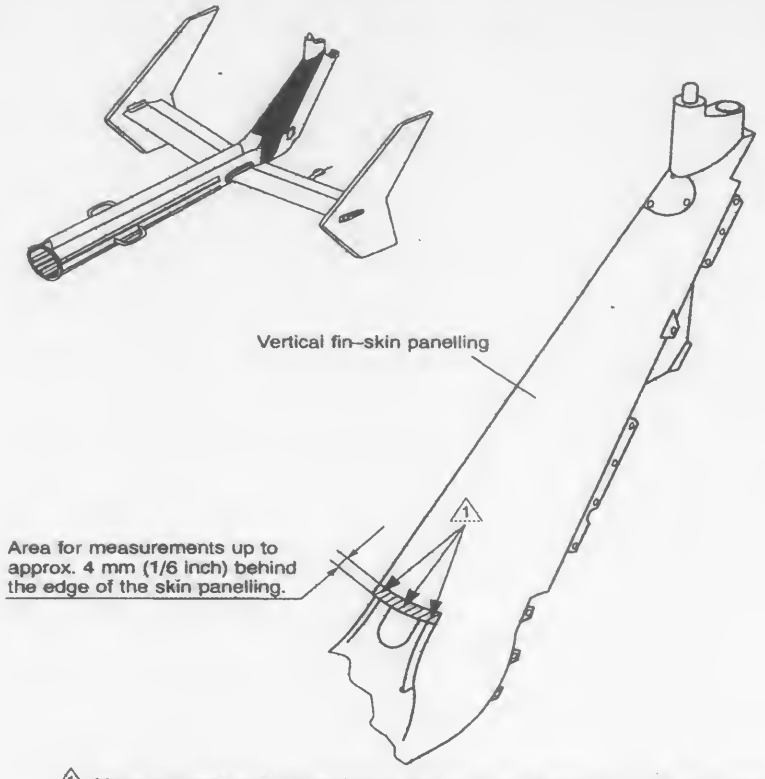


Vertical Fin–Skin Panelling
Figure 1

(b) If the wall thickness, including the primer coating, of the paneling is less than 0.778 millimeter (0.03063 inch) at any of the measured locations, replace the vertical fin with an airworthy part before further flight.

(c) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Safety Management Group, Rotorcraft Directorate, FAA, for information about previously approved alternative methods of compliance.

**Note 2:** The subject of this AD is addressed in Luftfahrt-Bundesamt (Federal Republic of Germany) AD 2003–219, dated August 21, 2003.

Issued in Fort Worth, Texas, on January 30, 2004.

**David A. Downey,**

*Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 04–2783 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–13–C

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Parts 60 and 121

[Docket No. FAA–2002–12461; Notice No. 02–11]

RIN 2120–AH07

## Flight Simulation Device Initial and Continuing Qualification and Use

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** On September 25, 2002, the FAA published a Notice of Proposed Rulemaking (NPRM) to establish a new

part regarding flight simulation device qualification requirements. The comment period closed on February 24, 2003; however, the FAA is reopening the comment period for an additional 30 days in order to give the public an opportunity to comment on recommendations received from an Aviation Rulemaking Committee established by the Administrator on July 2, 2003.

**DATES:** Comments must be received on or before March 11, 2004.

**ADDRESSES:** You may send comments [identified by Docket Number FAA–2002–12461] using any of the following methods:

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.
- Fax: 1–202–493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

*Privacy:* We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* To read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Edward Cook, National Simulator Program Staff (AFS–205), Flight Standards Service, Federal Aviation Administration, 100 Hartsfield Centre Parkway, Suite 400, Atlanta, GA 30354; telephone: (404) 832–4700

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the Web address in the **ADDRESSES** section.

*Privacy Act:* Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov*.

Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

## Availability of NPRMs

An electronic copy of this document may be downloaded using a modem and suitable communications software from the FAA regulations section of the FedWorld electronic bulletin board service (telephone: (703) 321–3339) or the Government Printing Office (GPO)'s electronic bulletin board service (telephone: (202) 512–1661).

Internet users may reach the FAA's Web page at *http://www.faa.gov/avr/arm/nprm/nprm.htm* or the GPO's Web page at *http://www.access.gpo.gov/nara* to access recently published rulemaking documents.

Any person may obtain a copy of this document by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Communications must identify the notice number or docket number of this NPRM.

Persons interested in being placed on the mailing list for future rulemaking documents should request from the above office a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

## Background

On September 25, 2002, the FAA published in the **Federal Register** Notice 02–11, entitled "Flight Simulation Device Initial and Continuing Qualification and Use" (67 FR 60284). The comment period closed on February 24, 2003. In order to resolve comments and provide a forum for the FAA and the aviation community to discuss and resolve issues regarding FSDs, the FAA established the Flight Simulation Device Aviation Rulemaking Committee (ARC) on July 2, 2003. The general goal of the ARC is to provide advice, guidance, and recommendations on FSD issues including but not limited to safety of flight issues; the suitability and/or the application of the simulation to flight crewmember training, testing, or checking activities; and implementation of technical changes or scientific advancements in simulation. This ARC provided a forum for the FAA and affected members of the aviation community to discuss issues. The ARC also allowed members of the aviation community to reach consensus on certain recommendations that would be submitted to the FAA, to develop resolutions to facilitate the evolution of FSDs. The ARC's initial task was to review the FAA's proposed new rules in Notice 02–11 (Docket No. FAA–2002–12461), published on September 25, 2002. On November 24, 2003, the ARC submitted to the FAA its recommendations on how the proposed rule language should be clarified and reorganized. The ARC believes its recommendations are within the scope of the original NPRM.

In order to give the public an opportunity to comment on the recommendations received from the ARC, the FAA is reopening the comment period for an additional 30 days. The FAA finds that it is in the public interest to reopen the comment period for 30 days.

Issued in Washington, DC, on February 2, 2004.

**John M. Allen,**

*Acting Director, Flight Standards Service.*

[FR Doc. 04–2872 Filed 2–9–04; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Parts 61, 91, 119, 121, 135, and 136

**[Docket No. FAA–1998–4521; Notice No. 04–02]**

**RIN 2120–AF07**

### National Air Tour Safety Standards

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of public meeting on the Internet.

**SUMMARY:** On October 22, 2003, the FAA published a notice of proposed rulemaking (NPRM) that proposes regulations to govern commercial air tours throughout the United States. We are announcing an Internet public meeting to supplement the traditional comment period. The public meeting will help us consider the concerns of those who may be most affected by the proposed rule as we develop a final rule that will promote safety in the commercial air tour industry.

**DATES:** You may access the public meeting at any time beginning February 23, 2004, at 9 a.m. EST and ending on March 5, 2004, at 4:30 p.m. EST.

**ADDRESSES:** You may access the on-line public meeting at *http://www.faa.gov/avr/arm/rulemakingforum.cfm?nav=part.* Under the 'View Docket/Comments' column, click once on 'Enter Public Meeting.' Follow the instructions to participate in the discussion.

You may submit written comments to the docket, whether or not you participate in the public meeting. Address your comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh St., SW., Washington, DC 20590–0001. You must identify the docket number FAA–1998–4521 at the beginning of your comments, and you should submit two copies of your comments. The public meeting on the Internet is intended to supplement the docket. A copy of the discussion from the public meeting will be submitted to the docket after the close of the public meeting.

You may also submit comments through the Internet to *http://dms/dot.gov.* You may review the public docket containing comments to these proposed regulations in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level at the Department of Transportation building at the address above. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Alberta Brown, Air Transportation Division, Flight Standards Service, AFS–200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8166; e-mail: *Alberta.Brown@faa.gov.*

**SUPPLEMENTARY INFORMATION**

#### Background

We published a notice of proposed rulemaking on October 22, 2003 (68 FR 60572) that proposes to regulate commercial air tours throughout the United States. The notice provided a 90-day comment period that was to end on January 20, 2004. We received significant response to this NPRM, including numerous requests to extend the comment period and to conduct a series of public meetings. On January 16, 2004, we published a notice to extend the comment period an additional 90 days to April 19, 2004 (69 FR 2529).

#### Public Meeting on the Internet

We have carefully considered the requests for a series of public meetings. Traditionally, public meetings have been useful when we have been able to identify a geographic area that may be most affected by a proposed rule. We could then supplement the comment period with a public meeting that would allow those most affected to express their views directly to FAA representatives. As of the date of this notice, we have received approximately 1,500 comments in docket FAA–1998–4521. Most of the comments are from individuals or small aviation businesses. The persons who submitted these comments are widely dispersed throughout the country, many of them in small communities. It would be impractical to conduct a public meeting in every community in America where someone could be affected by the proposed rule. If we were to choose to hold public meetings only in areas where large tour operators are located, they would have a disproportionate opportunity to participate, to the disadvantage of the many small operators who have responded to this proposed rule.

The Internet allows us to overcome the barriers of geography and enables anyone with an Internet connection to participate in a public discussion of the issues. A further advantage of a public meeting on the Internet is that it is not limited by time. A traditional public meeting would be scheduled at a particular place, on a particular day, at a specific time. Anyone with a schedule conflict may be unable to participate. A public meeting on the Internet can be available 24 hours per day over a period of several weeks. A public meeting held on the Internet, like a traditional public meeting, provides the opportunity to obtain useful information from the public. It has the additional advantage of allowing much broader participation throughout the country. We have therefore decided to hold a public meeting on the Internet.

#### How the Public Meeting Will Be Conducted

To facilitate an organized and useful discussion of the issues, we will divide the discussion into three forums that will address specific areas of the proposed rule. The three forums will be:

1. *Community and charity events.* This forum will discuss portions of the proposed rule that may affect persons who provide aerial sightseeing rides for charitable purposes or at community events.

2. *Part 91 sightseeing in accordance with the 25-mile exception.* This forum will discuss portions of the proposed rule that may affect persons who are not currently required to obtain an operating certificate because they conduct nonstop sighseeing flights that begin and end at the same airport and are conducted within a 25-mile radius of that airport under the exception found in section 119.1(e)(2).

3. *Part 121 and part 135 commercial air tour operators.* This forum will include discussion of portions of the proposed rule that may affect commercial air tour operators who conduct tours with an air carrier certificate under part 119 and operate under the rules of part 121 or 135 of Chapter 14 of the Code of Federal Regulations.

It is possible that some may wish to participate in more than one forum within the public meeting. You can participate in as many forums as you wish. To focus the discussion and encourage responses that will help us address both safety issues and concerns of those affected by the proposed rule, in each forum we will solicit responses to specific questions. You will be able

to read the questions on-line and submit your answers and comments electronically. We will participate in the discussion throughout the 2-week forum and may ask you clarifying questions. While we have selected topics that we are particularly interested in, we still welcome all of your comments and suggestions. We will not make any commitments or draw any conclusions while the docket is open for public comment.

Issued in Washington, DC, on February 5, 2004.

**Anthony F. Fazio,**

*Director, Office of Rulemaking.*

[FR Doc. 04–2911 Filed 2–6–04; 11:13 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[CGD13–04–002]**

**RIN 1625–AA00**

## Safety Zone Regulations, Seafair Blue Angels Air Show Performance, Lake Washington, WA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a safety zone on the waters of Lake Washington, Seattle, Washington. The Coast Guard is taking this action to safeguard participants and spectators from the safety hazards associated with the Seafair Blue Angels Air Show Performance. Entry into this zone is prohibited unless authorized by the Captain of the Port, Puget Sound or his designated representatives.

**DATES:** Comments and related material must reach the Coast Guard on or before May 10, 2004.

**ADDRESSES:** You may mail comments and related material to Commanding Officer, Marine Safety Office Puget Sound, 1519 Alaskan Way South, Seattle, Washington 98134. Marine Safety Office Puget Sound 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 Marine Safety Office Puget Sound between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** LT J. Argudo, c/o Captain of the Port Puget Sound, 1519 Alaskan Way South, Seattle, WA 98134, (206) 217–6232.

**SUPPLEMENTARY INFORMATION:**

### Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD13–04–002), 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 now plan to hold a public meeting. But you may submit a request for a meeting by writing to Marine Safety Office Puget Sound at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register.**

### Background and Purpose

The Coast Guard has issued temporary final rules establishing safety zones in the past for the Blue Angels Seafair Air Show Performance (*see, e.g.,* 68 FR 44888, July 31, 2003 (CGD13–03–023), 33 CFR 165T.13–014). The Blue Angels air show has become a permanent part of the Seafair events and takes place during the Seafair unlimited hydroplane races. The air show poses several dangers to the public including excessive noise and objects falling from any accidents by low flying aircraft. Permanent regulations already exist which restrict general navigation during the Seafair unlimited hydroplane races (33 CFR 100.1301). The proposed rule complements the existing regulations contained in 33 CFR 100.1301, which are intended to ensure public safety during Seafair.

### Discussion of Proposed Rule

The Coast Guard proposes establishing a permanent safety zone on the waters of Lake Washington, Seattle, Washington, for the Seafair Blue Angels Performance. The Coast Guard, in consultation with the U.S. Navy and Federal Aviation Administration has determined it is necessary to close the area in the vicinity of the air show in order to minimize the dangers that low-flying aircraft present to persons and vessels. These dangers include, but are not limited to excessive noise and the risk of falling objects from any accidents associated with low flying aircraft. In the event that an aircraft(s) requires emergency assistance, rescuers must have immediate and unencumbered access to the aircraft. The Coast Guard, through this action, intends to promote the safety of personnel, vessels, and facilities in the area of the Blue Angels air show. Entry into this zone will be prohibited unless authorized by the Captain of the Port or his representative. Coast Guard personnel will enforce this safety zone.

### Regulatory Evaluation

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

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

This expectation is based on the fact that the regulated area established by the proposed regulation would encompass an area near the middle of Lake Washington, not frequented by commercial navigation. The safety zone is also of limited time and duration. The regulation is established for the benefit and safety of the recreational boating public, and any negative recreational boating impact is offset by the benefits of allowing the Blue Angels to fly. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

### 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. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit this portion of Lake Washington during the time this regulation is in effect. The zone will not have a significant economic impact due to its short duration and small area. The only vessels likely to be impacted will be recreational boaters and small passenger vessel operators. The event is held for the benefit and entertainment of those above categories. Because the impacts of this proposal are expected to be so minimal, the Coast Guard certifies under 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this final rule will not have a significant economic impact on a substantial number of small entities.

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 (Public Law 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 the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

**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 would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This proposed rule would 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 would not create an environmental risk to health or risk to safety that might disproportionately affect children.

**Indian Tribal Governments**

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

**Energy Effects**

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. 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.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. The environmental analysis and Categorical Exclusion Determination are available in the docket for inspection and copying where indicated under **ADDRESSES.** All standard environmental measures remain in effect.

**List of Subjects in 33 CFR Part 165**

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.1319 to read as follows:

**§ 165.1319 Safety Zone Regulations, Seafair Blue Angels Air Show Performance, Seattle, WA.**

(a) *Enforcement period.* This section will be enforced annually during the last week in July and the first two weeks of August from 8 a.m. until 4 p.m. Pacific Daylight Time each day during the event. The event will be one week or less in duration. The specific event dates during this time frame will be published in the **Federal Register**.

(b) *Location.* The following is a safety zone: All waters of Lake Washington, Washington State, enclosed by the following points: Near the termination of Roanoke Way 47°35′44″ N, 122°14′47″ W; thence to 47°35′48″ N, 122°15′45″ W; thence to 47°36′02.1″N, 122°15′50.2″ W; thence to 47°35′56.6″ N, 122°16′29.2″ W;

thence to 47°35′42″ N; 122°16′24″ W; thence to the east side of the entrance to the west highrise of the Interstate 90 bridge; thence westerly along the south side of the bridge to the shoreline on the western terminus of the bridge; thence southerly along the shoreline to Andrews Bay at 47°33′06″ N, 122°15′32″ W; thence northeast along the shoreline of Bailey Peninsula to its northeast point at 47°33′44″ N, 122°15′04″ W; thence easterly along the east-west line drawn tangent to Bailey Peninsula; thence northerly along the shore of Mercer Island to the point of origin. [Datum: NAD 1983]

(c) *Regulations.* In accordance with the general regulations in 33 CFR Part 165, Subpart C, no person or vessel may enter or remain in the zone except for support vessels and support personnel, vessels registered with the event organizer, or other vessels authorized by the Captain of the Port or his designated representatives. Vessels and persons granted authorization to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port or his designated representatives.

Dated: January 16, 2004.

**Danny Ellis,**

*Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.*

[FR Doc. 04–2748 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[CGD01–03–025]**

**RIN 1625–AA00**

## Safety Zone; Coast Guard Station Fire Island, Fire Island, NY

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a safety zone in the waters adjacent to Coast Guard Station Fire Island, Fire Island, New York. This proposed zone would ensure safety of the boating community and Coast Guard vessels when prompt response is needed for Coast Guard vessels to respond to mariners' or other requests for assistance. This zone would exclude all vessels from operating within the prescribed safety zone without first obtaining authorization from the Captain of the Port, Long Island Sound.

**DATES:** Comments and related material must reach the Coast Guard on or before April 12, 2004.

**ADDRESSES:** You may mail comments and related material to Waterways Management, Coast Guard Group/Marine Safety Office Long Island Sound, 120 Woodward Avenue, New Haven, CT 06512. Coast Guard Group/MSO Long Island Sound 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 Group/MSO Long Island Sound, New Haven, CT, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant A. Logman, Waterways Management Officer, Coast Guard Group/Marine Safety Office Long Island Sound at (203) 468–4429.

**SUPPLEMENTARY INFORMATION:**

### Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD01–03–025), 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 if your submission 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 now plan to hold a public meeting, but you may submit a request for a meeting by writing to Coast Guard Group/Marine Safety Office Long Island Sound at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

### Background and Purpose

United States Coast Guard Station (STA) Fire Island is located in Babylon, New York, on the northern shore of Fire Island, Long Island, New York. The waters north of Station, Fire Island Inlet, attract numerous recreational and small charter fishing vessels each year from May through October. Throughout the summer months and fishing season, the waters immediately surrounding the Station and within a quarter mile radius of the Station become heavily congested with vessels, mainly consisting of recreational boaters. The accumulation of vessels immediately in front of the station present a continuous hindrance to the safety of Coast Guard vessels responding to search and rescue or other maritime emergencies, and hamper their ability to respond expeditiously. The proposed zone would be established by reference to coordinates, representing an area approximately 100 yards seaward from STA Fire Island vessels, facilities and property.

The proposed zone has been tailored to fit the needs of safety, while minimizing the impact on the maritime community. All coordinates are North American Datum 1983.

No person or vessel would be permitted to enter or remain in a prescribed safety zone for any time without the permission of the COTP. Each person or vessel in the proposed safety zone would be required to obey any direction or order of the COTP. Any violation of the proposed safety zone described herein, would be punishable by, among others, civil penalties (not to exceed $32,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment for not more than 6 years and a fine of not more than $250,000), in rem liability against the offending vessel, or license sanctions. This regulation is proposed under the authority contained in 33 U.S.C. 1223 and 1225 and the regulations promulgated thereunder.

### Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This proposed regulation could have some impact on the public, but these potential impacts would be minimized because the proposed safety zone would encompass

only a small portion of Fire Island Inlet allowing sufficient room for vessels to operate or anchor outside of the zone.

**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. This proposed rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in that portion of Fire Island Inlet covered by the proposed safety zone.

For the reasons outlined in the Regulatory Evaluation section above, this proposed rule would not have a significant impact on a substantial number of small entities.

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 how and to what degree this rule would economically affect it.

**Assistance for Small Entities**

Under subsection 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), the Coast Guard wants 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 proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call Lieutenant A. Logman, Waterways Management Officer, Group/Marine Safety Office Long Island Sound, at (203) 468–4429.

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

**Collection of Information**

This 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 would 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 would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This proposed rule would 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 proposed rule is not an economically significant rule and would not concern an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

This proposed rule would 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.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on how to best carry out the Order. We invite your comments on how this proposed rule could impact tribal governments, even if that impact would not constitute a "tribal implication" under the Order.

**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 would not be a "significant energy action" under that order because it would not be a "significant regulatory action" under Executive Order 12866 and would not likely have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Environment**

The Coast Guard considered the environmental impact of this proposed rule and concluded that, under figure 2–1, paragraph 34(g), of Commandant Instruction M16475.1D, this proposed rule is categorically excluded from further environmental documentation. 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 proposes to amend 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.152 to read as follows:

**§ 165.152 Coast Guard Station Fire Island, Long Island, New York—safety zone.**

(a) *Location.* The safety zone consists of all waters of Fire Island Inlet encompassed by a line connecting the following points, 40°37.523′ N, 073°15.685′ W; then north to 40°37.593′ N, 073°15.719′ W; then east to 40–37.612 N, 073°15.664′ W; then east to 40°37.630′ N, 073°15.610′ W; then east to 40°37.641′ N, 073°15.558′ W; then southeast to 40°37.630′ N, 073°15.475′ W; then southeast to 40°37.625′ N, 073°15.369′ W; then southeast to 40°37.627′ N, 073°15.318′ W; then southeast to point on shore at 40°37.565′ N, 073°15.346′ W. All coordinates are North American Datum 1983.

(b) *Regulations.* (1) The general regulations contained in 33 CFR § 165.23 apply.

(2) All persons and vessels must comply with the Coast Guard Captain of the Port or designated on-scene patrol personnel. These personnel comprise commissioned, warrant and petty officers of the U.S. Coast Guard. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed.

Dated: November 17, 2003.

**Joseph J. Coccia,**

*Captain, U.S. Coast Guard, Captain of the Port, Long Island Sound.*

[FR Doc. 04–2746 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

**RIN 2900–AL38**

### Testimony Certified or Under Oath

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Withdrawal of proposed rule.

**SUMMARY:** This document withdraws a proposed rule that would have removed the adjudication regulation that requires written and oral testimony to be certified or given under oath or affirmation in most cases. This proposed rule was erroneously published in the **Federal Register** on July 31, 2002, at 67 FR 49646, under a previously deleted Regulatory Identification Number (RIN 2900–AK24). The proposal is being withdrawn because the Department of Veterans Affairs is revising and republishing its part 3 compensation and pension regulations to make them easier to understand and apply. To ensure that this proposal is consistent with other related regulations being rewritten and published in that project, it is being withdrawn at this time. The Regulation Rewrite Project plans to republish this proposed rulemaking within one of its packages of regulations, "General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings."

**FOR FURTHER INFORMATION CONTACT:** Bill Russo, Chief of C&P Rewrite Projects (00REG2), Office of Regulation Policy and Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–9515. This is not a toll-free number.

Approved: February 3, 2004.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

[FR Doc. 04–2795 Filed 2–9–04; 8:45 am]

BILLING CODE 8320–01–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[WV063–6032b; FRL–7613–1]**

### Approval and Promulgation of Air Quality Implementation Plans; West Virginia; MOBILE6-Based Motor Vehicle Emission Budgets for Greenbrier County and the Charleston, Huntington, and Parkersburg 1-Hour Ozone Maintenance Areas

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve revisions to the West Virginia State Implementation Plan (SIP). The revisions amend the 1-hour ozone maintenance plans for Greenbrier County and the Charleston, Huntington and Parkersburg areas. These revisions amend the maintenance plan's base year and 2005 highway mobile volatile organic compound (VOC) and nitrogen oxide ($NO_X$) emission inventories and the 2005 motor vehicle emissions budgets (MVEBs) to reflect the use of MOBILE6. These revisions also reallocate a portion of each plans' safety margins which results in an increase in the MVEBs. The revised plans continue to demonstrate maintenance of the 1-hour national ambient air quality standard (NAAQS) for ozone. In the final rules section of this **Federal Register**, EPA is approving West Virginia's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by March 11, 2004.

**ADDRESSES:** Comments may be submitted either by mail or electronically. Written comments should be mailed to Larry Budney, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Electronic comments should be sent either to *budney.larry@epa.gov* or to *http://www.regulations.gov*, which is an alternative method for submitting electronic comments to EPA. To submit comments, please follow the detailed instructions described in the Supplementary Information section. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and at the West Virginia Department of Environmental Protection, Division of Air Quality, 7012 MacCorkle Avenue, SE., Charleston, WV 25304–2943.

**FOR FURTHER INFORMATION CONTACT:** Larry Budney, (215) 814–2184, or by e-mail at *budney.larry@epa.gov*.

**SUPPLEMENTARY INFORMATION:** For further information, please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

You may submit comments either electronically or by mail. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number, WV063–6032, in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the

close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-mail.* Comments may be sent by electronic mail (e-mail) to *budney.larry@epa.gov,* attention WV063–6032. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly without going through Regulations.gov, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket.

ii. *Regulations.gov.* Your use of Regulation.gov is an alternative method of submitting electronic comments to EPA. Go directly to *http://www.regulations.gov,* then select "Environmental Protection Agency" at the top of the page and use the "go" button. 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 the **ADDRESSES** section of this document. 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.* Written comments should be addressed to the EPA Regional office listed in the **ADDRESSES** section of this document.

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, confidential business information (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.

*Submittal of CBI Comments*—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.

### Considerations When Preparing Comments to EPA

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate regional file/rulemaking identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: January 14, 2004.

**James W. Newsom,**

*Acting Regional Administrator, Region III.*

[FR Doc. 04–2708 Filed 2–9–04; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 67

**[Docket No. FEMA–D–7582]**

## Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** The comment period is ninety (90) days following the second publication of this proposed rule in a

newspaper of local circulation in each community.

**ADDRESSES:** The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

**National Environmental Policy Act**

This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

**Regulatory Flexibility Act**

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

**Regulatory Classification**

This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

**Executive Order 12612, Federalism**

This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

**Executive Order 12778, Civil Justice Reform**

This proposed rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| State | City/town/county | Source of flooding | Location | #Depth in feet above ground. *Elevation in feet (NGVD) *Elevation in feet (NAVD) | |
|---|---|---|---|---|---|
| | | | | Existing | Modified |
| North Carolina ..... | Person County (Unincorporated Areas). | Deep Creek ..... | At the Person/Durham County boundary ... | None | *419 |
| | | | Approximately 0.8 mile upstream of Smith Road. | None | *419 |

Maps available for inspection at Person County Planning and Zoning Department, 20A Court Street, Roxboro, North Carolina.
Send comments to Mr. Steve Carpenter, Person County Manager, 304 South Morgan Street, Room 212, Roxboro, North Carolina 27573.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: February 3, 2004.

**Anthony S. Lowe,**

*Mitigation Division Director, Emergency Preparedness and Response Directorate.*

[FR Doc. 04–2792 Filed 2–9–04; 8:45 am]

BILLING CODE 9110–12–P

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

**45 CFR Part 2551**

**RIN 3045–AA39**

## The Senior Companion Program; Amendments

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Proposed rule.

**SUMMARY:** These proposed amendments to the regulations governing the Senior Companion Program (SCP) modify provisions concerning deductions for medical expenses and the allowability of certain volunteer expense items. The specific amendments are as follows:

Section 2551.42(c) is modified to increase the ceiling on medical expenses that may be deducted for determining income for eligibility purposes from 15 percent to 50 percent of the applicable income guideline; and §§ 2551.45 and 2551.93(d) are modified to allow project funds, including the required non-federal share, to be used to reimburse volunteers for expenses, including transportation costs, incurred while performing volunteer assignments, and for purchase of equipment or supplies for volunteers on assignment.

**DATES:** Submit comments on or before March 26, 2004.

**ADDRESSES:** You may submit comments, identified by the title of the program, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, National Senior Service Corps; Attention Peter Boynton, Program Officer; 9th Floor, 1201 New York Avenue, NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 6010 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) By fax to: (202) 565–2743, Attention Peter Boynton, Program Officer.

(4) Electronically through the Corporation's e-mail address system: *Seniorfeedback@cns.gov*.

**FOR FURTHER INFORMATION CONTACT:** Peter L. Boynton, 202–606–5000, ext. 554.

**SUPPLEMENTARY INFORMATION:**

## Background

*A. Program Description*

The Senior Companion Program provides a way for limited-income people age 60 and older to provide assistance and friendship to adults who have difficulty with daily living tasks, such as grocery shopping and bill paying. Senior Companions spend from 15 to 40 hours a week helping two to four adult clients live independently in their own homes. Senior Companions provide relief to caregivers and alert doctors and family members to potential problems. In return for their service, Senior Companions receive a stipend of $2.65 an hour, accident and liability insurance and meals while on duty, reimbursement for transportation, and monthly training. Approximately 15,000 Senior Companions tend to the needs of more than 60,000 adults each year.

*B. Medical Expenses Deduction*

Income eligibility for the Senior Companion Program is determined based on annual income from all sources after deducting medical expenses. Currently the allowable medical expenses may not exceed 15 percent of the applicable income eligibility guideline. In order to increase the pool of seniors eligible to serve as Senior Companions, and in recognition that the cost of medical care and insurance have increased significantly, the Corporation proposes to increase the ceiling for allowable medical expenses to 50 percent of the applicable income eligibility guideline.

*C. Volunteer Expenses*

The Senior Companion Program regulations currently distinguish between volunteer expenses that may be paid or reimbursed with federal and required non-federal grant funds and volunteer expenses that must be paid by the volunteer station to which a Senior Companion is assigned. Grant funds may be used only to pay for volunteer stipends, insurance, transportation to and from volunteer assignments and official project activities, annual physical examinations, meals taken on assignment, and service recognition expenses. With the exception of certain meals, volunteer stations must pay for all expenses incurred while performing volunteer assignments.

In "Principles and Reforms for a Citizen Service Act," issued by President Bush April 9, 2002, the Administration proposed to create greater flexibility in the use of Federal resources by easing requirements that govern the activities and support of volunteers. The proposed amendment would allow Senior Companion Program sponsors to determine, in consultation with volunteer stations, how best to fund volunteer expenses. The respective responsibilities of the sponsor and volunteer station for volunteer expenses would be incorporated in the memorandum of understanding negotiated by the sponsor with each station. Sponsors would be free to maintain the current division of responsibility for volunteer expenses but have the flexibility to use federal and required non-federal funds to cover any volunteer expense when the sponsor determines that doing so would be in the best interest of the project. The provisions of the applicable OMB Cost Principles Circulars referenced in Section 2551.93(a)(4) would continue to apply to all expenses paid with federal or required non-federal funds.

## Impact of Various Acts and Executive Orders

After carefully reviewing the changes implemented by this amendment, and after coordination with the Office of Management and Budget, it was determined that:

(1) This was a significant regulatory action under section 3(f)(4) of Executive Order 12866 "Regulatory Planning and Review", and required a review by the Office of Management and Budget;

(2) The Corporation hereby certifies that the Regulatory Flexibility Act does not apply because there is no "significant economic impact on a substantial number of small entities";

(3) That the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II) does not apply because the amendment does not result in any annual expenditures of $100 million by State, local, Indian Tribal governments or the private sector;

(4) That the Paperwork Reduction Act does not apply because the amendments do not impose any additional reporting or record-keeping requirements;

(5) That the Small Business Regulatory Enforcement Fairness Act of 1996 does not apply because it is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, and would not result in an annual effect on the economy of $100 million or more; result in an increase in cost or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets; and

(6) That Executive Order 13132, "Federalism" does not apply because it would not have substantial direct effects on the States or the relationship between the national government and the States.

## List of Subjects in 45 CFR Part 2551

Aged, Grant programs—social programs, Volunteers.

For the reasons set forth in the preamble, the Corporation for National and Community Service proposes to amend 45 CFR part 2551 as follows:

## PART 2551—THE SENIOR COMPANION PROGRAM

1. The authority citation for part 2551 continues to read as follows:

**Authority:** 42 U.S.C. 4950 *et seq.*

### § 2551.42 [Amended]

2. In § 2551.42(c), remove the words "15 percent" and add the words "50 percent" in their place.

### § 2551.45 [Amended]

3. In § 2551.45, add a new paragraph (f), to read as follows:

* * * * *

(f) Other Volunteer Expenses. Senior Companions may be reimbursed for expenses incurred while performing their volunteer assignments provided these expenses are described in the Memorandum of Understanding negotiated with the volunteer station to which the volunteer is assigned, and there are sufficient funds available to cover these expenses and meet all other

requirements identified in the notice of grant award.

**§ 2551.93 [Amended]**

4. In § 2551.93, remove paragraph (d) and redesignate paragraphs (e) through (i) as paragraphs (d) through (h).

Dated: February 3, 2004.

**Tess Scannell,**

*Director, National Senior Service Corps.*

[FR Doc. 04–2802 Filed 2–9–04; 8:45 am]

BILLING CODE 6050–$$–P

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### 45 CFR Part 2552

**RIN 3045–AA39**

### The Foster Grandparent Program; Amendments

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Proposed rule.

**SUMMARY:** These proposed amendments to the regulations governing the Foster Grandparent Program (FGP) modify provisions concerning deductions for medical expenses and the allowability of certain volunteer expense items.

**DATES:** Submit comments on or before March 26, 2004.

**ADDRESSES:** You may submit comments, identified by the title of the program, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, National Senior Service Corps; Attention Peter Boynton, Program Officer; 9th Floor, 1201 New York Avenue, NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 6010 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) By fax to: (202) 565–2743, Attention Peter Boynton, Program Officer.

(4) Electronically through the Corporation's e-mail address system: *Seniorfeedback@cns.gov.*

**FOR FURTHER INFORMATION CONTACT:** Peter L. Boynton, 202–606–5000, ext. 554.

**SUPPLEMENTARY INFORMATION:**

#### Background

*A. Program Description*

The Foster Grandparent Program provides a way for limited-income people age 60 and older, to serve as extended family members to children and youth with exceptional needs. Foster Grandparents serve from 15 to 40 hours a week in schools, hospitals, correctional institutions, day-care facilities, Head Start centers, and small community-based organizations, both faith-based and secular. They help children who have been abused or neglected, mentor troubled teenagers and young mothers, and care for premature infants and children with physical disabilities. In return for their service, Foster Grandparents receive a stipend of $2.65 an hour, accident and liability insurance and meals while on duty, reimbursement for transportation, and monthly training. More than 30,000 Foster Grandparents tend to the needs of 275,000 young children and teenagers each year.

*B. Medical Expenses Deduction*

Income eligibility for the Foster Grandparent Program is determined based on annual income from all sources after deducting medical expenses. Currently the allowable medical expenses may not exceed 15 percent of the applicable income eligibility guideline. In order to increase the pool of seniors eligible to serve as Foster Grandparents, and in recognition that the cost of medical care and insurance have increased significantly, the Corporation proposes to increase the ceiling for allowable medical expenses to 50 percent of the applicable income eligibility guideline.

*C. Volunteer Expenses*

The Foster Grandparent Program regulations currently distinguish between volunteer expenses that may be paid or reimbursed with federal and required non-federal grant funds and volunteer expenses that must be paid by the volunteer station to which a Foster Grandparent is assigned. Grant funds may be used only to pay for volunteer stipends, insurance, transportation to and from volunteer assignments and official project activities, annual physical examinations, meals taken on assignment, and service recognition expenses. With the exception of certain meals, volunteer stations must pay for all expenses incurred while performing volunteer assignments.

In "Principles and Reforms for a Citizen Service Act," issued by President Bush April 9, 2002, the Administration proposed to create greater flexibility in the use of Federal resources by easing requirements that govern the activities and support of volunteers. The proposed amendment would allow Foster Grandparent Program sponsors to determine, in consultation with volunteer stations, how best to fund volunteer expenses. The respective responsibilities of the sponsor and volunteer station for volunteer expenses would be incorporated in the memorandum of understanding negotiated by the sponsor with each station. Sponsors would be free to maintain the current division of responsibility for volunteer expenses but have the flexibility to use federal and required non-federal funds to cover any volunteer expense when the sponsor determines that doing so would be in the best interest of the project. The provisions of the applicable OMB Cost Principles Circulars referenced in 2552.93(4) would continue to apply to all expenses paid with federal or required non-federal funds.

#### Impact of Various Acts and Executive Orders

After carefully reviewing the changes implemented by this amendment, and after coordination with the Office of Management and Budget, it was determined that:

(1) This was a significant regulatory action under section 3(f)(4) of Executive Order 12866 "Regulatory Planning and Review", and required a review by the Office of Management and Budget;

(2) The Corporation hereby certifies that the Regulatory Flexibility Act does not apply because there is no "significant economic impact on a substantial number of small entities";

(3) That the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II) does not apply because the amendment does not result in any annual expenditures of $100 million by State, local, Indian Tribal governments or the private sector;

(4) That the Paperwork Reduction Act does not apply because the amendments do not impose any additional reporting or record-keeping requirements;

(5) That the Small Business Regulatory Enforcement Fairness Act of 1996 does not apply because it is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, and would not result in an annual effect on the economy of $100 million or more; result in an increase in cost or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets; and

(6) That Executive Order 13132, "Federalism" does not apply because it would not have substantial direct effects on the States or the relationship

between the national government and the States.

**List of Subjects in 45 CFR Part 2552**

Aged, Grant programs—social programs, Volunteers.

For the reasons set forth in the preamble, the Corporation for National and Community Service proposes to amend 45 CFR part 2552 as follows:

## PART 2552—FOSTER GRANDPARENT PROGRAM

1. The authority citation for part 2552 continues to read as follows:

**Authority:** 42 U.S.C. 4950 *et seq.*

**§ 2552.42 [Amended]**

2. In § 2552.42(c), remove the phrase "15 percent" and add in its place the phrase "50 percent".

**§ 2552.45 [Amended]**

3. In § 2552.45, add a new paragraph (f), as follows:

* * * * *

(f) *Other Volunteer Expenses.* Foster Grandparents may be reimbursed for expenses incurred while performing their volunteer assignments provided these expenses are described in the Memorandum of Understanding negotiated with the volunteer station to which the volunteer is assigned and meet all other requirements identified in the notice of grant award.

**§ 2552.93 [Amended]**

4. In § 2552.93, remove paragraph (d) and redesignate paragraphs (e) through (i) as (d) through (h) accordingly.

Dated: February 3, 2004.

**Tess Scannell,**

*Director, National Senior Service Corps.*

[FR Doc. 04–2801 Filed 2–9–04; 8:45 am]

**BILLING CODE 6050–$$–P**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

**45 CFR Part 2553**

**RIN 3045–AA39**

## The Retired and Senior Volunteer Program; Amendments

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Proposed rule.

**SUMMARY:** These proposed amendments to the regulations governing the Retired and Senior Volunteer Program (RSVP) modify provisions concerning the allowability of certain volunteer expense items. The specific amendments are as follows: Sections 2553.43 and 2553.73(d) are modified to allow project funds, including the required non-federal share, to be used to reimburse volunteers for expenses, including transportation costs, incurred while performing volunteer assignments, and for purchase of equipment or supplies for volunteers on assignment.

**DATES:** Submit comments on or before March 26, 2004.

**ADDRESSES:** You may submit comments, identified by the title of the program, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, National Senior Service Corps; Attention Peter Boynton, Program Officer; 9th Floor, 1201 New York Avenue, NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 6010 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) By fax to: (202) 565–2743, Attention Peter Boynton, Program Officer.

(4) Electronically through the Corporation's e-mail address system: *Seniorfeedback@cns.gov.*

**FOR FURTHER INFORMATION CONTACT:** Peter L. Boynton, 202–606–5000, ext. 554.

**SUPPLEMENTARY INFORMATION:**

### Background

*A. Program Description*

RSVP, one of the largest volunteer efforts in the nation, engages people age 55 and older in a diverse range of volunteer activities. Volunteers organize neighborhood watch programs, tutor children, renovate homes, teach English to immigrants, assist victims of natural disasters, and serve their communities in a myriad of other ways. Through RSVP, more than 480,000 volunteers serve a few hours a week to nearly full time at an estimated 65,000 local and national nonprofit groups, government agencies, and small community-based organizations, both faith-based and secular. Volunteers are not paid, but sponsoring organizations may reimburse them for some costs incurred during service, including meals and transportation.

*B. Volunteer Expenses*

The Retired and Senior Volunteer Program regulations currently distinguish between volunteer expenses that may be paid or reimbursed with federal and required non-federal grant funds and volunteer expenses that must be paid by the volunteer station to which a RSVP volunteer is assigned. Grant funds may be used only to pay for volunteer stipends, insurance, transportation to and from volunteer assignments and official project activities, annual physical examinations, meals taken on assignment, and service recognition expenses. With the exception of certain meals, volunteer stations must pay for all expenses incurred while performing volunteer assignments.

In "Principles and Reforms for a Citizen Service Act," issued by President Bush April 9, 2002, the Administration proposed to create greater flexibility in the use of Federal resources by easing requirements that govern the activities and support of volunteers. The proposed amendment would allow Retired and Senior Volunteer Program sponsors to determine, in consultation with volunteer stations, how best to fund volunteer expenses. The respective responsibilities of the sponsor and volunteer station for volunteer expenses would be incorporated in the memorandum of understanding negotiated by the sponsor with each station. Sponsors would be free to maintain the current division of responsibility for volunteer expenses but have the flexibility to use federal and required non-federal funds to cover any volunteer expense when the sponsor determines that doing so would be in the best interest of the project. The provisions of the applicable OMB Cost Principles Circulars referenced in 2553.73(a)(4) would continue to apply to all expenses paid with federal or required non-federal funds.

### Impact of Various Acts and Executive Orders

After carefully reviewing the changes implemented by this amendment, and after coordination with the Office of Management and Budget, it was determined that:

(1) This was a significant regulatory action under section 3(f)(4) of Executive Order 12866 "Regulatory Planning and Review", and required a review by the Office of Management and Budget;

(2) The Corporation hereby certifies that the Regulatory Flexibility Act does not apply because there is no "significant economic impact on a substantial number of small entities";

(3) That the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II) does not apply because the amendment does not result in any annual expenditures of $100 million by State, local, Indian Tribal governments or the private sector;

(4) That the Paperwork Reduction Act does not apply because the amendments do not impose any additional reporting or record-keeping requirements;

(5) That the Small Business Regulatory Enforcement Fairness Act of 1996 does not apply because it is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, and would not result in an annual effect on the economy of $100 million or more; result in an increase in cost or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets; and

(6) That Executive Order 13132, "Federalism" does not apply because it would not have substantial direct effects on the States or the relationship between the national government and the States.

**List of Subjects in 45 CFR Part 2553**

Aged, Grant programs—social programs, Volunteers.

For the reasons set forth in the preamble, the Corporation for National and Community Service proposes to amend 45 CFR part 2553 as follows:

## PART 2553—THE RETIRED AND SENIOR VOLUNTEER PROGRAM

1. The authority citation for part 2553 continues to read as follows:

**Authority:** 42 U.S.C. 4950 *et seq.*

2. In § 2553.43, add a new paragraph (e) to read as follows:

* * * * *

(e) Other Volunteer Expenses. RSVP volunteers may be reimbursed for expenses incurred while performing their volunteer assignments provided these expenses are described in the Memorandum of Understanding negotiated with the volunteer station to which the volunteer is assigned.

**§ 2553.73 [Amended]**

3. In § 2553.73, remove paragraph (d) and redesignate paragraphs (e) through (i) as paragraphs (d) through (h).

Dated: February 3, 2004.

**Tess Scannell,**

*Director, National Senior Service Corps.*

[FR Doc. 04–2803 Filed 2–9–04; 8:45 am]

BILLING CODE 6050–$$–P

## FEDERAL COMMUNICATIONS COMMISSION

**47 CFR Part 54**

**[CC Docket No. 02–6; FCC 03–323]**

## Schools and Libraries Universal Service Support Mechanism

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In this document, the Commission addresses several matters related to the administration of the schools and libraries universal service mechanism (also known as the e-rate program). The Commission seeks comment on several issues, including whether we should change the discount matrix used to determine the level of discounts for which applicants are eligible, the current competitive bidding process, the definition of "rural area" used in the program, the definition of Internet access, current rules relating to wide area networks, and current procedures for recovery of funds. The Commission also seeks comment on measures to limit waste, fraud, and abuse and improve the Commission's ability to enforce the rules governing the program.

**DATES:** Comments are due on or before March 11, 2004. Reply comments are due on or before April 12, 2004. Written comments on the proposed information collection(s) must be submitted by the public, Office of Management and Budget OMB), and other interested parties on or before April 12, 2004.

**ADDRESSES:** All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act (PRA) comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov*, and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to *Kim_A._Johnson@omb.eop.gov* or by fax to 202–395–5167. Parties should also send three paper copies of their filings to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 Twelfth Street, SW., Room 5–B540, Washington, DC 20554. *See* Supplemental Information for further filing instructions.

**FOR FURTHER INFORMATION CONTACT:** Kathy Tofigh, Attorney, at (202) 418–1553, Karen Franklin, Attorney, at (202) 418–7706, or Jennifer Schneider, Attorney, at (202) 418–0425 in the Telecommunications Access Policy Division, Wireline Competition Bureau. For additional information concerning the information collection(s) contained in this document, contact Judith B. Herman at 202–418–0214, or via the Internet at *Judith-B.Heman@fc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Second Further Notice of Proposed Rulemaking (*Second FNPRM*) in CC Docket No. 02–6; FCC 03–323, released on December 23, 2003. A companion Order was also released in CC Docket No. 02–6; FCC 03–323, on December 23, 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 Second Further Notice of Proposed Rulemaking, we address several matters related to the administration of the schools and libraries universal service mechanism (also known as the e-rate program). In the Second FNPRM, we seek comment on several issues, including whether we should change (1) the discount matrix used to determine the level of discounts for which applicants are eligible, (2) the current competitive bidding process, (3) the definition of "rural area" used in the program, (4) the definition of Internet access, (5) current rules relating to wide area networks, and (6) current procedures for recovery of funds. We also seek comment on measures to limit waste, fraud, and abuse and improve the Commission's ability to enforce the rules governing the program. Finally, we seek additional comment on how to ensure the goals of section 254 continue to be met.

### II. Second Further Notice of Proposed Rulemaking

*A. Discount Matrix*

2. Under the Commission's rules, eligible schools and libraries may receive discounts ranging from 20 percent to 90 percent of the pre-discount price of eligible services, based on indicators of need. We seek comment on the effectiveness and efficiency of the discount matrix used to determine support payments for eligible

applicants. In particular, we seek comment on changing the matrix to adjust the levels of discounts received by schools and libraries for supported services. We also particularly seek comment from the State members of the Federal-State Joint Board on Universal Service, and commit to ongoing informal consultations on these issues.

3. Interested parties have indicated that an altered discount matrix may better serve the schools and libraries program. In response to the *Schools and Libraries NPRM*, 67 FR 7327, February 19, 2002, several commenters asserted that reducing the discount rate would make applicants more accountable for their funding requests and dissuade vendors from improperly offering to forgive or refund the 10 percent contribution required of applicants in the highest discount band. In addition, commenters stated that altering the discount rate would be an effective way to increase the availability of funds for eligible applicants outside the highest discount band. While the *Universal Service Order*, 62 FR 32862, June 17, 1997, prioritized support for entities with the greatest level of economic disadvantage, some interested parties have suggested that greater emphasis should be given to the equitable distribution of E-rate funds to eligible applicants from all discount bands, to ensure that they have comparable access to advanced telecommunications and information services. Participants in the Commission's Public Forum on the E-rate program in May 2003 also suggested that the Commission amend its discount matrix, and USAC's Task Force on Waste, Fraud, and Abuse has recommended that the discount level for internal connections be lowered from 90 percent to 80 percent.

4. For these reasons, we seek comment on whether the Commission should amend the discount matrix to reduce the discounts available in some or all of the discount bands, including the current 90 percent discount band. We propose that such a change, if adopted, become effective in Funding Year 2005. We seek comment on whether the current discount matrix provides sufficient incentives for schools and libraries to limit funding requests to services that can be efficiently used and for vendors to competitively price their services. We also seek comment on whether it would be appropriate to adjust the discount matrix in order to expand the reach of funding to lower discount bands. We note that the rules we adopt in the companion Order, limiting the availability of support for internal connections to twice every five years, is intended to make support available to more applicants on a regular basis. How does this action affect the need to adjust the discount matrix? We further seek comment on which discount rates in the matrix, if any, other than the highest discount rate band, should be reduced. Additionally, we seek comment on whether developing a separate discount matrix for Priority Two funding would effectively address issues of waste, fraud, and abuse and expand the reach of funds to a larger number of schools and libraries. Many parties have suggested that, at a minimum, the maximum discount level for internal connections be lowered to 70 percent. What would be the effect of such a change? While we seek comment generally on revisions to the discount matrix, we note that we are not seeking comment on whether to combine the existing Priority One and Priority Two funding categories.

5. We ask that commenters address implementation issues surrounding a change in the discount matrix. Currently, in the event that there are not sufficient funds remaining under the annual cap to support all requests for discounts at a particular discount level, funds are allocated on a pro rata basis among applicants at that discount level. Should funds continue to be allocated among all applicants at the discount level on a pro rata basis, or is there some other means of allocating the remaining funds? We seek comment on how changes to the discount matrix should be implemented across all levels of need. Should certain existing discount levels be combined? For example, should the 90 and 80 percent discount levels be combined? In the alternative, should each discount level be reduced by a fixed amount? For example, should each discount level be reduced by 10 percent? Is there some other method of re-setting other discount levels below the highest discount level? Finally, we seek comment on how the transition to a new discount matrix, if adopted, should be implemented in order to minimize burdens on applicants and disruptions to the program.

*B. Competitive Bidding Process*

6. We seek comment on the current process of applying for discounted services. Pursuant to competitive bidding requirements, eligible schools and libraries that wish to receive support for discounted services must submit FCC Form 470 to the Administrator. The FCC Form 470 describes the applicant's telecommunication needs and notifies service providers of the applicant's intent to contract for eligible services. After the FCC Form 470 has been posted to the Administrator's website for 28 days, the applicant may contract for the provision of services and file an FCC Form 471, requesting discounts for the services. We seek comment on whether this process typically results in competitive bids, and ask commenters to elaborate on the characteristics of recipients that do not ordinarily receive multiple bids. We seek comment on whether this process continues to suit the needs of the schools and libraries program, or if a different application process would better suit the program's needs. We specifically request that commenters discuss how the current process and any proposed processes address the Commission's goal of minimizing waste, fraud, and abuse in the program, while encouraging the benefits of competition as set out in the *Universal Service Order*.

7. A number of parties have suggested that the current Form 470 posting process should be modified for certain types of services. For instance, one participant in the Commission's public forum on the ways to improve the administration of the schools and libraries mechanism suggested that the Form 470 process be eliminated for requests for funding local telephone service. Others suggest that the FCC simplify the application process for applications that only seek funding for local and long distance service (including cell phone service), or that seek to continue an existing telecommunications service or Internet access service. We seek comment on whether it would serve our goals to simplify or eliminate the current FCC Form 470 posting process in such situations. What other mechanisms would ensure that our objective of ensuring that applicants are aware of potential service providers and select reasonably priced services is met? What would be the costs and benefits of such a change?

8. We also seek comment on how we can ensure that applicants select cost effective services in situations in which no entity, or only one entity, responds to a Form 470 posting. In some situations, there may be only one service provider capable of, or willing to, provide the requested service. How can we ensure that the prices for such services are reasonable, and do not waste scarce universal service funds? Should we adopt bright line rules that would impose limits on the amount of discounts that could be available in such situations?

9. We further seek comment on whether the Commission, as a condition of support, should require that each

service provider certify that the prices in its bid have been independently developed. Such a certification could be modeled after the certificate of independent price determination required under federal acquisition regulations. A fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources. Adopting a certification requirement would ensure that service providers are fully aware that they may not communicate with other service providers in a way that subverts the competitive bidding process. Moreover, service providers that violate a non-collusion certification will, in many instances, also violate federal antitrust laws. Requiring certifications of independent pricing would better enable the Commission or other government agencies to enforce the Commission's rules and to seek criminal sanctions where appropriate. We also seek comment on whether the Commission's rules should specifically require that records related to the competitive bidding process for services must be maintained by both the recipient and the service provider for a period of five years.

*C. Definition of Rural Area*

10. We seek comment on modifications to the definition of "rural area" for the schools and libraries mechanism. Currently, an area qualifies as rural under our rules for the schools and libraries support mechanism if it is located in a non-metropolitan county as defined by the Office of Management and Budget or is specifically identified in the Goldsmith Modification to 1990 Census data published by the Office of Rural Health Care Policy (ORHP). We understand, however, that OHRP no longer utilizes the definition adopted by the Commission in 1997, and that there will be no Goldsmith Modification to the most recent 2000 Census data.

11. We seek comment on whether we should adopt a new definition of rural area for the schools and libraries program, and, if so, what that new definition should be. We seek comment on whether there are definitions for rural areas used by other government agencies that would be appropriate for the schools and libraries program. In addition to describing any proposed new definitions, we ask commenters to address the specific proposals that have already been raised in the rural health care proceeding. In particular, several commenters in the rural health care proceeding suggest that the Commission adopt the rural designation system currently utilized by ORHP, the Rural Urban Commuting Area (RUCA) system. Others propose to define rural as non-urbanized areas, as specified by the Census Bureau. We also recently sought comment on the definition of "rural area" in the context of increasing flexibility and the deployment of spectrum-based services in rural areas. There we identified and sought comment on the following potential definitions of "rural area," in addition to the ones already identified above: (1) Counties with a population density of 100 persons or fewer per square mile; (2) Rural Service Areas; (3) non-nodal counties within an Economic Area; (4) the definition of "rural" used by the Rural Utility Service for its broadband program; (5) the definition of "rural" based on census tracts as outlined by the Economic Research Service of the USDA; and (6) any census tract that is not within ten miles of any incorporated or census-designated place containing more than 2,500 people, and is not within a county or county equivalent which has an overall population density of more than 500 persons per square mile of land. Finally, some commenters in that proceeding assert that if the Commission adopts a new definition of rural, it should grandfather existing areas that currently qualify as rural area, if they would no longer qualify under the new definition.

12. Commenters are encouraged to describe the effects of any new definition on the reach of the schools and libraries program, *e.g.*, how many existing rural areas would become non-rural and vice versa, and whether and how the Commission should consider any such changes in adopting a new definition for "rural area." We also seek comment on whether it is necessary or desirable to use the same definition of "rural" for both the schools and libraries program and rural health care program.

*D. Definition of Internet Access*

13. In the *Schools and Libraries NPRM*, the Commission sought comment on whether modifying our rules governing the funding of Internet content would improve program operation consistent with our other goals of ensuring a fair and equitable distribution of benefits and preventing waste, fraud, and abuse. In particular, the Commission sought comment on whether to permit funding for an Internet access package that includes content if that package is the most cost effective form of Internet access. Comments we received in response to the *Schools and Libraries NPRM* indicated that parties had widely varying views of what should be viewed as "content," although many parties expressed concern about providing funding for Internet access bundled with subject matter content. The record developed on this issue, in conjunction with recent changes made in the rural health care program, leads us to seek more focused comment on whether we should alter the definition of Internet access used for the schools and libraries program. Support for Internet access under the schools and libraries program is provided only for "basic conduit access to the Internet." Support in the Internet access category has not been provided for virtual private networks, nor has it been provided for Internet access services that enable communications through private networks. In our recent *Rural Health Care Order*, we concluded that the definition currently used in the schools and libraries context was too limited for the rural health care program, because it precludes support for features that provide the capability to generate or alter the content of information. We concluded that adopting such a limitation in the rural health care context would significantly undercut the utility of providing support for Internet access to rural health care providers, because the ability to alter and interact with information over the Internet is a functionality that could facilitate improved medical care in rural areas.

14. We now seek comment on whether we should amend our definition of Internet access in the schools context to conform to the definition recently adopted for the rural health care mechanism. The Administrator has utilized cost allocation to ensure that support is not provided for features deemed ineligible under the Commission's definition of Internet access in the schools context, and also has provided discounts on services that provide ineligible features when that ineligible portion is provided on an ancillary basis. While we conclude that this has been a reasonable way to implement our rules in an administratively workable fashion, we are concerned that the definition adopted in 1997 may unintentionally preclude support for features of Internet access that would provide substantial benefits to school children and library patrons in the United States. We are concerned that the rule adopted six years ago may not adequately address the full ranges of features and functionalities in Internet access services that are available in the marketplace today. Moreover, we seek comment on whether amending the current definition of Internet access

would simplify and streamline program administration. We also seek comment on how broadening the definition of Internet access (a Priority One service) will impact the availability of funds for Priority Two services. To the extent commenters argue that the definition of Internet access should differ for the schools and libraries program, and the rural health care program, they should provide specific arguments outlining the legal, policy, or technical reasons for that position.

*E. Wide Area Networks*

15. In the *Schools and Libraries NPRM*, the Commission sought comment on whether to modify its policies regarding the funding of Priority One services (telecommunications service and Internet access) that include service provider charges for capital investments for wide area networks. The record we received demonstrated a wide range of views on what changes, if any, should be made in this area.

16. In light of our decision to impose limitations on funding of internal connections, we recognize that there may be even greater incentives than before for service providers to characterize charges for facilities that also could be viewed as internal connections as Priority One services. We believe it desirable, therefore, to seek more focused comment on specific proposals in this area to ensure that funds are distributed in a fair and equitable fashion. If we adopt rules in this area, we anticipate that those rules would be effective no earlier than Funding Year 2005. We seek comment on the advantages and disadvantages of the proposals set forth.

17. We seek comment on whether to refine a standard for determining whether expenditures that subsidize infrastructure investment, either on-premises or off-premises, may properly be viewed as Priority One services. In particular, we seek comment on whether we should adopt a rule that would limit recipients from receiving discounts for service provider upfront capital investments to the extent those capital investments exceed 25 percent of the funding request for the service in question. Such a rule could serve to spread funding for Priority One services more evenly across all recipients, and could limit the extent to which the universal service fund is used to finance significant service provider infrastructure investment.

18. In the *Brooklyn Order*, the Commission determined that recipients may receive discounts on non-recurring charges associated with capital investment made by a service provider in an amount equal to the investment prorated equally over a term of at least three years. We now seek focused comment on whether we should adopt a rule that discounts for any service provider charges for capital investment of $500,000 or more must be prorated over a period of at least five years. Like the other proposal, such a rule could serve to spread funding for Priority One services more evenly across all recipients, and could limit the extent to which the universal service fund is used to finance significant service provider infrastructure investment.

19. We also take this opportunity to address other issues related to the provision of service over wide area networks. Under our current rules, schools and libraries may receive support to obtain telecommunications services using lit fiber. Schools and libraries may also receive discounts when they obtain Internet access that uses lit fiber. In order to receive support for services using lit fiber as a Priority One service, the school or library must purchase a functioning service from either a telecommunications service provider or internet access provider, which in turn is responsible for ensuring that both the fiber and the equipment to light the fiber are provided. If a school or library enters a contract to lease unlit fiber, and obtain telecommunications service or Internet access using lit fiber, it must segregate the cost of the unsupported unlit fiber from the cost of the supported lit fiber service in its application for support.

20. We seek comment on the provision of funding for unlit (dark) fiber under the schools and libraries support mechanism. We note that the Commission has addressed dark fiber in several different contexts. We seek comment on whether we should permit funding for dark fiber, pursuant to section 254(h), to provide additional flexibility to applicants in meeting their communications needs. We also seek comment on whether any limitations should be adopted to preclude discounts on the full cost of dark fiber network buildout when the applicant will not be utilizing the full capacity of that network.

*F. Recovery of Funds*

21. In 1999, the Commission adopted the *Commitment Adjustment Order*, which directed the Administrator to recover funding erroneously committed to schools and libraries in violation of the Telecommunications Act of 1996. The Commission adopted a companion order on the same day granting a limited waiver of four Commission rules to first year applicants who had received commitments and disbursements in violation of Commission rules. Shortly thereafter, pursuant to the *Commitment Adjustment Order*, USAC submitted to the Commission its plan to collect universal service funds that were erroneously disbursed in the first year of the program in violation of the statute. Subsequently, in 2000, the Commission adopted with minor modifications USAC's plan to implement the requirements of the *Commitment Adjustment Order*. In that Order, the Commission also emphasized that the recovery plan "is not intended to cover the rare cases in which the Commission has determined that a school or library has engaged in waste, fraud or abuse." The Commission stated that it would address such situations on a case-by-case basis.

22. At the time the Commission adopted the *Commitment Adjustment Order*, USAC had been distributing funds through the schools and libraries universal service support mechanism for approximately one year. The Commission and USAC then faced a limited range of situations in which errors had occurred requiring the recovery of funds. Since then, through the audit process, the Commission and USAC have become aware of additional scenarios that may require recovery of funds due to errors made by applicants and/or service providers. While the *Commitment Adjustment Implementation Order* implemented procedures, consistent with the Commission's debt collection rules, for recovery of funds that were disbursed in violation of *statutory* requirements, the Commission has not comprehensively addressed the question of what recovery procedures would be appropriate in situations where it is determined that funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements. Likewise, the Commission has not addressed the question of what procedures are needed to govern the recovery of funds that have been committed or disbursed in situations later determined to involve waste, fraud or abuse.

23. In administering the schools and libraries program, we have become aware of instances in which funds were disbursed erroneously, and, depending upon the circumstances surrounding the particular error as well as the procedure or rule implicated, we determined whether recovery was appropriate. In light of these experiences, we now consider whether we should implement procedures or adopt rules governing fund recovery across particular

situations and, more generally, whether additional safeguards or procedures are needed to address the matter of erroneously disbursed funds.

24. In particular, we ask whether we should adopt specific recovery rules for funds that are disbursed in violation of statutory requirements. We also seek comment on whether the Commission should implement procedures or adopt rules for funds that are disbursed in violation of one or more programmatic rules or procedures under the schools and libraries program or in situations involving waste, fraud or abuse. If so, we ask whether we should adopt for all instances of improperly disbursed funds, procedures comparable to those adopted in the *Commitment Adjustment Implementation Order*, or whether we should modify any of those procedures. We note that, through petitions for reconsideration of the *Commitment Adjustment Order* and in comments filed in support of those petitions, particular service providers have argued that the Commission should recover erroneously disbursed funds from the party that received the benefit of the disbursement, specifically the school or library. Although the Commission continues to believe that there are valid reasons for seeking recovery only from service providers, we ask whether there are any circumstances under which recovery would be more appropriately sought from a school or library applicant. At this time we do not resolve the specific issues raised in the pending petitions for reconsideration. Instead, we seek to further develop the record in this area in light of particular issues that have come to our attention and as to which we seek comment in this notice.

25. We note that in some circumstances, there may be a series of rule violations that neither collectively nor individually implicate the full amount of the funding commitment. In the event that the full amount of the funding commitment has been disbursed under such circumstances, we seek comment on what circumstances would make recovery of the full amount of the funding commitment appropriate or inappropriate. We seek comment specifically on whether a pattern of systematic noncompliance with Commission rules warrants recovery of the full amount disbursed, irrespective of the dollars associated with specific audit findings. We note that, unlike errors resulting in statutory violations, the Commission may waive non-compliance with regulations in appropriate circumstances. We recognize that some errors made by applicants and/or service providers may not violate the statute, may be minor in nature and may not affect the integrity of or otherwise undermine policies central to administration of the program. We invite comment on whether there are situations in which such errors would warrant a Commission decision not requiring the recovery of funds. For example, should we waive recovery if the dollars at issue are *de minimis*, either on absolute dollar or percentage of disbursement basis, and if so, what dollar level or percentage would be an appropriate threshold for deeming a violation to be *de minimis*? Parties advocating such a position should describe what mechanism the Commission should use to reach such a result, such as waiving the rules that are not statutory, are minor and do not affect program integrity, focusing particularly on how such a result could be achieved with administrative ease.

26. In addressing the issues, we also invite commenters to explain whether any additional policies or rules directed at circumstances involving waste, fraud and abuse would be necessary, or whether procedures we may adopt in response to our questions will be sufficient in correcting waste, fraud and abuse. In doing so, parties should consider whether certain violations are more critical in our attempts to control waste, fraud and abuse than others. Are the circumstances where waste, fraud and abuse are found the type that should result in recovery of funds from the entity that is responsible for the waste, fraud and abuse? How should we proceed if both the applicant and the service provider are culpable for such misconduct? We seek proposals that include detailed procedures for dealing with waste, fraud and abuse cases.

27. We also seek comment on whether we should implement other measures to ensure service provider and applicant accountability. In particular, we seek comment on whether we should implement procedures or adopt rules to defer action on any additional funding request involving a beneficiary for whom there is an outstanding commitment adjustment proceeding. Under such a policy, no discounts would flow to the beneficiary in subsequent years until there was full satisfaction of the outstanding commitment adjustment. We also seek comment on whether any applicant that has previously been subject to a commitment adjustment proceeding should be subjected to more rigorous scrutiny before receiving commitments in the future. If we were to implement such a policy, what additional showing should be required of the applicant in subsequent years, and how long should the entity be subjected to such enhanced scrutiny?

28. Commenters should provide discrete proposals with examples or data to support their suggestions.

*G. Other Actions To Reduce Waste, Fraud, and Abuse*

29. We seek comment on a number of proposals intended to improve the abilities of the Commission and the Administrator to identify and enforce violations of the Commission's rules and, thereby, to reduce waste, fraud, and abuse in the schools and libraries universal service mechanism.

30. *Cost-Effective Funding Requests.* We seek comment on whether we should codify additional rules to ensure that applicants make informed and reasonable decisions in deciding for which services they will seek discounts. Currently, our rules specify that, in selecting a service provider, a recipient must carefully consider all bids submitted and must select the most cost-effective service offering. Moreover, the *Universal Service Order* makes clear that applicants must request services based on an assessment of their reasonable needs. Our rules do not expressly require, however, that the applicant consider whether a particular package of services are the most cost effective means of meeting its technology needs. Nor do our rules expressly establish a bright line test for what is a "cost effective" service. Would it be beneficial and administratively feasible to develop such a test, or, for example, a benchmark or formula for "cost-effective" funding requests, such as a specified dollar amount per student or per library patron for specified types of service? Should we adopt a ceiling on the total amount of annual funding that an applicant can request? If so, how would such a ceiling is calculated? Are there other rule changes that would ensure applicants are not requesting discounts for services beyond their reasonable needs?

31. *Recordkeeping Requirements.* We seek comment on whether to amend our rules governing the maintenance of records related to the receipt of universal service discounts. Currently, the Commission rules require each entity receiving supported services to keep records related to the receipt of discounted services similar to those that the entity maintains for other purchases, but do not specify how long such records should be maintained. Nor do our rules expressly require all entities to maintain records to demonstrate compliance with all rules. Recent beneficiary audits conducted by USAC's independent auditor identify a number

of instances in which the independent auditor was unable to perform certain procedures due to lack of documentation. We seek comment on whether to amend our rules to require that all records related to the receipt of or delivery of discounted services, sufficient to demonstrate compliance with the Commission's rules governing the schools and libraries mechanism, be maintained by the beneficiary for a period of five years after the last day of the delivery of the discounted services. We also seek comment on what types of documents would be sufficient to demonstrate compliance.

32. In addition, the Commission's rules require service providers to keep and retain records of rates charged to and discounts allowed for entities receiving supported services. We seek comment on requiring that service providers retain all records related to the delivery of discounted services for a period of five years after the completion of the discounted services. Further, we seek comment on a requirement that service providers comply with random audits or reviews that the Commission or USAC may undertake periodically to assure program compliance, including identifying the portions of applicant's bills that represent the costs of services provided to eligible entities for eligible purposes. In accordance with this proposed requirement, we also seek comment on requiring beneficiaries to authorize the release of such information.

33. Commenters are specifically requested to address the impact that these rule changes would have on the Commission's ability to enforce its substantive rules and reduce waste, fraud, and abuse in the schools and libraries universal service program. Commenters are also requested to identify with particularity any additional recordkeeping requirements that would improve the Commission's ability to enforce its rules in the schools and libraries program.

34. *Consultants and Outside Experts.* We seek comment on whether applicants should be required to identify any consultants or other outside experts, whether paid or unpaid, that aid in the preparation of the applicant's technology plan or in the applicant's procurement process. Additionally, we seek comment on whether consultants and other outside experts offering their services to applicants should be required to register with USAC and to disclose any potential conflicts of interests derived from relationships with service providers. Identifying these consultants and outside experts could facilitate the ability of the Commission, and law enforcement officials, to identify and prosecute individuals that may seek to manipulate the competitive bidding process or engage in other illegal acts. We also seek comment on whether we should adopt a rule that would prohibit an entity that seeks to become a service provider from providing any form of technology planning or procurement management assistance to applicants. Under such a rule, any entity that provides management support services, technical assistance, consulting services, assistance in technical evaluations, or systems engineering services to a particular recipient would be barred from competing for the contracts for eligible services with that recipient.

35. *Distribution of Support Payments.* We seek comment on whether the Commission should amend its rules to codify certain existing administrative procedures related to the payment of support for discounted services. There are two methods by which support for discounts is distributed. One method is for the service provider to submit an invoice to the Administrator, seeking payment for the discounted portion of the supported service using FCC Form 474. The other method is for the recipient of the discounted services to pay the service provider and then seek reimbursement from the Administrator using FCC Form 473. Under either method, the Administrator requires that a completed Service Provider Annual Certification (or FCC Form 473) must be filed in order for payment to be made. We seek comment on whether this procedure should be codified in the Commission's rules. We also seek comment on whether the Commission should codify rules regarding the establishment of deadlines for service providers to file invoices with the Administrator. The timely receipt and payment of invoices is extremely important to the administration of the program in accordance with the Commission's rules. Accordingly, we seek comment on whether to codify the Administrator's existing policy not to provide support for untimely filed invoices.

36. USAC provides an extension of the deadline to file invoices under certain conditions. Under current USAC procedures, these circumstances include: authorized service provider changes; authorized service substitutions; no timely notice to USAC (*e.g.*, the service providers' Form 486 Notification Letter is returned to USAC as undeliverable); USAC errors that result in a late invoice; USAC delays in data entering a form that ultimately result in a late invoice; documentation requirements that necessitate third party contact or certification; natural or man-made disasters that prevent timely filing of invoices; good Samaritan BEARs; and circumstances beyond the service providers control. We seek comment on whether to codify the described procedures providing for an extension of the deadline to file invoices.

37. *Technology Plans.* We seek comment on whether the Commission should revise its rules regarding technology plans. To ensure applicants make a *bona fide* request for services, the Commission requires applicants to undertake a technology assessment before making a request for services. Section 54.504(b)(2)(vii) states that in its FCC Form 470 the applicant must certify that it has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission. The instructions for FCC Form 470 permit applicants to certify that their technology plan will be approved by the relevant body no later than the time when service commences. The Commission adopted specific requirements for information that must be included in the FCC Form 470, but did not adopt specific rules addressing what should be included in a technology plan. In the *Universal Service Order*, however, the Commission set forth what applicants should address in their technology plans, which USAC implemented in its guidelines for technology plans. We seek comment on whether we should codify USAC's current guidelines regarding technology plans. Should we require that, as part of the technology plan process, applicants analyze the cost of leasing versus purchasing E-rate eligible products and services? Should we require the applicant to consider the most cost-effective way to meet its educational objectives? In addition, we seek comment on whether the Commission's technology planning requirements should be amended to be made more consistent with the technology planning goals and requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services. We also seek comment on whether the Commission's technology planning requirements could be strengthened through additional or different qualifications for entities, including states, which approve technology plans.

38. *Prevention of Unauthorized Applications by Subunits.* We seek comment on whether the Commission should adopt rules to prevent subunits, such as individual schools or library branches, from filing applications

without the authorization of the central authorities over those subunits, such as school districts and library systems. We also seek comment on how such restrictions should be implemented, if adopted. For example, should an applicant be required to certify that it has the appropriate authorization from its central authority, or should a central authority be permitted to request the Administrator to reject any application filed by one of its subunits?

39. *Use of Surveys to Determine School Lunch Eligibility.* The Universal Service Order stated that a school may use federally-approved alternative mechanisms which rely on actual counts of low-income children to determine the level of poverty for purposes of the schools and libraries universal service discount mechanism. USAC implemented this provision by permitting schools to collect this information from surveys. Currently, USAC procedures require a response rate of at least 50 percent to ensure a statistically valid sample to project the percentage of eligibility for all students in the school. We seek comment on whether to codify this procedure, and if so, should we alter the required response rate? Is a 50 percent response rate higher than necessary to ensure a statistically valid sample? We seek to streamline program administration in this area while protecting against any potential abuse. Should the required response rate depend on the size of the population being surveyed?

*H. Miscellaneous*

40. *Determining Whether Rates Are Affordable.* We seek comment generally on how we can ensure that we continue to meet the requirements of section 254 in an efficient and equitable manner. Congress mandated that schools and libraries across the United States have access to advanced telecommunications and information services at affordable rates. As the expert agency charged with this critical task, we believe it important to consider periodically how we should determine what funding is necessary to ensure access at "affordable" rates. Give the myriad of service offerings in today's marketplace, how can we measure our progress in ensuring "affordable" access?

41. *Priority for Applicants that Have Not Achieved Connectivity.* We note that, in 1996, prior to implementation of the E-rate program, 14 percent of public school instructional rooms (*i.e.*, classrooms) were connected to the Internet. According to the most recently available data, in 2002, 92 percent of public school classrooms were connected to the Internet. While considerable progress has been made in achieving the congressional goal of enhancing access of school classrooms and libraries to advanced telecommunications and information services, we are concerned that our rules as currently structured may preclude full attainment of that goal. As noted, a number of commenters in this proceeding have suggested that altering the discount rate would be an effective way to increase the availability of funds for eligible applicants outside the highest discount band. We seek comment on whether other measures should be adopted to further the objectives set forth in section 254(h)(2)(A). In particular, we seek comment on whether we should provide priority for internal connections to those applicants that have not yet achieved Internet connectivity in their classrooms or libraries. If we were to adopt such a proposal, should the priority for funding be targeted to those entities where 50 percent or more of students are eligible for the school lunch program? Under such a proposal, any entity in an area where 50 percent or more of students are eligible for free school lunch that certifies it has not yet implemented internal connections to achieve Internet connectivity in any classrooms or in the library would receive funding for internal connections in advance of all applicants seeking funding for internal connections that certify that they have implemented internal connections to achieve Internet connectivity in multiple classrooms or locations. Are there other rule changes that would ensure that all entities are able to provide access to the Internet from individual classrooms or the library?

## III. Procedural Matters

*A. Initial Paperwork Reduction Act of 1995 Analysis*

42. This Second Further Notice of Proposed Rulemaking (*Second FNPRM*) contains either a proposed or modified information collection. As part of a continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second FNPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13. Public and agency comments are due at the same time as other comments on this *Second FNPRM;* OMB comments are due April 12, 2004. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

*B. Initial Regulatory Flexibility Analysis*

43. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Second FNPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second FNPRM.* The Commission will send a copy of this *Second FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Second FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register.**

1. Need for, and Objectives of, the Proposed Rules

44. In the *Second FNPRM,* we seek comment on whether the current discount matrix provides sufficient incentives for schools and libraries to limit funding requests to services that can be efficiently used and whether modifying the discount matrix would make funds available to a greater number of schools and libraries. Further, we ask whether the Commission should adopt rules adjusting the discount matrix for certain supported services. To the extent that commenters support creating a separate discount matrix for priority two services, we seek comment on the structure and implementation issues associated with a new discount matrix. In light of the limitations placed on applications for internal connection discounts, which are Priority Two services, we seek comment on measures to deter the mischaracterization of internal connections as Priority One services.

45. In addition, we seek comment on whether the current process for applying for discounted services sufficiently addresses the Commission's goals of minimizing waste, fraud, and abuse in the program, while encouraging the benefits of competition as set out in the *Universal Service Order.* In that regard, we solicit comment on the current competitive

bidding process and the efficiency and effectiveness of using Form 470 and requested comment regarding any means by which the Commission could ensure that applicants select cost-effective services. Also, we seek further comment whether the Commission, as a condition of support, should require that each service provider certify that the prices in its bid have been independently developed. Further, we request comment on whether the Commission's rules should specifically require that records related to the competitive bidding process for services be maintained by both the recipient and service provider for a period of five years.

46. Next, we seek comment on modifications to the definition of "rural area" for the schools and libraries mechanism and ask whether it would be necessary or desirable to use the same definition of "rural" for both the schools and libraries program and rural health care program. Similarly, we seek comment whether the definition of Internet access in the schools context should be changed to mirror the definition of Internet access recently adopted in the *Rural Health Care Order*.

47. In light of the restrictions imposed on receiving discounts for internal connections, we seek comment asking whether any measures should be taken to evaluate service provider charges for capital investments for wide area networks, a Priority One service. In that regard, we seek comment whether expenditures that subsidize infrastructure investment, either on-premises or off-premises, may properly be viewed as Priority One services. We also seek comment on funding for unlit (dark) fiber under the E-rate program. In addition, we ask whether we should adopt specific recovery rules for funds—entire or partial commitments—that are disbursed in violation of the statute or programmatic rules or procedures. In that connection, we seek comment regarding measures to prevent waste, fraud, and abuse associated with improper disbursement of E-rate funds.

48. We seek comment on various measures to abate waste, fraud and abuse in the schools and libraries universal service mechanism, including whether a rule should be adopted requiring that all records related to the receipt of or delivery of discounted services be maintained by beneficiaries and service providers for a period of five years after the completion of the discounted services. In addition, we solicit comment whether rules defining "cost-effective" service should be adopted. Also, we seek comment whether applicants should be required to identify any consultants or other outside experts, whether paid or unpaid, that aid in the preparation of the applicant's technology plan or in the applicant's procurement process. In addition, we solicit comment on the adoption of a rule requiring the filing of a Service Provider Annual Certification (or FCC Form 473) with the Administrator for remittance of payment. We also seek comment as to whether the Commission should codify rules establishing deadlines for service providers to file invoices with the Administrator and whether the Administrator's existing policy to deny support for untimely filed invoices, except in limited circumstances, should be codified. In an effort to further reduce waste, fraud and abuse in the E-rate program, we request comment whether current guidelines from the *Universal Service Order* and USAC regarding the content of the applicants' technology plans should be adopted as Commission rules. We also ask for comments whether the Commission's technology planning goals should be consistent with the requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services. In addition, we seek comment whether the Commission should adopt rules to prevent individual schools and libraries from submitting applications without coordination with or authorization from the central authorities, namely school districts and library systems. We solicit comment on whether USAC's policy of accepting surveys to determine National School Lunch eligibility should be codified.

49. Finally, we seek comment whether our rules should be modified to ensure a funding priority for applicants that have not yet achieved internet connectivity in their classrooms or libraries. We also seek comment generally on whether any rules should be adopted to ensure affordable rates for eligible services and ensure access to eligible services.

2. Legal Basis

50. The legal basis for the *Second FNPRM* is contained in sections 1 through 4, 201 through 205, 254, 303(r), and 403 of the Communications Act of 1934, as amended, and § 1.411 of the Commission's rules.

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

51. We have described in detail in the Final Regulatory Flexibility Analysis in the companion Order in this proceeding, the categories of entities that may be directly affected by our proposals. For this Initial Regulatory Flexibility Analysis, we hereby incorporate those entity descriptions by reference.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

52. With one exception, the specific proposals under consideration in this *Second FNPRM* would not, if adopted, result in additional recordkeeping requirements for small businesses. With regard to the one exception, we propose adoption of a rule that requires each entity receiving supported services to keep all records related to the receipt of or delivery of discounted services for a period of five years after implementation of the discounted services. This proposal includes additional recordkeeping because the current Commission rule requires each entity receiving supported services to keep records related to receipt of discounted services similar to those that the entity maintains for other purchases and does not specify the time period for which such records must be maintained. Thus, the revised rule means that the records need not be kept beyond the five year period.

53. We have sought comments regarding the other proposed rules; however, new recordkeeping requirements are not involved.

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

54. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance and 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 part thereof, for small entities.

55. In the *Second FNPRM*, we seek comment regarding the adoption of rules requiring addition recordkeeping for each entity receiving discounted services. Moreover, we seek comments asking for identification of any recordkeeping measures that would improve the Commission's ability to enforce its rules governing waste, fraud, and abuse in the schools and libraries program. In that regard, we note the findings by recent beneficiary audits

conducted by KPMG, which indicate that better documentation would improve the ability to audit the beneficiaries. Since abatement of waste, fraud, and abuse in the schools and libraries program is the objective, excluding small entities from such a requirement would contravene that objective and present a loophole that could damage the integrity of the program. Decreasing the likelihood of waste, fraud, and abuse preserves program funding for discounts to all eligible schools and libraries. We invite comment on this recordkeeping requirement and ask that those parties who object to the proposed requirement offer an alternative and explain the merits of their alternative.

6. Federal Rules that may Duplicate, Overlap, or Conflict With the Proposed Rules

56. None.

*C. Comment Filing Procedures*

57. We invite comment on the issues and questions set forth in the *Second FNPRM* and Initial Regulatory Flexibility Analysis contained herein. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before March 11, 2004, and reply comments on or before April 12, 2004. All filings should refer to CC Docket No. 02–6. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

58. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/*. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To receive 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.

59. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

60. 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).

61. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002.

—The filing hours at this location are 8 a.m. to 7 p.m.
—All hand deliveries must be held together with rubber bands or fasteners.
—Any envelopes must be disposed of before entering the building.
—Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
—U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.
—All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

62. Parties filing electronic media should be advised that the Commission released a public notice on August 22, 2003 providing new guidance for mailing electronic media. In brief, electronic media should NOT be sent through USPS because of the eradiation process USPS mail must undergo to complete delivery. Hand or messenger delivered electronic media for the Commission's Secretary should be addressed for delivery to 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002, and other messenger-delivered electronic media should be addressed for delivery to 9300 East Hampton Drive, Capitol Heights, MD 20743.

63. Parties who choose to file by paper should also submit their comments on diskette to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–B540, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 02–6), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy—Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Natek, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554.

64. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex, International Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. In addition, the full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

65. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with § 1.49 and all other applicable sections of the Commission's rules. We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage parties to track the organization set forth in the FNPRM in order to facilitate our internal review process.

*D. Further Information*

66. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 voice, (202) 418–7365 TTY, or *bmillin@fcc.gov*. This

Second FNPRM can also be downloaded in Microsoft Word and ASCII formats at *http://www.fcc.gov/wcb/universal_service/schoolsandlibs.html.*

67. For further information, contact Kathy Tofigh at (202) 418–1553, Karen Franklin at (202) 418–7706, or Jennifer Schneider at (202) 418–0425 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

**IV. Ordering Clauses**

68. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, this Second Further Notice of Proposed Rulemaking is adopted.

69. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Second Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 54**

Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

[FR Doc. 04–2734 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–U

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–144, MB Docket No. 04–16, RM–10840]**

### Digital Television Broadcast Service; Roswell, NM

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition filed by Eastern New Mexico University proposing the allotment and the reservation of DTV channel 31 for noncommercial educational use at Roswell, New Mexico. DTV Channel *31 can be allotted to Roswell at reference coordinates 33–19–56 N. and 104–48–17 W. Since the community of Roswell is located within 275 kilometers of the U.S.-Mexican border, concurrence from the Mexican government must be obtained for this allotment.

**DATES:** Comments must be filed on or before March, 22, 2004, and reply comments on or before April 4, 2004.

**ADDRESSES:** The Commission permits the electronic filing of all pleadings and comments in proceedings involving petitions for rule making (*except in broadcast allotment proceedings*). *See Electronic Filing of Documents in Rule Making Proceedings*, GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows:

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Media Bureau, (202) 418–1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 04–16, adopted January 22, 2004, and released January 30, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via-e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Digital television broadcasting, Television.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

### PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.622 [Amended]**

2. Section 73.622(b), the Table of Digital Television Allotments under New Mexico is amended by adding DTV channel *31 at Roswell.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

[FR Doc. 04–2835 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–94, MB Docket No. 04–11, RM–10841]**

### Digital Television Broadcast Service; Colby, KS

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition filed by Smoky Hills Public Television Corporation, proposing the allotment of DTV channel 19 to Colby, as an educational channel. DTV Channel *19 can be allotted to Colby, Kansas, at reference coordinates 39–23–45 N. and 101–03–37 W in compliance with §§ 73.625(a) and 73.623(d) of the Commission's Rules.

**DATES:** Comments must be filed on or before March 15, 2004, and reply comments on or before March 30, 2004.

**ADDRESSES:** The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (except in broadcast allotment proceedings). *See Electronic Filing of Documents in Rule*

*Making Proceedings*, GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows:

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Media Bureau, (202) 418–1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 04–11, adopted January 16, 2004, and released January 22, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Digital television broadcasting, Television.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.622 [Amended]**

2. Section 73.622(b), the Table of Digital Television Allotments under Kansas is amended by adding DTV channel *19 at Colby.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

[FR Doc. 04–2832 Filed 2–9–04; 8:45 am]

**BILLING CODE 6712–01–P**

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–73; MB Docket No. 02–164, RM–10476]**

### Radio Broadcasting Services; Cimarron, NM

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule; dismissal.

**SUMMARY:** Sierra Grande Broadcasting filed a petition for rule making proposing the allotment of Channel 236C2 at Cimarron, New Mexico, as the community's first local aural transmission service. *See* 67 FR 47502, July 19, 2002. Petitioner subsequently filed an amendment requesting the allotment of Channel 296C1 in lieu of Channel 236C2 at Cimarron, New Mexico. The new proposal to allot Channel 296C1 at Cimarron conflicts with a pending petition to allot Channel 296A at Las Vegas, New Mexico, and will be considered in the context of that proceeding. A showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, we will dismiss petitioner's petition in the instant proceeding.

**FOR FURTHER INFORMATION CONTACT:** Sharon P. McDonald, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 02–164, adopted January 14, 2004, and released January 20, 2004 . The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2834 Filed 2–9–04; 8:45 am]

**BILLING CODE 6712–01–P**

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–72; MB Docket No. 04–12; RM–10834]**

### Radio Broadcasting Services; Littleville and Russellville, AL

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition for rulemaking filed by Clear Channel Broadcasting Licenses, Inc. requesting the reallotment of Channel 278A from Russellville, Alabama, to Littleville, Alabama, and modification of the license for Station WMXV to specify operation at Littleville. Channel 278A can be allotted to Littleville at coordinates 34–35–44 and 87–40–47. In accordance with the provisions of § 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest for the use of Channel 278A at Littleville.

**DATES:** Comments must be filed on or before March 8, 2004, and reply comments on or before March 23, 2004.

**ADDRESSES:** Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Marissa G. Repp, Hogan & Hartson L.L.P., 555 Thirteenth Street, NW., Washington, DC 20004–1109.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Scheuerle, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 04–12, adopted January 14, 2004, and released January 20, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW, Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Qualex International, Portals II, 445 12th Street, SW, Room CY–B402, Washington, DC 20554, telephone 202–863–2893, or via e-mail *qualexint@aol.com*.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by adding Littleville, Channel 278A, and removing Russellville, Channel 249A.[1]

[1] In MM Docket No. 01–62, Station WKGL was ordered to specify operation on Channel 278A in lieu of Channel 249A at Russellville, Alabama. *See Ardmore, AL et al.*, 17 FCC Rcd 16332. Station WKGL was granted a license (BMLH–20030415ACF), which implemented this change.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–2833 Filed 2–9–04; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

### Endangered and Threatened Wildlife and Plants; 90-day Finding for a Petition To List *Cymopterus deserticola* (Desert Cymopterus) as Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding for a petition to list *Cymopterus deserticola* (desert cymopterus) as endangered under the Endangered Species Act of 1973, as amended. We find that the petition does present substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the species, and will issue a 12-month finding to determine if the petitioned action is warranted. To help ensure the review is comprehensive, we are soliciting information and data regarding this species.

**DATES:** The finding announced in this document was made on January 29, 2004. To be considered in the 12-month finding for this petition, comments and information must be submitted to us by April 12, 2004.

**ADDRESSES:** Data, information, written comments and materials, or questions concerning this petition and finding must be submitted to the Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003. The petition finding and supporting information are available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, at the above **ADDRESSES** (telephone 805/644–1766; facsimile 805/644–3958).

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on all information available to us at the time we make the finding. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the **Federal Register**. Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If the finding is that substantial information was presented, we are required to promptly commence a review of the status of the species, if one has not already been initiated under our internal candidate assessment process.

*Cymopterus deserticola* became a candidate for listing in 1975. In 1993, the Service elevated the status of *C. deserticola* from a "C2" candidate to a "C1" candidate. In 1995, *C. deserticola* was returned to the "C2" category, citing reduced threats due to the development of the West Mojave Plan (BLM 2003). In 1996, the Service discontinued the recognition of "C2" candidates and henceforth referred to former "C1" candidates as "candidates" (61 FR 7457).

On April 15, 2002, the Service received a petition, dated March 29, 2002, from Ileene Anderson of the California Native Plant Society and Daniel Patterson of the Center for Biological Diversity, requesting that the Service list *Cymopterus deserticola* (desert cymopterus) in the western Mojave Desert, California, as endangered pursuant to the Act, and to concurrently designate critical habitat. The petition requested endangered status because the petitioners assert very few *C. deserticola* remain in the western Mojave Desert, this species has suffered declines in recent years, and habitat destruction is ongoing and impending.

In response to the petitioners' requests to list *Cymopterus deserticola*, we sent a letter to the petitioners on June 12, 2002, explaining that we would not be able to address their petition until fiscal year 2003. The reason for this delay was that court orders and settlement agreements required nearly

all of our listing funding for fiscal year 2002. At the end of fiscal year 2003, we were able to initiate work on the petition.

**Biology**

*Cymopterus deserticola* is a member of the carrot family (Apiaceae). *C. deserticola* varies from other members of the genus *Cymopterus* by having extremely dense, single-tiered umbels (flower stems radiating from a central point). Individual plants generally reach 6 inches (in) (15 centimeters (cm)) in height when in flower. The leaves are highly dissected (fernlike), grayish green and hairless, and are arranged in a basal rosette around the stem-root crown that is just below the soil surface.

*Cymopterus deserticola* is unusual in having herbaceous aboveground leaves and inflorescences (flowering structure) that die back at the end of the growing season, leaving only the perennial taproot to overwinter. The leaves and inflorescences may only be visible in years when climatic conditions, including sufficient rainfall, are present. In some years, individuals may produce leaves but not inflorescences. In years when flowering does occur, the inflorescences emerge between March and May. When climatic conditions are unfavorable, including drought, the plant may persist solely as a dormant taproot. Although many perennial desert species survive periods of drought-induced dormancy, the lifespan of the perennial taproot of *C. deserticola* is unknown.

In 1915, Thomas Brandegee first described *Cymopterus deserticola* from material collected near Kramer Junction, San Bernardino County, California. The historic distribution of *C. deserticola* ranges from Apple Valley, San Bernardino County, northward approximately 55 miles (mi) (89 kilometers (km)) to the Cuddeback Lake basin in San Bernardino County, and westward approximately 45 mi (73 km) to the Rogers and Buckhorn Lake basins on Edwards Air Force Base (EAFB) in Kern and Los Angeles Counties (Mitchell *et al.* 1995; California Department of Fish and Game (CDFG) 2003).

The Apple Valley populations are known only from historic collections made in 1915, 1920, and 1941. Recent attempts to locate *Cymopterus deserticola* in areas of the historic Apple Valley collections have been unsuccessful, and it appears likely that these populations have been lost to urban development and off-highway vehicle (OHV) use (Moe 1988). The Apple Valley populations are also disjunct by at least 28 mi (45 km) from the nearest known extant populations.

The extant range of the species includes the Rogers Dry Lake basin, the Harper Dry Lake basin, the Cuddeback Dry Lake basin, and the Superior Dry Lake basin. This extant range extends approximately 50 mi (80 km) from east to west and 35 mi (56 km) from north to south. However, the plant usually occurs in areas adjacent to these ephemeral (transitory) lakes.

Survey information is more complete for some areas than others. In addition, survey results are not always comparable because of the variation in how individuals tallied populations or colonies (concentrations of individuals) across the landscape. Moreover, surveys only count the individuals visible above ground; consequently, survey numbers represent only a subset of the total number of individuals that may be present at that population.

The greatest number of individuals are located within the Rogers Dry Lake basin on Edwards Air Force Base (EAFB), where approximately 14,093 plants were counted or estimated over 1,465 acres (ac) (593 hectares (ha)) throughout the base in 67 survey areas (Mitchell *et al.* 1995), including 8 previously documented populations from 1988 (Moe 1988; CDFG 2001) and 2 historic collections. Prior to extensive surveys conducted in 1995, *Cymopterus deserticola* had been reported from 29 populations on EAFB (Mitchell *et al.* 1995). The intensity of survey efforts for *C. deserticola* in 1995 and favorable weather contributed to the relocation of 19 of the previously known 29 populations, and the discovery of 57 new populations. Approximately 10,402 plants were counted in all the 19 populations in 1995, while fewer than 1,700 plants had previously been reported for these 19 populations. Within this watershed, there are 9 other populations outside of EAFB in the Peerless Valley where *C. deserticola* has been observed. Less than 200 plants have been cumulatively documented from these nine populations (Bureau of Land Management (BLM) 2001). In all, 76 *C. deserticola* populations were observed within this basin in 1995, with 14,362 plants counted.

In 2003, EAFB undertook efforts to develop an initial habitat model for *Cymopterus deserticola* and two other plant species of concern, *Calochortus striatus* (Alkali mariposa lily) and *Eriophyllum mohavense* (Barstow wooly sunflower). Six new populations of *C. deserticola* were found on base and just to the north of the base during field verification of the habitat model (Wood 2003). Therefore, *C. deserticola* has occurred, or is known to occur, at 92 populations on EAFB.

The Harper Dry Lake basin contains 6 populations, which together support at a maximum 200 *Cymopterus deserticola* plants (BLM 2001). The Cuddeback Dry Lake basin supports four populations of *C. deserticola*. In 2001, more than 40 plants were observed at these populations. At the Superior Dry Lake basin in 2001, Silverman and Cione discovered a range extension to the east. Forty plants in a single population were counted (BLM 2001).

*Cymopterus deserticola* grows on loose sandy soils in Joshua tree woodland, saltbush scrub, and Mojavean desert scrub communities in the western Mojave Desert between 2,000 and 3,000 feet (610 and 915 meters) in elevation (Bagley 1998). The sandy soils that *C. deserticola* requires can be found in the following, alluvial fans and basins, stabilized sand fields, and occasionally sandy slopes of desert dry lake basins. This species typically grows in the cool, moist conditions of winter and early spring, and goes dormant as the warmer weather progresses in April and May (Bagley 1998).

**Conservation Status**

The petitioners provided substantial amounts of information relating to threats to *Cymopterus deserticola*. Information on the status and threats to the species in relation to the five factors in section 4 of the Act are summarized below:

With respect to factor A, the petitioners assert that the Rogers Dry Lake basin, which contains the largest concentration of known extant species occurrences, is threatened by habitat alteration and destruction due to military activities on EAFB. One example is the cleanup of the groundwater contamination from the Air Force Research Laboratory Propulsion Directorate (EAFB 1998) that underlies one of the documented study sites for *Cymopterus deserticola* as stated in the 1995 Mitchell *et al.* report.

The petitioners claim that utility construction has also adversely affected this species and its habitat in the southern portion of the Harper Dry Lake basin and the northern portion of Rogers Dry Lake in the BLM designated utility corridor and adjacent sites (Bagley 1998). Types of projects in utility corridors include construction of transmission lines and pipelines. An example is the Kern River Pipeline expansion project that potentially threatens six populations on private lands west of Kramer Junction between Highway 58 and EAFB. The realignment

and widening of State Highway 58 also potentially poses a threat to the species and its habitat.

Other factors the petitioners claim are adversely affecting *Cymopterus deserticola* and its habitat include OHV activity, oil and gas development, and the BLM's Land Tenure Adjustment program. The BLM has assessed the habitat at the Superior Valley site as being in "poor condition" due to adverse affects from OHV recreation (BLM 1998). Oil and gas development may have increased the potential for destroying habitat for this species in the Cuddeback Dry Lake basin and Rogers Dry Lake. One population of *C. deserticola* occurs on BLM lands available for Land Tenure Adjustment, potentially removing another population from public management and making it available for private development.

With regard to factor B, the petitioners state no commercial or recreation overutilization for the species is known at this time, but that, because of its rarity, collection for scientific or educational purposes may be a threat to the species.

With respect to factor C, the petitioners assert that grazing poses another threat to this species. Although the effects of livestock grazing on *Cymopterus deserticola* is not documented in the literature, sheep grazing has been documented to have directly affected two populations. Although according to Bagley (1998), grazing is not permitted on EAFB, one of these two populations is located on the base. Individuals at this site on EAFB were entirely eliminated as a result of grazing by trespass sheep in 1994. On two other sites that occur on BLM lands in Harper Dry Lake outside of the grazing allotment, trespass of sheep has been chronic (BLM 1998). In addition to direct predation (eating the plants), the ecological processes of the habitat are altered by livestock trampling, which may disrupt water holding capacities of the soil, promote soil erosion from wind, and change the plant taxa composition found within the community to non-native weedy species that outcompete native species.

High levels of leaf predation on *Cymopterus deserticola* have been observed in two studies on EAFB in areas not grazed by livestock (Mitchell *et al.*1995; Charleton 1993). Predation is likely due to a variety of herbivores such as black-tailed jackrabbits (*Lepus californicus*), brush rabbits (Family Leporidae), ground squirrels (Family Sciuridae), kangaroo rats (Family Heteromyidae), mice (Families Cricetidae and Muridae), desert tortoise (*Gopherus agassizii*), caterpillars (Order Lepidoptera), and beetles (Order Coleoptera) (Bagley 1998). The petitioners claim no specific disease threats have been reported for *C. deserticola*.

In respect to factor D, the petitioners address the draft WMP (BLM 2003), which will function as a multi-species Habitat Conservation Plan for the desert tortoise (*Gopherus agassizii*) and other listed and sensitive species within the planning area. The petitioners claim that *Cymopterus deserticola* has been dropped from the planning process because the species cannot have a viable conservation strategy without military participation (BLM 2002). According to the draft Environmental Impact Report and Statement for the draft WMP (BLM 2003), *C. deserticola* is still a species targeted for conservation measures, and has not been dropped.

The draft WMP (BLM 2003) requires botanical surveys for projects proposed within the Fremont-Kramer and Superior-Cronese Desert Wildlife Management Areas (DWMAs) for those areas of windblown sand on the east side of larger playas, including Harper Dry Lake, Superior Dry Lake, and Cuddeback Dry Lake in San Bernardino County. If the plant is located, prescriptions call for avoiding all occurrences to the maximum extent practicable, and reporting the loss of plants. In Kern County, the draft WMP proposes the following measures: establishing the North Edwards Conservation Area, requiring botanical surveys, and adjusting the boundary over time to reflect survey results. The draft WMP has undergone numerous revisions over the last decade and is still in draft form and the implementation of conservation strategies for *Cymopterus deserticola* and its habitat remain a proposal.

The petitioners also state that the lack of any management or conservation strategies by EAFB and ongoing projects on EAFB is adversely affecting this species and leave the future survival of *C. deserticola* populations on EAFB uncertain. Petitioners assert that, since the core population of this species is located on EAFB, without assured conservation measures in place, the long-term survival of *C. deserticola* remains in question.

With regard to factor E, the petitioners claim that the "extremely limited distribution and relatively small numbers of individuals" of this species, make populations of *Cymopterus deserticola* vulnerable to extinction from stochastic events (*e.g.*, drought and disease). Species with few populations and individuals are vulnerable to the threat of naturally occurring events, causing extinction through mechanisms operating either at the genetic level, the population level, and/or the landscape level. Isolation of small populations from one another can lead to loss of genetic variation due to genetic drift and increased inbreeding (Hamrick and Godt 1996). Genetic consequences of drift and loss of genetic variation include loss of adaptability to change and inbreeding, which is the mating of individuals likely to share some of their genes due to common ancestry. Inbreeding depression is thought to reduce fitness of individual plants; it may negatively affect components such as seed availability, germination success, and flower and fruit production (Falk 1992). At the landscape level, random natural events, such as storms or drought, could destroy a significant percentage of individuals or entire populations; a hot fire could destroy a seedbank as well. The restriction of colonies to small sites increases their risk of extinction from such naturally occurring events. The genetic characteristics of *Cymopterus deserticola* have not been investigated; therefore, the degree to which these characteristics contribute to the likelihood of *C. deserticola* being vulnerable to extinction for these reasons is unknown.

**Summary**

The information provided by the petitioners and information in our files presents substantive information that *Cymopterus deserticola* may be threatened by habitat alteration and destruction and livestock grazing throughout its range, both on EAFB and BLM lands. The draft WMP may contain measures that contribute to the conservation of *C. deserticola*. However, the WMP only addresses a small portion of this species' range, which is outside of EAFB. More than 90 percent of the known populations occur on EAFB and conservation measures for the species were not included in the EAFB INRMP.

**Finding**

We have reviewed the petition to list *Cymoterus deserticola* and the supporting documentation, information in our files, and other readily available information. We find that the petition did include substantial information indicating that the listing of *C. deserticola* may be warranted. With the publication of this notice, we are initiating a status review of *C. deserticola* to determine whether listing is warranted.

The petition also requests us to designate critical habitat for this species. If we determine in our 12-

month finding that listing *Cymopterus deserticola* is warranted, we will address the designation of critical habitat in the subsequent proposed listing rule or as funding allows.

**Public Information Solicited**

When we find that there is substantial information indicating that the petitioned action may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the *Cymopterus deserticola* throughout the species' range. We request any additional information, comments, and suggestions from the public, governmental agencies, the scientific community, industry, and any other interested parties concerning the status of this species throughout its range. We are seeking information regarding historic and current distribution, habitat, biology and ecology, ongoing conservation measures for this species and its habitat, threats to the species and its habitat and information regarding the adequacy of existing regulatory mechanisms.

If you wish to comment, you may submit your comments and materials concerning this finding to the Field Supervisor (*see* **ADDRESSES** section). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

**References Cited**

A complete list of all references cited herein is available on request from the Ventura Fish and Wildlife Office (*see* **ADDRESSES** section).

**Author**

The primary author of this document is Robert McMorran, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service (*see* **ADDRESSES** section).

**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 29, 2004.

**Steve Williams,**

*Director, Fish and Wildlife Service.*

[FR Doc. 04–2596 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–55–P

# Notices

Federal Register
Vol. 69, No. 27
Tuesday, February 10, 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

### Office of the Secretary

### Notice of Appointment of Members to the National Agricultural Research, Extension, Education, and Economics Advisory Board

**AGENCY:** Research, Education, and Economics, USDA.

**ACTION:** Appointment of members.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, 5 U.S.C. App 2, the United States Department of Agriculture announces the appointments made by the Secretary of Agriculture to the 12 vacancies on the National Agricultural Research, Extension, Education, and Economics Advisory Board. The appointees, by vacancy category, are as follows: Category A. "National Farm Organizations," Alan Foutz, Owner/Operator, Foutz Farms, Akron CO; Category C. "Food Animal Commodity Producers," Carol Keiser, President, C-BAR Cattle Co. Inc., and President, C-ARC Enterprises, Inc., Champaign, IL; Category E. "National Animal Commodity Organizations," Alois Kertz, Principal, ANDHILL, LLC, and Managing Partner, KKC Tech, LLC, St. Louis, MO; Category F. "National Crop Commodity Organizations," Gary Davis, Farmer/Veterinarian, Gar-Mar Farms and Greenbriar Veterinary Services, Inc., Delaware, OH; Category K. "National Human Health Associations," John Cunningham, Deputy Provost and Professor of Nutrition, University of Massachusetts, Amherst, MA; Category P. "Hispanic Serving Institutions," Ricardo Chavez Rel, Special Assistant to the Secretary of Agriculture, New Mexico State University, Department of Agriculture, Las Cruces, NM; Category Q. "American Colleges of Veterinary Medicine," Glen Hoffsis, Dean, College of Veterinary Medicine, Ohio State University, Columbus, OH; Category R. "Non-Land Grant College or University with Historic Commitment to Research in the Food and Agricultural Sciences," David Wehner, Dean, College of Agriculture, California Polytechnic State University, San Luis Obispo, CA; Category T. "Transportation of Food and Agricultural Products (foreign and domestic)," James Lugg, President, TransFRESH Corporation, Salinas, CA; Category V. "Food and Fiber Processors," Gilbert Leveille, Vice President, System Design, Cargill, Inc., and President, Charles Valentine Riley Memorial Foundation, Wayzata, MN (reappointment); Category AA. "International Development/Private Sector Organizations," Shirley Dunlap Bowser, Self-Employed Farmer/Chair of Kellogg Foundation, Williamsport, OH (reappointment); and Category DD. "National Social Science Associations," Cornelia Flora, Director, North Central Regional Center for Rural Development, Iowa State University, Ames, IA.

**DATES:** Appointments by the Secretary of Agriculture are for a three-year term, effective October 1, 2003 until September 30, 2006.

**ADDRESSES:** National Agricultural Research, Extension, Education, and Economics Advisory Board; Research, Education, and Economics Advisory Board Office, Room 344A, Jamie L. Whitten Building, U.S. Department of Agriculture; STOP 2255; 1400 Independence Avenue, SW., Washington, DC 20250–2255

**FOR FURTHER INFORMATION CONTACT:** Deborah Hanfman, Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board; telephone: (202) 720–3684; fax: (202) 720–6199 or e-mail: *dhanfman@csrees.usda.gov*

**SUPPLEMENTARY INFORMATION:** Section 802 of the Federal Agricultural Improvement and Reform Act of 1996 authorized the creation of the National Agricultural Research, Extension, Education, Economics Advisory Board. The Board is composed of 31 members, each representing a specific category related to agriculture. The Board was first appointed in September 1996 and at the time one-third of the original members were appointed for a one, two, and three-year term, respectively. Due to the staggered appointments, the terms for 12 of the 31 members expired September 30, 2003. Each member is appointed by the Secretary of Agriculture to a specific category on the Board, including: farming or ranching, food production and processing, forestry research, crop and animal science, land-grant institutions, non-land grant college or university with a historic commitment to research in the food and agricultural sciences, food retailing and marketing, rural economic development, and natural resource and consumer interest groups, among many others.

Done at Washington, DC this 29th day of January 2004.

**Joseph J. Jen,**

*Under Secretary, Research, Education, and Economics.*

[FR Doc. 04–2763 Filed 2–9–04; 8:45 am]

BILLING CODE 3410–22–P

## DEPARTMENT OF AGRICULTURE

### Cooperative State Research, Education, and Extension Service

### Revisions to the Guidelines for State Plans of Work for the Agricultural Research and Extension Formula Funds

**AGENCY:** Cooperative State Research, Education, and Extension Service, USDA.

**ACTION:** Final notice.

**SUMMARY:** The Cooperative State Research, Education, and Extension Service (CSREES) is implementing the Revisions to the Guidelines for State Plans of Work for the Agricultural Research and Extension Formula Funds (64 FR 19242–19248). These guidelines prescribe the procedures to be followed by the eligible institutions receiving Federal agricultural research and extension formula funds under the Hatch Act of 1887, as amended (7 U.S.C. 361a *et seq.*); sections 3(b)(1) and (c) of the Smith-Lever Act of 1914, as amended (7 U.S.C. 343 (b)(1) and (c)); and sections 1444 and 1445 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3221 and 3222). The recipients of these funds are commonly referred to as the 1862 land-grant institutions and 1890 land-grant institutions, including Tuskegee University and West Virginia State College. CSREES is also revising and reinstating a previously approved

information collection (OMB No. 0524–0036) associated with these Guidelines.

**FOR FURTHER INFORMATION CONTACT:** Mr. Bart Hewitt; Program Analyst, Planning and Accountability, Office of the Administrator; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; Washington, DC 20250; at 202–720–5623, 202–720–7714 (fax) or via electronic mail at *bhewitt@csrees.usda.gov.*

**SUPPLEMENTARY INFORMATION:** CSREES published a notice and request for comment on the Proposed Revisions to the Guidelines for State Plans of Work for the Agricultural Research and Extension Formula Funds in the **Federal Register** on August 7, 2003 (68 FR 47012–47015).

**Background and Purpose**

The Cooperative State Research, Education, and Extension Service (CSREES) is implementing the following revision to the Guidelines for State Plans of Work for the Agricultural Research and Extension Formula Funds which implement the plan-of-work reporting requirements enacted in the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA), Pub. L. 105–185, by adding Part V, FY 2005–FY 2006 Plan of Work Update. The 1862 and 1890 land-grant institutions are required to submit a Plan of Work Update only for FY 2005 and FY 2006, instead of submitting a new 5-Year Plan of Work for FY 2005–FY 2009, as CSREES needs to incorporate the recommendations from the USDA Office of Inspector General (OIG) Audit No. 13001–3–Te, CSREES Implementation of the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA). Consequently, once the final audit recommendations are made, CSREES needs time to develop a viable electronic option for compliance with the Government Paperwork Elimination Act (GPEA). Currently, institutions are submitting their reports via e-mail in WordPerfect file format, Microsoft Word file format, or ASCII file format, and the institutions should continue to do so until a viable electronic option is available.

The objective of the USDA OIG Audit is to determine whether CSREES established effective controls to ensure land-grant institutions implemented AREERA provisions in accordance with the law and regulations. The audit began on November 8, 2002, and the report is currently being drafted. CSREES would like to consider the findings and recommendations of that audit in the design of the next 5-year plan of work. Time also is needed for CSREES to consult with its partnering institutions—1862 and 1890 land-grant institutions—in any redesign of the plan-of-work reporting system or extensive revision of the existing Guidelines for the State Plans of Work. This 2-year period will allow for the consideration of the USDA OIG audit findings and recommendations, opportunity to consult with the 1862 and 1890 land-grant institutions on any extensive revisions to the current Guidelines for State Plans of Work, and the development of a viable electronic option in compliance with GPEA.

CSREES also is changing the due date of the Annual Report of Accomplishments and Results from March 1 to April 1. On December 28, 2000 (65 FR 82317), CSREES changed the original due date for the Annual Reports of Accomplishments and Results from December 31 to the following March 1 after consultation with the 1862 and 1890 land-grant institutions. CSREES is now extending the due date for the Annual Report of Accomplishments and Results to April 1, 2004, for FY 2003; April 1, 2005, for FY 2004; April 1, 2006, for FY 2005; and April 1, 2007, for FY 2006.

The Proposed Guidelines were published in the **Federal Register** as a notice with a 30-day comment period on August 7, 2003, and these Final Guidelines reflect consideration by CSREES of the comments received.

The due date for submission of the FY 2005–FY 2006 Plan of Work Update for the period covering October 1, 2004, through September 2006, is April 1, 2004.

**Public Comments and Guideline Changes in Response**

In the Notice of the Proposed Guidelines, CSREES invited comments on the Proposed Guidelines as well as comments on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Thirteen comments were received. All 13 were from deans, directors, administrators, or their representatives of research and extension programs at the 1862 land-grant institutions. Eleven of the 13 commenters made comments on the proposed guidelines. Twelve of the 13 commenters made comments on the proposed collection of information.

The most significant comments which required a change to the guidelines centered around the accuracy of, and the amount of, the burden hours required to complete the FY 2005–FY 2006 Plan of Work Update. Based on these comments, CSREES is making a change to the guidelines to indicate that it will only require a 5- to 10-page FY 2005–FY 2006 Plan of Work Update to allow the institutions to outline any changes and additions made to the FY 2000–FY 2004 5-Year Plan of Work currently in place. The CSREES responses to specific comments are as follows.

*Positive Comments*

*Comment:* Six of the 11 comments that focused on the guidelines were positive comments. Four commenters supported the change in submitting the Annual Report from March 1 to April 1 of each year. Two commenters generally approved of all the proposed changes to the guidelines as outlined in the **Federal Register.** One commenter stated that since the requirements for the proposed 2-year extension are not being changed from the current 5-year plan, the proposal will ensure continuity and will enable research and extension personnel to anticipate and prepare the reports in a consistent manner. The commenter further stated that the time frame is consistent with their next strategic planning cycle for research and extension programs involving broad-based stakeholder input and would not impose a reporting burden.

*CSREES Response:* CSREES agrees and appreciates the positive feedback where appropriate.

*Submitting a FY 2005–FY 2006 Plan of Work Update*

*Comment:* Four commenters stated that amending the FY 2000–FY 2004 Plan of Work is an insufficient alternative for their institutions due to programmatic, procedural, and administrative changes that have occurred and that any resources invested should be used to build a new 5-year plan, rather than to update the current plan.

*CSREES Response:* CSREES disagrees as it wants to involve the Land-Grant University system that receives the Federal formula funds in any changes to

the next 5-Year Plan of Work. The Agency also believes that the discussion with the system cannot begin until a final report is issued on the Office of Inspector General Audit No. 13001–3–Te, CSREES Implementation of the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA). Also, the Agency believes that it needs time, once the final recommendations are made, to develop a viable electronic option for compliance with the Government Paperwork Elimination Act (GPEA). CSREES believes it cannot be ready to implement this system for the next 5-Year Plan of Work until the Summer of 2005. The Land-Grant University system that receives Federal formula funds could then be trained to use the new electronic system with the FY 2007–FY 2011 5-Year Plan of Work due in the spring of 2006.

*CSREES Comment:* These same four commenters plus one other commenter suggested that the states should be given an automatic 1-year renewal or extension of their current plan, and that a new 5-Year Plan of Work be filed by all states beginning with FY 2006.

*CSREES Response:* CSREES disagrees with this position as it needs the brief updates to the 5-Year Plan of Work to insure that institutions are considering stakeholder input as required under section 102(c) of AREERA and that program objectives have been revised and developed to address the critical agricultural issues in the state. In addition, CSREES needs to insure that all the requirements of AREERA sections 103(e), 105, 202, 204, and 225 continue to be met by the institutions.

*Due Date*

*Comment:* Only one commenter thought that they were not in a position to submit the Plan of Work Update simultaneously with the Annual Report and suggested that the Plan of Work Update be submitted on July 1, 2004, instead of April 1, 2004.

*CSREES Response:* CSREES needs to receive the FY 2005–FY 2006 Plan of Work Update earlier than July 1 in order to thoroughly review any changes an institution may make to their original 5-Year Plan of Work and approve them prior to October 1, 2004, in order to guarantee the timely release of first quarter FY 2005 formula funds. On a case-by-case basis, CSREES has extended the reporting due date for an individual institution in the past and will continue to consider a submission extension in this same manner.

*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*

*Comment:* One commenter assumes the information is useful to the agency for coordination of national initiatives and planning and reporting of these initiatives at national and state levels.

*CSREES Response:* CSREES agrees and appreciates positive feedback where appropriate.

*Comment:* One commenter states that extending the Plan of Work and asking for accountability against the same is appropriate, but questions the merit review process as an unnecessary use of time and duplication of effort, given the ongoing level of review most programs are continually involved in with stakeholders, clients, and external department and college reviews.

*CSREES Response:* CSREES disagrees but recognizes the burden that this additional accountability requirement places on the institutions. However, the merit review process is an integral part of AREERA; it pertains to the Plan of Work and must be included in order to receive funds. Section 103(e)(1) of AREERA states that "1862 AND 1890 INSTITUTIONS.—Effective October 1, 1999, to be eligible to obtain agricultural research or extension funds from the Secretary for an activity, each 1862 Institution and 1890 Institution shall—(A) establish a process for merit review of the activity; and (B) review the activity in accordance with the process."

*Comment:* Another commenter assumes that well-crafted plans of work provide a clear vision of goals and objectives of each state's programs, and therefore these documents are useful to the agency.

*CSREES Response:* CSREES agrees and appreciates positive feedback where appropriate.

*The Accuracy of the Agency's Estimate of the Burden of the Proposed Collection of Information*

*Comment:* Four commenters thought the estimate of time required was accurate or reasonable. Seven commenters thought the estimate of time required was significantly underestimated.

*CSREES Response:* CSREES agrees in part with the seven commenters on the estimate of time. CSREES agrees that the estimate of burden for an entirely new 5-Year Plan of Work will take considerably more effort, and thus, burden, than was estimated here. However, CSREES based its estimate of time required for submitting a 2-Year Plan of Work Update of a representative sample of all four regions and an assumption that an amendment to the current 5-Year Plan of Work would take about 10 percent as much effort as a newly developed 5-Year Plan of Work upon which the original survey was based. The 10 percent estimated burden for a Plan of Work Update was approved in the original Plan of Work guidelines published in 1999. In fact, representatives of CSREES administration discussed this issue of perceived burden with the State Agricultural Experiment Station directors on September 24, 2003, in Dearborn, Michigan, after most of these comments had been received by CSREES. Once CSREES explained what is expected in the FY 2005–FY 2006 Plan of Work Update, the directors understood that the burden will be minimal. CSREES recognizes that for some states that have many changes to make in their 5-Year Plan of Work, it may take more time than estimated, and for other states that have little or no changes to make in the 5-Year Plan of Work, it will take less time than estimated. The intent of CSREES is to decrease burden to the plan-of-work respondents, and to extend the current plan-of-work cycle to include FY 2005 and FY 2006. To make what is expected in the FY 2005–FY 2006 Plan of Work Update more clear, CSREES is making a change to the guidelines to indicate that it will only require a 5-to 10-page FY 2005–2006 Plan of Work Update which will allow the institutions to outline any changes and additions made to the FY 2000–FY 2004 5-Year Plan of Work currently in place. Any detailed information that the institution wants to address can be done in the Annual Report. However, we also will allow the institutions the option to submit a wholly new FY 2005–FY 2006 Plan of Work Update if it feels that it is in their best interest to do so.

*Ways to Enhance the Quality, Utility, and Clarity of the Information to be Collected*

Comments received focused on aggregation and a standardized system for reporting.

*Comment:* One commenter stated he looks forward to a more standardized and aggregated system in the future. Another commenter wants the Agency to work to clarify a list of outcomes/impacts that states could choose among to report against so data can be aggregated at the regional and national level.

*CSREES Response:* CSREES agrees as it intends to have a more standardized

system in the future and will consider working to clarify a list of outcomes/impacts as it begins to develop the guidelines for the next 5-Year Plan of Work which will begin with the FY 2007.

*Comment:* One commenter suggested that the requirement to limit the reporting to programs supported by Federal dollars is the biggest hindrance to quality, causes an unnecessary burden on fiscal officers, and limits the results for which USDA might take credit. The commenter also suggested that an easy fix would be to allow states to report about programs that fit, regardless of funding source.

*CSREES Response:* While CSREES agrees with this in principle, AREERA only requires that programs funded with formula funds be reported in the Plan of Work and Annual Report of Accomplishments and Results. Thus, CSREES can only require that institutions that receive Federal formula funds to report on programs that use Federal formula funds through the plan-of-work process.

*CSREES Comment:* Another commenter questions the necessity of reporting on the manner in which research and extension activities are funded other than through Federal formula funds. This commenter also asks if AREERA only requires plans of work for the Federal formula funds distributed by CSREES, why are we burdening them to account for other funds.

*Response:* CSREES disagrees as this information is required under section 202 of AREERA which amended both the Smith-Lever and Hatch Acts and states as one of its "Requirements Related to the Plan of Work": "(4) The manner in which research and extension, including research and extension activities funded other than through formula funds, will cooperate to address the critical issues in the State, including the activities to be carried out separately, the activities to be carried out sequentially, and the activities to be carried out jointly."

*Comment:* Another commenter stated that examples and materials posted on the CSREES Web site are quite helpful, and that feedback regarding planning and reporting is also helpful in moving planning and reporting toward a more outcomes-based effort. The commenter further stated that electronic platforms will further help users to assess component information more readily.

*CSREES Response:* CSREES agrees and appreciates positive feedback where appropriate and will work on a more sophisticated electronic platform for the next 5-Year Plan of Work which is due to begin with FY 2007.

*Ways to Minimize the Burden of Collection of Information on Those Who Are to Respond, Including the Use of Appropriate Automated, Electronic, Mechanical, or Other Technological Collection Techniques or Other Forms of Information Technology*

*Comment:* Seven commenters supported the Agency notion to develop one standardized holistic electronic planning and reporting system for all its information needs, which the agency has named "One-Solution." However, one commenter stated that the current method of reporting works well for their State.

*CSREES Response:* Although the current free text format may work well for a few States, CSREES appreciates the support of the agency notion to develop a standardized holistic electronic planning and reporting system for all of its information needs. CSREES is committed to developing a more sophisticated holistic electronic system to reduce reporting burden.

**Paperwork Reduction Act**

In accordance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection and recordkeeping requirements imposed by the implementation of these Final Guidelines will be submitted to OMB for approval. Those requirements will not become effective prior to OMB approval. The eligible institutions will be notified upon this approval.

The public reporting burden for this collection of information contained in these guidelines is estimated at 336.9 hours per response for the FY 2005–FY 2006 Plan of Work Update and 1,356.3 hours per response for the Annual Report of Accomplishments and Results. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. These guidelines have no additional impact on any existing data collection burden.

Pursuant to the plan of work requirements enacted in the Agricultural Research, Extension, and Education Reform Act of 1998, the Cooperative State Research, Education, and Extension Service hereby adds Part V, FY 2005–FY 2006 Plan of Work Update, to the Guidelines for State Plans of Work for Agricultural Research and Extension Formula Funds as follows:

**Guidelines for State Plans of Work for Agricultural Research and Extension Formula Funds**

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**V. Submission of the FY 2005–FY 2006 Plan of Work Update**

*A. General*

1. Planning Option

The FY 2005–FY 2006 Plan of Work Update is a prospective plan that extends coverage of the original 5-Year Plan of Work (*i.e.*, FY 2000–FY 2004) to include FY 2005–FY 2006. CSREES requests, and will only require, this Plan of Work Update be limited to 5–10 pages and outline the changes and additions made to the original FY 2000–FY 2004 5-year Plan of Work. However, CSREES will also allow the institution the option to submit a wholly new FY 2005–2006 Plan of Work Update if they feel it is in their best interest to do so. The FY 2005–2006 Plan of Work Update should be prepared for an institution's individual functions (*i.e.*, research or extension activities), for an individual institution (including the planning of research and extension activities), or for state-wide activities (a 5-year research and/or extension plan of work for all the eligible institutions in a State), as they were submitted in the original 5-Year Plan of Work that was due on July 15, 1999. Each FY 2005–FY 2006 Plan of Work Update must reflect the content of the program(s) funded by Federal agricultural research and extension formula funds and the required matching funds. This FY 2005–FY 2006 Plan of Work Update must continue to describe not only how the program(s) address critical short-term, intermediate, and long-term agricultural issues in a State, but how it relates to and is part of the five broad national goals as outlined above and originally described in the previous 5-year plan of work, thus expanding upon and extending the existing plan with new or continuing efforts.

The FY 2005–FY 2006 Plan of Work Update should continue to be based on the five original national goals

established in the FY 2000–FY 2004 5-year Plan of Work as described above.

2. Period Covered

The FY 2005–FY 2006 Plan of Work Update will extend the current 5-Year Plan of Work that covered the period from October 1, 1999, through September 30, 2004, to include the period from October 1, 2004, through September 30, 2006.

3. Projected Resources

The resources that are allocated for various planned programs in the FY 2005–2006 Plan of Work Update, in terms of human and fiscal measures, should be included and projected to include the sixth and seventh years. The baseline for the institution's or State's initial plan (for the two years) should be the Federal agricultural research and extension formula funds for FY 1999 and the required level (*i.e.*, percentage) of matching funds for FY 2005 and FY 2006.

4. Submission and Due Date

The FY 2005–FY 2006 Plan of Work Update must be submitted by April 1, 2004, to the Planning and Accountability Unit, Office of the Administrator of the Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture. It is preferred that these FY 2005–FY 2006 Plan of Work Updates be submitted electronically to *bhewitt@csrees.usda.gov* in either WordPerfect file format, Microsoft Word file format, or ASCII file format. It also is requested that the FY 2003 Annual Report of Accomplishments and Results be submitted with the FY 2005–FY 2006 Plan of Work Update in order to facilitate a more efficient and comprehensive review for both CSREES and the land-grant institutions.

5. Certification

The FY 2005–FY 2006 Plan of Work Updates must be signed by the 1862 Extension Director, 1862 Research Director, 1890 Extension Administrator, and/or 1890 Research Director, depending on the planning option chosen.

*B. FY 2005–2006 Plan of Work Update Evaluation by CSREES*

1. Schedule

All FY 2005–FY 2006 Plan of Work Updates will be evaluated by CSREES in conjunction with the review of the FY 2003 Annual Report of Accomplishments and Results. The FY 2005–FY 2006 Plan of Work Update will either be accepted by CSREES without change or returned to the institution, with clear and detailed recommendations for its modification. The submitting institution(s) will be notified by CSREES of its determination within 90 days (review to be completed in 60 days, communications to the institutions allowing a 30-day response) of receipt of the document. Adherence to the Plan of Work schedule by the recipient institution is critical to assuring the timely allocation of funds by CSREES. The FY 2005–FY 2006 Plan of Work Updates accepted by CSREES will be in effect for the period beginning October 1, 2004, through September 30, 2006. CSREES will notify all institutions of a need for a new 5-year plan of work one year prior to the plan's expiration on September 30, 2006.

2. Review Criteria

CSREES will evaluate the FY 2005–FY 2006 Plan of Work Update according to the criteria in these revised guidelines.

Done in Washington, DC, this 30th day of January, 2004.

**Colien Hefferan,**

*Administrator, Cooperative State Research, Education, and Extension Service.*

[FR Doc. 04–2786 Filed 2–9–04; 8:45 am]

BILLING CODE 3410–22–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Information Collection; Request for Comments; Annual Wildfire Summary Report

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Forest Service announces its intention to reinstate, without change, a previously approved information collection, for which approval has expired. The collected information enables the Forest Service to provide timely, substantive information to Congress about the effectiveness of State and local fire fighting agencies, when the agencies request annual funding for the Forest Service State and Private Forestry Cooperative Fire Program. This program supplements the funding of State and local fire fighting efforts.

**DATES:** Comments must be received in writing on or before April 12, 2004.

**ADDRESSES:** Comments concerning this notice should be addressed to Jim Shell, Fire and Aviation Management, MAIL STOP 1107, State and Private Forestry, Forest Service, USDA, 1400 Independence Avenue SW., Washington, DC 20250.

Comments also may be submitted via facsimile to (202) 205–1494 or by e-mail to *jshell@fs.fed.us.*

The public may inspect comments received at the Office of the Deputy Chief, State and Private Forestry, Forest Service, USDA, 2nd Floor SW., Yates Building, 1400 Independence Avenue SW., Washington DC. Visitors are urged to call ahead to (202) 205–1494 to facilitate entrance into the building.

**FOR FURTHER INFORMATION CONTACT:** Jim Shell, Fire and Aviation Management, State and Private Forestry, (202) 205–1494. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Cooperative Forestry Assistance Act of 1978 requires the Forest Service to collect information about wildfire suppression efforts by State and local fire fighting agencies to ensure that Congress has adequate information to implement its oversight responsibilities and to provide accountability for expenditures and activities under the Act. The Forest Service works cooperatively with State and local fire fighting agencies and provides supplemental funding to these agencies to support their fire suppression efforts through the Forest Service State and Private Forestry Cooperative Fire Program. State and local fire agencies are the first line of defense against fires that threaten non-Federal property and resources and that might spread to Federal lands.

State Foresters use the form, FS–3100–8, Annual Wildfire Summary Report, to compile information from their State and local fire agencies in response to a request for this information from the Forest Service.

The Forest Service would be unable to assess the effectiveness of the State and Private Forestry Cooperative Fire Program if the information provided on form, FS–3100–8, were not collected.

**Description of Information Collection**

The following describes the information collection to be retained.

*Title:* FS–3100–8, Annual Wildfire Summary Report.

*OMB Number:* 0596–0025.

*Date of Expiration:* May 31, 2003.

*Type of Request:* Reinstatement.

*Abstract:* Forest Service State and Private Forestry Cooperative Fire

Program managers will evaluate the collected information to determine whether Cooperative Fire program funds provided to the State and local fire fighting agencies by the Forest Service have been used to improve their fire suppression capabilities. The Forest Service will share the results of the data with Congress when requesting annual funding for the Program. The collected information also will enable the Forest Service to share with the public the importance and value of the State and Private Forestry Cooperative Fire Program.

Forest Service employees will not collect the information directly, but will request the information from State Foresters, who will collect the information from their own State fire fighting agencies, and from local fire fighting agencies, such as volunteer fire departments. The information collected for the Annual Wildfire Summary Report will include the number of acres protected; the number of fires to which the State or local fire fighting agencies responded within the fiscal year; the sizes of the fires in acres; and the causes of the fires, such as lightening, campfire, or arson. Data gathered in this information collection are not available from other sources.

*Estimate of Annual Burden:* 30 minutes.

*Type of Respondents:* State Foresters.

*Estimated Annual Number of Respondents:* 50.

*Estimated Annual Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 25 hours.

**Comment Is Invited**

Comment is invited on: (a) Whether the proposed collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**Use of Comments**

All comments received in response to this notice, including names and addresses when provided, will become a matter of public record and will be available for public inspection and copying. Comments will be summarized and included in the request for Office of Management and Budget approval.

Dated: February 4, 2004.

**Robin L. Thompson,**

*Acting Deputy Chief, State and Private Forestry.*

[FR Doc. 04–2843 Filed 2–9–04; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Whitetail-Pipestone Travel Management Project, Beaverhead-Deerlodge National Forest, Jefferson and Silver Bow Counties, MT

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice; intent to prepare an environmental impact statement.

**SUMMARY:** The Forest Service will prepare an environmental impact statement to document the analysis and disclose the environmental impacts of a proposed action to develop a travel and access management plan for the Whitetail-Pipestone area. The project area is located on National Forest System lands east of Interstate 15 from Butte to Boulder, southwest of Highway 69 to Hadley Park road, west and north of the Hadley Park Road over the Bull Mountain range to the Whitetail Road, west of the Whitetail Road to Whitehall, and north of Montana Highway 2 from Whitehall to Butte.

The decision to be made is to define the appropriate road and trail systems and the type of uses on them.

**DATES:** Initial comments concerning the scope of the analysis should be received in writing no later than march 15, 2004.

**ADDRESSES:** The responsible official is Forest Supervisor Thomas K. Reilly, Beaverhead-Deerlodge National Forest, Dillon, Montana. Please send comments to Eric Tolf, 3 Whitetail Road, Whitehall, MT 59759. Comments may be electronically submitted to *comments-northern-beaverhead-deerlodge-jefferson@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Eric Tolf, project leader, 3 Whitetail Road, Whitehall, MT 59759, or phone (406) 287–3223, or by email to *etolf@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** The purpose of this action is to define a transportation system (roads and trails) to provide a variety of motorized and non-motorized recreation opportunities. A condition of this transportation system is that it can be properly maintained.

The project area is located in T. 2 N.–T. 5 N., R 7 W.–R. 4 W. The scope of this proposal is limited to access and travel management actions to accomplish the purpose and need.

Public participation is important to this analysis. Part of the goal of public involvement is to identify additional issues and to refine the general, tentative issues. A scoping notice describing the proposal will be mailed to those who request information on these types of activities on the Beaverhead-Deerlodge National Forests. Preliminary issues identified by the Forest Service include:

(1) Motorized and non-motorized recreation—the existing transportation system does not provide for a mix of quality recreational experiences for both motorized and non-motorized users.

(2) Road and trail safety—safety concerns exist along roads utilized by both full-sized vehicles and off-highway vehicles, and hazards on low standard roads and trails.

The analysis will consider all reasonably foreseeable activities. The interdisciplinary team has not yet developed alternatives to the proposed action. Alternatives will be developed based on the key issues identified through scoping.

People may visit with Forest Service officials at any time during the analysis and prior to the decision. Two periods are specifically designated for comments on the analysis: (1) During the scoping process, and (2) during the draft EIS period.

During the scoping process, the Forest Service seeks additional information and comments from individuals organization that may be interested in or affected by the proposed action, and Federal, State and local agencies. The Forest Service invites written comments and suggestions on this action, particularly in terms of identification of issues and alternative development.

The draft EIS is anticipated to be available for review in May 2004. The final EIS is planned for completion in December 2004.

The Environmental Protection Agency will publish the Notice of Availability of the draft Environmental Impact Statement in the Federal Register. The Forest will also publish a Legal Notice of its availability in the Montana Standard Newspaper, Butte, Montana, A 45-day comment period on the draft environmental impact statement will begin the day following the date of publication of the Notice of Availability in the **Federal Register.**

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings

related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519,553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

The responsible official will make the decision on this proposal after considering comments and responses, environmental consequences discussed in the final EIS, applicable laws, regulations, and policies. The decision and reasons for the decision will be documented in the Record of Decision.

Dated: February 3, 2004.

**Thomas K. Reilly,**

*Forest Supervisor.*

[FR Doc. 04–2775 Filed 2–9–04; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Forest Service

### National Tree-Marking Paint Committee Meeting

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Tree-Marking Paint Committee will meet in Hot Springs, Arkansas on May 11–13, 2004. The purpose of the meeting is to discuss activities related to improvements in, concerns about, and the handling and use of tree-marking paint by personnel of the Forest Service and the Department of the Interior's Bureau of Land Management.

**DATES:** The meeting will be held May 11–13, 2004, from 8 a.m. to 5 p.m.

**ADDRESSES:** The meeting will be held at the Clarion Resort, 4813 Central Avenue, Hot Springs, Arkansas. Persons who wish to file written comments before or after the meeting must send written comments to Bob Monk, Chairman, National Tree-Marking Paint Committee, San Dimas Technology and Development Center, Forest Service, USDA, 444 East Bonita Avenue, San Dimas, California 91773, or electronically to *rmonk@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Bob Monk, Project Leader, San Dimas Technology and Development Center, Forest Service, USDA, (909) 599–1267, extension 267, or via e-mail to *rmonk@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** The National Tree-Marking Paint Committee comprises representatives from the Forest Service national headquarters, each of the nine Forest Service Regions, the Forest Products Laboratory, the Forest Service San Dimas Technology and Development Center, and the Bureau of Land Management. The General Services Administration and the National Institute for Occupational Safety and Health are ad hoc members and provide technical advice to the committee.

A field trip will be held on May 11 and is designed to supplement information related to tree-marking paint. This trip is open to any member of the public participating in the public meeting on May 12–13. However, transportation is provided only for committee members.

The main session of the meeting, which is open to public attendance, will be held on May 12–13.

#### Closed Sessions

While certain segments of this meeting are open to the public, there will be two closed sessions during the meeting. The first closed session is planned for approximately 9 to 11 a.m. on May 12. This session is reserved for individual paint manufacturers to present products and information about tree-marking paint for consideration in future testing and use by the agency. Paint manufacturers also may provide comments on tree-marking paint specifications or other requirements. This portion of the meeting is open only to paint manufacturers, the Committee, and committee staff to ensure that trade secrets will not be disclosed to other paint manufacturers or to the public. Paint manufacturers wishing to make presentations to the Tree-Marking Paint Committee during the closed session should contact the Chairman at the telephone number listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. The second closed session is planned for approximately 2 to 4 p.m. on May 13. This session is reserved for Federal Government employees only.

Any person with special access needs should contact the Chairman to make those accommodations. Space for individuals who are not members of the National Tree-Marking Paint Committee is limited and will be available to the public on a first-come, first-served basis.

Dated: February 3, 2004.

**Abigail R. Kimbell,**

*Associate Deputy Chief, National Forest System.*

[FR Doc. 04–2771 Filed 2–9–04; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Notice of Meeting; Southwest Oregon Province Advisory Committee

**SUMMARY:** The Southwest Oregon Province Advisory Committee will meet on Wednesday, March 17, 2004. The meeting begins at 9 a.m. and ends at 5 p.m.; the open public forum begins at 11:30 a.m. It will be held at the J. Herbert Stone Nursery, 2606 Old Stage Road, Central Point, Oregon in the Employee Center. The tentative agenda include: (1) Biscuit Fire Recovery Project Draft Environmental Impact Statement update; (2) Port-Orford-cedar Supplemental Environmental Impact Statement update; and (3) Province Advisory Committee 2004 Work Plan development.

**FOR FURTHER INFORMATION CONTACT:** Rogue River-Siskiyou National Forest Public Affairs Officer Mary T. Marrs at (541) 858–2211, e-mail *mmarrs@fs.fed.us,* or USDA Forest

Service, 333 West 8th Street, Medford, OR, 97501.

Dated: February 4, 2004.

**M.J. Harvie,**

*Fire and Aviation Staff Officer, Rogue River-Siskiyou National Forest.*

[FR Doc. 04–2776 Filed 2–9–04; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Financing for Household Water Well Systems

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Water and Environmental Program within the Rural Utilities Service (RUS) is developing regulations to implement section 306E of the Consolidated Farm and Rural Development Act (CONACT). The Agency seeks written comments about the prospective grant program to an entity that will establish a lending program for the construction, refurbishing, and servicing of individually-owned household water well systems in rural areas that are or will be owned by the eligible individuals. RUS believes it is beneficial to have the public's input before drafting regulations and this notice of inquiry will allow the public's opinion to be considered in the drafting of those regulations.

**DATES:** Interested parties must submit written comments on or before March 11, 2004.

**ADDRESSES:** You may submit comments by any of the following methods:

- *E-mail: RUSComments@usda.gov.* Include in the subject line of the message "Water Well Systems." The e-mail must identify, in the text of the message, the name of the individual (and name of the entity if applicable) who is submitting the comment.
- *Mail:* Addressed to Richard Annan, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, United States Department of Agriculture, 1400 Independence Avenue, SW., STOP 1522, Washington, DC 20250–1522.
- *Hand Delivery/Courier:* Addressed to Richard Annan, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, United States Department of Agriculture, 1400 Independence Avenue, SW., Room 5168–S, Washington, DC 20250–1522

RUS requires, in hard copy, a signed original and 3 copies of all written comments (7 CFR 1700.4). Comments will be available for public inspection during normal business hours (7 CFR part 1).

**FOR FURTHER INFROMATION CONTACT:** Gary Morgan, Assistant Administrator, Water and Environmental Programs, Rural Utilities Service, United States Department of Agriculture, 1400 Independence Avenue, SW., stop 1548 room 5145–S, Washington, DC 20250–1548. Phone: 202–690–2670. Fax: 202–720–0718. E-mail: *gary.morgan@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Background

On May 13, 2002, the Farm Security and Rural Investment Act of 2002 (Farm Bill) was signed into law as Public Law 107–171. The CONACT was amended by section 6012 of the Farm Bill, by adding a grant program to establish a lending program. For this program, the Secretary may make grants to private nonprofit organizations for the purpose of providing loans to eligible individuals for the construction, refurbishing, and servicing of individual household water well systems in rural areas that are or will be owned by the eligible individuals.

An "eligible individual" means an individual who is a member of a household the members of which have a combined income (for the most recent 12-month period for which the information is available) that is not more than 100 percent of the median nonmetropolitan household income for the State or territory in which the individual resides, according to the most recent decennial census of the United States.

The terms of a loan made with grant funds are as follows: (a) Shall have an interest rate of 1 percent; (b) shall have a term not to exceed 20 years; and (c) shall not exceed $8,000 for each water well system.

A recipient of a grant made under this section may use grant funds to pay administrative expenses associated with providing the assistance described in the above paragraph.

The Secretary may give priority points to an applicant that has substantial expertise and experience in promoting the safe and productive use of individually-owned household water well systems and ground water.

This program is authorized to be appropriated $10,000,000 for each of fiscal years (FY) 2003 through 2007.

There was no funding appropriated in FY 2003. However, the appropriations bill for FY 2004 includes $500,000 for the grant program; therefore RUS is proceeding with the development of a regulation in order to implement the program.

RUS encourages interested parties to review the Act in its entirety on the USDA Web site at *http://www.usda.gov/farmbill/.*

#### Request for Comment

RUS is requesting comment and discussion on the following topics:

1. RUS is interested in comments regarding grantees' experience with individual household water systems and the importance of having a staff with both technical and lending experience.

2. In similar RD programs, there is either a requirement that the grantee provide matching funds or that the applicant receives additional priority for providing larger matching funds. Should there be a requirement to leverage funds? Also, should RUS give priority points to those who do leverage funds?

3. What percentage of financing should be allowed and what percentage of the project costs should the borrower cover?

4. Should administrative and servicing fees be an eligible grant purpose? If so, what should be the limit on those fees?

5. RUS is considering the use of the Central Servicing Center for servicing the loans, including processing loan payments, reviewing financial statements, and other responsibilities involved in loan servicing.

6. Several RD lending programs are limited to applicants who cannot obtain financing from commercial sources at reasonable rates and terms. How should the homeowner show an inability to obtain financing from other sources?

7. What should be eligible and ineligible loan purposes?

RUS invites interested parties including, but not limited to, financial and lending institutions, well drillers, trade associations, consumer groups and individuals to provide RUS, any information or analyses they believe to be relevant to the issues discussed in this Notice and to the implementation of the grant program.

Dated: January 16, 2004.

**Hilda Gay Legg,**

*Administrator, Rural Utilities Service.*

[FR Doc. 04–2764 Filed 2–9–04; 8:45 am]

**BILLING CODE 3410–15–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1318]**

### Expansion of Foreign-Trade Zone 191; Palmdale, CA, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas,* the City of Palmdale, California, grantee of Foreign-Trade Zone 191, submitted an application to the Board for authority to expand FTZ 191 to include a site at the Mojave Airport (91 acres) in Mojave, California (Site 11), adjacent to the Los Angeles-Long Beach Customs port of entry (FTZ Docket 20–2003; filed 4/16/03);

*Whereas,* notice inviting public comment was given in the **Federal Register** (68 FR 19778, 4/22/03) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas,* the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

*Now, therefore,* the Board hereby orders:

The application to expand FTZ 191 is approved, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 22nd day of January 2004.

**James J. Jochum,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

**Dennis Puccinelli,**

*Executive Secretary.*

[FR Doc. 04–2868 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–DS–U**

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## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1317]**

### Grant of Authority for Subzone Status; Inflation Systems, Inc. (Automotive Airbag Inflators), LaGrange, GA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas,* the Foreign-Trade Zones Act provides for "* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board (the Board) to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

*Whereas,* the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

*Whereas,* Georgia Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 26, has made application for authority to establish special-purpose subzone status at the automotive airbag inflator manufacturing facilities of Inflation Systems, Inc., located in LaGrange, Georgia (FTZ Docket 26–2003, filed 6–9–2003);

*Whereas,* notice inviting public comment was given in the **Federal Register** (68 FR 35856, 6–17–2003);

*Whereas,* the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

*Now, therefore,* the Board hereby grants authority for subzone status at the automotive airbag inflator manufacturing facilities of Inflation Systems, Inc., located in LaGrange, Georgia (Subzone 26I), at the locations described in the application, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 22nd day of January 2004.

**James J. Jochum,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

**Dennis Puccinelli,**

*Executive Secretary.*

[FR Doc. 04–2867 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–DS–M**

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## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1316]**

### Grant of Authority for Subzone Status; Inflation Systems, Inc. (Automotive Airbag Inflators and Propellant), Moses Lake, WA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas,* the Foreign-Trade Zones Act provides for "* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board (the Board) to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

*Whereas,* the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

*Whereas,* the Moses Lake Public Corporation, grantee of Foreign-Trade Zone 203, has made application for authority to establish special-purpose subzone status at the automotive airbag inflator and propellant manufacturing plant of Inflation Systems, Inc., located in Moses Lake, Washington (FTZ Docket 25–2003, filed 6–9–2003);

*Whereas,* notice inviting public comment was given in the **Federal Register** (68 FR 35857, 6–17–2003);

*Whereas,* the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

*Now, therefore,* the Board hereby grants authority for subzone status at the automotive airbag inflator and propellant manufacturing plant of Inflation Systems, Inc., located in Moses Lake, Washington (Subzone 203A), at the location described in the application, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 22nd day of January 2004.

**James J. Jochum,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

**Dennis Puccinelli,**

*Executive Secretary.*

[FR Doc. 04–2866 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–DS–U**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-570–846]**

### Brake Rotors from The People's Republic of China: Notice of Extension of Time Limit for Preliminary Results in Antidumping Duty Administrative and New Shipper Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is further extending the time limit for the preliminary results of the sixth administrative and ninth new shipper reviews of the antidumping duty order on brake rotors from the People's Republic of China (PRC), which cover the period April 1, 2002, through March 31, 2003.

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Brian Smith at (202) 482–1766, Terre Keaton at (202) 482–1280, or Margarita Panayi at (202) 482–0049, Office 2, AD/CVD Enforcement Group I, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC, 20230.

**SUPPLEMENTARY INFORMATION:** In accordance with section 751(a)(3)(A) of the Tariff Act of 1930 (the Act), as amended, the Department shall make a preliminary determination in an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. The Act further provides, however, that the Department may extend that 245-day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period.

Pursuant to 751(a)(2)(B)(iv) of the Act, the Department shall make a preliminary determination in a new shipper review within 180 days after the date on which the review is initiated. However, if the case is extraordinarily complicated, it may extend the 180 day period for the preliminary results to 300 days.

The Department initiated the sixth administrative review[1] of the antidumping duty order on brake rotors from the PRC (68 FR 27781) on May 21, 2003 and the ninth new shipper review[2] of the antidumping duty order on brake rotors from the PRC (68 FR 33675) on June 5, 2003. Pursuant to section 351.214(j)(3) of its regulations, and with the agreement of Laizhou City Luqi Machinery Co., Ltd. (Luqi), the Department is conducting these reviews concurrently. On October 8, 2003, we extended the time limits for the preliminary results from December 31, 2003, to February 2, 2003, the current deadline. This deadline was not fully extended.

The Department finds that it is not practicable to complete the preliminary results in the administrative review within the above-specified time limit because we must request additional information and/or clarification of submitted data from certain respondents. Given that the Department is conducting the administrative review concurrently with the new shipper review, we determine it appropriate to extend the deadline for both reviews.

Therefore, in accordance with sections 751(a)(3)(A) and 751(a)(2)(B)(iv) of the Act, the Department is extending the time for completion of the preliminary results of these reviews until March 3, 2004.

Dated: February 2, 2004.

**Jeffrey May,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 02–2858 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–DS–S**

[1] The administrative review respondents are China National Machinery Import & Export Company; Laizhou Hongda Auto Replacement Parts, Co. Ltd.; Qingdao Gren Co.; Yantai Winhere Auto Part Manufacturing Co., Ltd.; Longkou Haimeng Machinery Co., Ltd.; Zibo Luzhou Automobile Parts Co., Ltd.; Hongfa Machinery (Dalian) Co., Ltd.; Qingdao Meita Automotive Industry Co., Ltd.; Shandong Laizhou Huanri Group General; Laizhou Auto Brake Equipment Company, Ltd.; and Longkou TLC Machinery Co., Ltd.

[2] The new shipper respondent is Laizhou City Luqi Machinery Co., Ltd.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–823–808]**

### Amendment to the Agreement Between the United States Department of Commerce and the Government of Ukraine Suspending the Antidumping Investigation on Cut-to-Length Carbon Steel Plate From Ukraine

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of amendment to the agreement between the United States Department of Commerce and the government of Ukraine Suspending the Antidumping Investigation on Cut-to-Length Carbon Steel Plate from Ukraine.

**SUMMARY:** The Department of Commerce (the Department) and the Government of Ukraine (GOU) have signed an Amendment to the Agreement Suspending the Antidumping Investigation on Cut-Length Plate from Ukraine.

**EFFECTIVE DATE:** January 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Patricia Tran or Robert James, AD/CVD Enforcement, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–1121 or (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On November 19, 1997, the Department published in the **Federal Register** the text of an Agreement between the Department and the GOU suspending the antidumping investigation involving certain cut-to-length carbon steel plate (62 FR 61766). Pursuant to section XII of the Agreement, the export limits on the volume of subject merchandise expired on November 1, 2002. On December 20, 2002 the Department and the GOU signed an amendment to extend the export limit one year, expiring on November 1, 2003. On January 31, 2003 the Department published in the **Federal Register** the text of the amendment (68 FR 5075). On November 24, 2003 the Department and the GOU initialed another Amendment to provide for the continuation of exports of cut-to-length plate from Ukraine to the United States until November 1, 2004. The Department subsequently released the Amendment to interested parties for comment. No interested party filed comments and, therefore, the Department and the GOU signed a final Amendment on January 16, 2004. The text of the final Amendment follows this notice.

Dated: February 2, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc. 04–2864 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Amendment to the Antidumping Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate Between the United States Department of Commerce and the Government of Ukraine

The United States Department of Commerce (the Department) and the Government of Ukraine hereby amend Section XII of the Agreement Suspending the Antidumping Investigation on Certain Cut-to-Length Carbon Steel Plate from Ukraine (the Agreement), signed October 24, 1997, by adding the following language immediately after the second sentence of Section XII of the Agreement, as amended on December 20, 2002:

In order to provide for the continuation of exports of cut-to-length plate from Ukraine to the United States following the expiration of the one-year extension signed December 20, 2002, by the Department and the Government of Ukraine, the export limits provided for in Section III of this Agreement shall remain in force through November 1, 2004.

If, after said date, the underlying proceeding remains suspended, the Government of Ukraine and the Department will enter into consultations to agree upon export limits in order to permit future shipments under the Agreement.

For the United States Department of Commerce.

Dated: January 16, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

For the Ministry of Economy and for European Integration Issues of Ukraine.

**Mykhailo B. Reznik,**

*Ambassador of Ukraine to the United States.*

[FR Doc. 04–2865 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–201–817]**

### Oil Country Tubular Goods From Mexico: Rescission of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of rescission of antidumping duty administrative review.

**SUMMARY:** On September 30, 2003, the Department of Commerce (the Department) published in the **Federal Register** a notice announcing the initiation of an administrative review of the antidumping duty order on oil country tubular goods (OCTG) from Mexico. The period of review (POR) is August 1, 2002 to July 31, 2003. This review has now been rescinded because one party requesting the review withdrew its request, and the remaining exporter named in the request for review had no entries for consumption of subject merchandise that are subject to review in the United States during the POR.

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Phyllis Hall or Abdelali Elouaradia, Enforcement Group III, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room 7866, Washington, DC 20230; telephone (202) 482–1398 or (202) 482–1374 respectively.

### Scope of Review

Imports covered by this review are oil country tubular goods, hollow steel products of circular cross-section, including oil well casing, tubing, and drill pipe, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). This scope does not cover casing, tubing, or drill pipe containing 10.5 percent or more of chromium. The OCTG subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.30.10, 7304.29.30.20, 7304.29.30.30, 7304.29.30.40, 7304.29.30.50, 7304.29.30.60, 7304.29.30.80, 7304.29.40.10, 7304.29.40.20, 7304.29.40.30, 7304.29.40.40, 7304.29.40.50, 7304.29.40.60, 7304.29.40.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.60.15, 7304.29.60.30, 7304.29.60.45, 7304.29.60.60, 7304.29.60.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

The Department has determined that couplings, coupling stock and drill pipe are not within the scope of the antidumping order on OCTG from Mexico. See Letter to Interested Parties; Final Affirmative Scope Decision, August 27, 1998. *See Continuation of Countervailing and Antidumping Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders From Argentina and Mexico With Respect to Drill Pipe*, 66 FR 38630, July 25, 2001.

### Background

On August 29, 2003, Hylsa, S.A. de C.V. (Hylsa) requested that the Department conduct an administrative review of Hylsa. We initiated the review for Hylsa on September 30, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation* in part 68 FR 56262 (September 30, 2003). On October 7, 2003, Hylsa withdrew its request and requested that the Department terminate the review with respect to Hylsa. Additionally on September 2, 2003, United States Steel Corporation (petitioner), requested and administrative review of Tubos de Acero de Mexico S.A. (TAMSA), a Mexican producer and exporter of OCTG, with respect to the antidumping order published in the **Federal Register**. *See Antidumping Duty Order: Oil Country Tubular Goods From Mexico*, 60 FR 41055 (August 11, 1995). We initiated the review for TAMSA on October 24, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation* in part, 68 FR 60910 (October 24, 2003).

**SUPPLEMENTARY INFORMATION:** On November 5, 2003, the Department issued an antidumping duty questionnaire to TAMSA. On November 26, 2003, TAMSA and Siderca Corporation (TAMSA's U.S. affiliate) claimed that they "did not directly or indirectly, enter for consumption, or sell, export or ship for entry for consumption in the United States subject merchandise during the period of review." Petitioners did not comment on TAMSA's no shipment claim. See Memo to file dated January 12, 2004.

On January 7, 2004, the Department forwarded a no-shipment inquiry to U.S. Bureau of Customs and Border Protection (CBP) for circulation to all CBP ports. CBP did not indicate to the Department that there was any record of consumption entries during the POR of OCTG from Mexico exported by TAMSA.

As part of this investigation, the Department investigated proprietary information from CBP for all HTSUS numbers covered by the scope of this review. After reviewing the customs information, the Department determines that the merchandise entered during the POR was exported from a third country or party without TAMSA's knowledge and properly identified Mexico as the country of origin. *See* Memo to File dated January 22, 2004.

The Department has not been able to identify any other entries for consumption from TAMSA during the POR. Since there were no entries for consumption during the POR of OCTG from TAMSA, and because Hylsa timely withdrew its request for review, *see* 19 CFR 351.213(d)(1), we are rescinding this review in accordance with the Department's practice. The cash deposit rates for these firms will continue to be the rates established in the most recently completed segment of this proceeding.

This notice is issued and published in accordance with sections 777(i) of the Act and 19 CFR 351.213(d)(4).

Dated: February 3, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc.04–2859 Filed 2–9–04; 8:45am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-475–818]**

## Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part.

**SUMMARY:** On August 7, 2003, the Department of Commerce published the preliminary results and partial rescission of the sixth administrative review and intent not to revoke the order in part, for the antidumping duty order on certain pasta from Italy. The review covers ten manufacturers/exporters of the subject merchandise: (1) Pastificio Guido Ferrara S.r.l. ("Ferrara"), (2) Pastificio Lucio Garofalo S.p.A. ("Garofalo"), (3) Pasta Lensi S.r.l. ("Lensi")[1], (4) Industria Alimentare Colavita, S.p.A. ("Indalco") and its affiliate Fusco S.r.l. ("Fusco") (collectively "Indalco"), (5) PAM S.p.A. ("PAM"), (6) Pastificio Fratelli Pagani S.p.A. ("Pagani"), (7) Pastificio Antonio Pallante S.r.l. ("Pallante") and its affiliate Industrie Alimentari Molisane S.r.l ("IAM") (collectively "Pallante"), (8) Rummo S.p.A. Molino e Pastificio ("Rummo"), (9) Molino e Pastificio Tomasello S.r.l. ("Tomasello"), and (10) Pastificio Zaffiri S.r.l. ("Zaffiri"). The period of review ("POR") is July 1, 2001, through June 30, 2002.

As a result of our analysis of the comments received, these final results differ from the preliminary results. For our final results, we have found that during the POR, Garofalo, Indalco, PAM, Tomasello, and Zaffiri, sold subject merchandise at less than normal value ("NV"). We have also found that Ferrara, Pallante, Pagani, Lensi and Rummo did not make sales of the subject merchandise at less than NV (*i.e.*, they had "zero" or *de minimis* dumping margins). We have also determined not to revoke the antidumping duty order with respect to subject merchandise produced and also exported by Pagani. The final results are listed in the section "Final Results of Review" below.

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Alicia Kinsey or Mark Young, AD/CVD Enforcement Office VI, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230; telephone: (202) 482–4793 or (202) 482–6397, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On August 7, 2003, the Department published the preliminary results of the sixth administrative review of the antidumping duty order on certain pasta from Italy. *See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke in Part: For the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 68 FR 47020 (August 7, 2003) ("*Preliminary Results*"). Although the Department initiated the review of twelve companies, we rescinded the review of two of those companies. *See* Partial Rescission section of the *Preliminary Results* for a more detailed explanation. The review covers the remaining ten manufacturers/exporters. We invited parties to comment on our *Preliminary Results*. Petitioners[2] filed case briefs on September 24, 2003, regarding Rummo, Ferrara, Zaffiri, Garofalo, Indalco, and Pagani. On September 22 through September 24, 2003, PAM, Tomasello, Zaffiri, Lensi, Garofalo, and Rummo filed case briefs. On October 1, 2003, petitioners, Ferrara, Indalco, Pagani, Zaffiri, Garofalo, and Rummo submitted rebuttal briefs. On October 21, 2003, a public hearing was held at the Department of Commerce with respect to PAM. On November 21, 2003, the Department published the extension of final results of the antidumping administrative review of pasta from Italy. See Certain Pasta from Italy: Extension of Final Results of Antidumping Administrative Review, 68 FR 65679 (November 21, 2003).

### Scope of Review

Imports covered by this review are shipments of certain non-egg dry pasta in packages of five pounds (2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, by Bioagricoop Scrl, by QC&I International

[1] The Department determined that Lensi is the successor-in-interest to Italian American Pasta Company Italia S.r.l. ("IAPC"), and that Lensi retains the antidumping and countervailing duty deposit rates assigned to IAPC by the Department in the most recently completed antidumping and countervailing duty administrative reviews. *See Notice of Final Results of Antidumping and Countervailing Duty Changed Circumstances Reviews: Certain Pasta from Italy*, 68 FR 41553 (July 14, 2003).

[2] Petitioners are New World Pasta Company, Dakota Growers Pasta Company, Borden Foods Corporation and American Italian Pasta Company.

Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, by Associazione Italiana per l'Agricoltura Biologica, or by Codex S.R.L.

The merchandise subject to review is currently classifiable under item 1902.19.20 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

**Scope Rulings**

The Department has issued the following scope rulings to date:

(1) On August 25, 1997, the Department issued a scope ruling that multicolored pasta, imported in kitchen display bottles of decorative glass that are sealed with cork or paraffin and bound with raffia, is excluded from the scope of the antidumping and countervailing duty orders. *See* Memorandum from Edward Easton, Senior Analyst, Office of AD/CVD Office V, to Richard Moreland, Deputy Assist Secretary, "Scope Ruling Concerning Pasta from Italy," dated August 25, 1997, which is on file in the Central Records Unit ("CRU"), room B-099 of the main Commerce Department Building.

(2) On July 30, 1998, the Department issued a scope ruling, finding that multipacks consisting of six one-pound packages of pasta that are shrink-wrapped into a single package are within the scope of the antidumping and countervailing duty orders. *See* Letter from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Import Administration, to Barbara P. Sidari, Vice President, Joseph A. Sidari Company, Inc., dated July 30, 1998, which is available in the CRU.

(3) On October 23, 1997, the petitioners filed an application requesting that the Department initiate an anti-circumvention investigation of Barilla, an Italian producer and exporter of pasta. The Department initiated the investigation on December 8, 1997 (62 FR 65673). On October 5, 1998, the Department issued its final determination that Barilla's importation of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or less constitutes circumvention with respect to the antidumping duty order on pasta from Italy pursuant to section 781(a) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.225(b). *See Anti-circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 63 FR 54672 (October 13, 1998).

(4) On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the antidumping and countervailing duty orders. On May 24, 1999, we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the antidumping and countervailing duty orders. *See* Memorandum from John Brinkmann, Program Manager, Office of AD/CVD Enforcement VI, to Richard Moreland, Deputy Assistant Secretary, "Final Scope Ruling," dated May 24, 1999, which is available in the CRU.

(5) On April 27, 2000, the Department self-initiated an anti-circumvention inquiry to determine whether Pagani's importation of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or less constitutes circumvention, with respect to the antidumping and countervailing duty orders on pasta from Italy pursuant to section 781(a) of the Act and 19 CFR 351.225(b). *See Certain Pasta from Italy: Notice of Initiation of Anti-circumvention Inquiry of the Antidumping and Countervailing Duty Orders*, 65 FR 26179 (May 5, 2000). On September 19, 2003, we published an affirmative finding on the anti-circumvention inquiry. *See Anti-circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta from Italy: Affirmative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 68 FR 54888 (September 19, 2003).

**Intent Not to Revoke Order**

For the reasons outlined in the "Issues and Decision Memorandum" ("Decision Memo") from Holly A. Kuga, Acting Deputy Assistant Secretary for Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated February 3, 2004, which is hereby adopted by this notice, we have determined not to revoke the antidumping duty order with respect to subject merchandise produced and also exported by Pagani because Pagani failed to demonstrate that for three consecutive years it sold the subject merchandise to the United States in commercial quantities in accordance with 19 CFR 351.222(e).

**Use of Adverse Facts Available**

As discussed in detail in the *Preliminary Results*, we have determined to use facts otherwise available for PAM, in arriving at the final dumping margin; and as noted in the *Preliminary Results*, we determine that, in accordance with sections 776(a) and (b) of the Act, the use of adverse facts available is appropriate for PAM, who failed verification. The Department received comments from PAM and petitioners. The comments are addressed in the Decision Memo. As a result of our analysis of the arguments presented in the briefs, the Department confirms its decision to use adverse facts available to arrive at the final dumping margin for PAM.

**Use of Partial Facts Available**

There were several errors in Indalco's reporting of its selling expenses, and Indalco did not bring these errors to the Department's attention until after Indalco's submission of minor corrections at verification. Consequently, in the *Preliminary Results*, we applied partial facts available to determine Indalco's dumping margin. *See also* Memorandum to Eric Greynolds, Program Manager, from Mark Young and Tipten Troidl, Case Analysts, Re: Verification of the Sales Response of Industria Alimentare Colavita, S.p.A. ("INDALCO") and Fusco S.r.l. ("Fusco") in the 01/02 Administrative Review of the Antidumping Duty Order of Certain Pasta from Italy, which is available in the CRU. We received no comments on this issue. Therefore, pursuant to section 776(a)(2)(A) of the Act, we continue to apply partial facts otherwise available to determine Indalco's dumping margin in the final results.

**Analysis of Comments Received**

All issues raised in the case and rebuttal brief by parties to this administrative review are addressed in the Decision Memo, which is hereby adopted by this notice. A list of the issues which parties have raised, and to which we have responded in the Decision Memo, is attached to this notice as an Appendix. In addition, a complete version of the Decision Memo can be accessed directly on the Web at http://ia.ita.doc.gov. The paper copy and electronic version of the Decision Memo are identical in content.

**Final Results of Review**

We determine that the following weighted-average margins exist for the period July 1, 2001, through June 30, 2002:

| Manufacturer/exporter | Margin (percent) |
|---|---|
| Ferrara | 0.24 |
| Garofalo | 2.55 |
| Lensi | 0.36 |
| Indalco | 2.85 |
| Pagani | 0.21 |
| Pallante | 0.12 |
| PAM | 45.49 |
| Rummo | 0.94 |
| Tomasello | 4.59 |
| Zaffiri | 7.23 |
| All Others | 11.26 |

**Assessment**

The Department shall determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b), we have calculated exporter/importer-specific duty assessment rates by aggregating the dumping margins for the examined U.S. sales for each importer and dividing the amount by the total entered value of the sales for that importer. In situations in which the importer-specific assessment rate is above *de miminis*, we will instruct CBP to assess antidumping duties on that importer's entries of subject merchandise. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review.

**Cash Deposit Requirements**

The following deposit requirements will be effective upon publication of this notice of final results of the administrative review for all shipments of pasta from Italy entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed companies will be the rates shown above, except where the margin is *de minimis* or zero we will instruct CBP not to collect cash deposits; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 11.26 percent, the "All Others" rate established in the less than fair value investigation. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 FR 38547 (July 24, 1996). These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

**Notification**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement may result in the Secretary's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO are sanctionable violations.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 3, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

**Appendix I**

**List of Comments and Issues in the Decision Memorandum**

List of Comments:

**Pasta Lensi S.r.l.**

*Comment 1:* Clerical Error
*Comment 2:* Exclusion of Sales of Pasta Produced by Other Manufacturers

**Industria Alimentare Colavita, S.p.A. and Fusco S.r.l.**

*Comment 3:* Clerical Error
*Comment 4:* Disallowed Credit
*Comment 5:* Credit Amortization
*Comment 6:* Double Counted Amortization
*Comment 7:* Offsetting Positive Margins
*Comment 8:* Calculation of Entry Value

**PAM S.p.A.**

*Comment 9:* Rescission of the Administrative Review
*Comment 10:* Department's Application of Adverse Facts Available ("AFA")
*Comment 11:* The Reasonableness of the AFA Rate Applied by the Department

**Pastificio Fratelli Pagani S.p.A.**

*Comment 12:* Revocation

**Rummo S.p.A. Molino e Pastificio**

*Comment 13:* Treatment of Rummo USA's Customer's Note Receivable as a Rebate
*Comment 14:* Reimbursement of Antidumping Duties
*Comment 15:* Error in the Home Market Credit Expense Calculation
*Comment 16:* Inconsistencies in Rummo's Reporting of Certain Sales of Subject Merchandise
*Comment 17:* Exclusion of Political Contributions from General & Administrative Expenses ("G&A") Expense Ratio

**Molino e Pastificio Tomasello S.r.l.**

*Comment 18:* Incorrect Denominator Used in Calculation of U.S. Credit Expense
*Comment 19:* Calculation of Packing Costs for Home Market Net Prices
*Comment 20:* Calculation of DIRSEL3U for One U.S. Invoice
*Comment 21:* Change in Wheat Inventory
*Comment 22:* Pasta Scrap Production
*Comment 23:* Cost of Goods Sold ("COGS") used in the G&A and Interest Expense Ratio Calculation
*Comment 24:* Other G&A and Interest Adjustments

**Pastificio Lucio Garofalo S.p.A.**

*Comment 25:* The Department Should Collapse Garofalo and Amato
*Comment 26:* The Department Should Not Accept Garofalo's Definition of a Third Wheat Code
*Comment 27:* Matching of Wheat Codes
*Comment 28:* Subtracting DISCREBH from NETPRICOP
*Comment 29:* Incorporation of Only Home Market Sales that Passed the Cost Test
*Comment 30:* Revised Interest Amounts Should be Used in the Calculation of Constructed Value ("CV")
*Comment 31:* Conversion of Home Market Sales Data into Italian Lire rather than to Euros
*Comment 32:* Semolina Purchases
*Comment 33:* Failure to Include Commingled Sales in Garofalo's Margin Calculation
*Comment 34:* Use of Wrong Affiliated Party Arm's Length Test
*Comment 35:* Non-Use of Revised Total Cost of Manufacturing ("RTOTCOM")

**Pastificio Zaffiri S.r.l.**

*Comment 36:* Proper Matching of Zaffiri's Sales at the Same Level of Trade ("LOT")
*Comment 37:* Calculation of Imputed Credit Expense
*Comment 38:* Treatment of Piazzista Expenses
*Comment 39:* Treatment of the U.S. Billing Adjustment
*Comment 40:* Treatment of Free Pasta Program in the United States
*Comment 41:* Currency Conversions in Computer Program
*Comment 42:* Purchased Pasta
*Comment 43:* By-product Revenue Offset in the COGS Denominator of the Interest Expense and G&A Expense Ratios
*Comment 44:* Packing Cost in the COGS Denominator of the G&A and Interest Expense Ratios
*Comment 45:* Trade Show Revenue as Offset to G&A Expense
*Comment 46:* Foreign Exchange Loss
*Comment 47:* Expenses on Invoice Payables and Loss on Sale of Assets
*Comment 48:* Packing Costs

**Pastificio Guido Ferrara S.r.l.**

*Comment 49:* Offset to Ferrara's Depreciation for Italian Subsidies
*Comment 50:* Offset to Fixed Overhead Relating to Ferrara's Performance Bond Claim
*Comment 51:* Use of "Die Type" as a Product Matching Hierarchy

[FR Doc. 04–2862 Filed 2–9–04; 8:45 am]
BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-570–504]**

### Petroleum Wax Candles from the People's Republic of China: Rescission, in Part, of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, U.S. Department of Commerce.

**SUMMARY:** The Department of Commerce ("the Department") is rescinding its administrative review of twenty-one companies under the antidumping order on petroleum wax candles from the People's Republic of China (PRC) for the period August 1, 2002 through July 31, 2003. This rescission, in part, is based on the timely withdrawl of the request for review by the only interested party that requested a review of these twenty-one companies. A complete list of the companies for which the administrative review is being rescinded is provided in the *Rescission, in Part, of Administrative Review* section below. The Department is not rescinding its review of Dongguan Fay Candle Co., Ltd. (Fay Candle) and Qingdao Kingking Applied Chemistry Co., Ltd. (Qingdao Kingking), because each of these companies self-requested an administrative review.

**EFFECTIVE DATE:** February 10, 2004

**FOR FURTHER INFORMATION CONTACT:** Javier Barrientos or Sally Gannon at (202) 482–2243 and (202) 482–0162, respectively, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

#### Background

The Department published in the **Federal Register** an antidumping duty order on petroleum wax candles from the PRC on August 28, 1986 (51 FR 30686). Pursuant to its *Notice of Opportunity to Request an Administrative Review*, 68 FR 45218 (August 1, 2003), and in accordance with section 751(a)(1)(B) of the Act and section 351.213(b) of the Department's regulations, the Department received a timely request by the National Candle Association ("Petitioner") to conduct an administrative review of the antidumping duty order on petroleum wax candles from the PRC for twenty-three companies. Two of the twenty-three companies requested by the Petitioner (Fay Candle and Qingdao Kingking) individually requested a review. As such, the Petitioner was the sole requestor for twenty-one companies.

On September 30, 2003, the Department published its *Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Review*, 68 FR 56262 (September 30, 2003) (*Initiation Notice*), initiating on all twenty-three candle companies for which an administrative review was requested. On December 24, 2003, the Department received a timely withdrawal from the Petitioner of its request for an administrative review of all twenty-three companies for which it had requested a review.

#### Rescission, in Part, of Administrative Review

Pursuant to section 351.213(d)(1) of the Department's regulations, the Department may rescind an administrative review, "if a party that requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." Because the Petitioner has timely withdrawn its request for review within the ninety-day period, and because Petitioner was the sole party to request a review for twenty-one of the twenty-three companies for which a review was requested, we are rescinding this administrative review, in part, for the period August 1, 2002 to July 31, 2003, for the following companies: Amstar Business Co., Ltd.; AtHome America; Avon Products, Inc.; Candle World Industrial Co.; Dalian Hanbo Lighting Co., Ltd.; Generaluxe Factory; Guangdong Xin Hui City Si Qian Art & Craft Factory; Jiangsu Holly Corporation; Li & Fung Trading Ltd.; Premier Candle Co. Ltd.; Shandong Jiaye Gen. Merch.; Shanghai Charming Wax Co., Ltd.; Simon Int'l Ltd.; Sincere Factory Company; Smartcord Int'l Co., Ltd./Rich Talent Trading; Suzhou Ind'l Park Nam Kwong; Taizhou Int'l Trae Corp.; Two's Company Inc.; Universal Candle Co., Ltd.; Zen Continental Co., Inc.; and, Zhong Hang-Scanwell International/Scanwell Freight Express (LAX), Inc. However, we will continue the administrative review with respect to Fay Candle and Qingdao Kingking, as these companies individually submitted a request for review.

The Department will issue appropriate assessment instructions directly to the U.S. Customs and Border Protection (Customs) within 15 days of the publication of this notice. The Department will direct Customs to assess antidumping duties for these companies at the cash deposit rate in effect on the date of entry for entries during the period August 1, 2002 to July 31, 2003.

#### Notification to Parties

This notice serves as a reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period of time. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulations. Timely written notification of the return or

destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 351.213(d)(4) of the Department's regulations and, sections 751(a)(2)(C) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: January 27, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc. 04–2860 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-201–822]**

### Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative review of stainless steel sheet and strip from Mexico.

**SUMMARY:** On August 7, 2003, the Department of Commerce ("the Department") published the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico (68 FR 47043). This review covers one manufacturer/exporter, ThyssenKrupp Mexinox S.A. de C.V. ("Mexinox"), of the subject merchandise to the United States during the period July 1, 2001 to June 30, 2002. Based on our analysis of the comments received, we have made changes in the margin calculation. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of Review."

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Scott or Robert James, AD/CVD Enforcement, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, telephone: (202) 482–2657 or (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On August 7, 2003, the Department published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico for the period July 1, 2001 to June 30, 2002. *See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 47043 (August 7, 2003). In response to the Department's invitation to comment on the preliminary results of this review, Mexinox ("respondent") and Allegheny Ludlum, AK Steel Corporation, J&L Specialty Steel, Inc., Butler-Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC (collectively, "petitioners") filed their case briefs on September 8, 2003. Mexinox and petitioners submitted their rebuttal briefs on September 15, 2003. On October 14, 2003, we published in the **Federal Register** our notice of the extension of time limits for this review. *See Stainless Steel Sheet and Strip in Coils from Mexico; Antidumping Duty Administrative Review; Extension of Time Limit*, 68 FR 59162 (October 14, 2003). This extension established the deadline for this final as February 3, 2004.

#### Period of Review

The period of review ("POR") is July 1, 2001 to June 30, 2002.

#### Scope of the Review

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing. The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States ("HTS") at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.1300.81, 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the review of this order are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* chapter 72 of the HTS, "Additional U.S. Note" 1(d).

Flapper valve steel is also excluded from the scope of the order. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper

valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as "Arnokrome III."[1]

Certain electrical resistance alloy steel is also excluded from the scope of this order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials ("ASTM") specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as "Gilphy 36."[2]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System ("UNS") as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as "Durphynox 17."[3]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this order. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[4] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as "GIN4 Mo." The second excluded stainless steel strip in coils is similar to AISI 420-J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is "GIN5" steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, "GIN6."[5]

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the "Issues and Decision Memorandum" ("Decision Memorandum") from Joseph A. Spetrini, Deputy Assistant Secretary, Group III, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated February 3, 2004, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099, of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly via the Internet at www.ia.ita.doc.gov. The paper copy and electronic version of the Decision Memorandum are identical in content.

**Changes Since the Preliminary Results**

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

- We have recalculated Mexinox's handling expenses (HANDLEH) using the actual warehousing and freight expenses incurred by Mexinox Trading.
- We revised the denominator of the U.S. indirect selling expense ratio (INDIRSU) by subtracting the value of Mexinox USA's raw material sales to

[1] "Arnokrome III" is a trademark of the Arnold Engineering Company.

[2] "Gilphy 36" is a trademark of Imphy, S.A.

[3] "Durphynox 17" is a trademark of Imphy, S.A.

[4] This list of uses is illustrative and provided for descriptive purposes only.

[5] "GIN4 Mo," "GIN5" and "GIN6" are the proprietary grades of Hitachi Metals America, Ltd.

Mexinox, and revised the numerator of the U.S. indirect selling expense ratio by deducting an amount attributable to the expenses incurred in selling these raw materials. We also adjusted the numerator of the U.S. indirect selling expense ratio to account for Mexinox's historical bad debt experience. We then used the revised numerator and denominator to calculate a revised U.S. indirect selling expense ratio.

• We recalculated the first component of Mexinox's direct selling expense ratio (DIRSELU) in order to allocate the expenses incurred during the POR to the relevant POR sales.

• We included in the denominator of the assessment rate the entered value of subject merchandise that entered for consumption in the United States but was first sold to unaffiliated parties outside the United States.

• We removed the programming language which had adjusted the billing adjustment (BILLADJU) reported for a certain U.S. sale (U.S. surprise sale 12).

• We revised our calculation of the constructed export price profit rate to include the indirect selling expenses incurred by Mexinox USA's affiliated reseller, Ken-Mac Metals, Inc. (KINDSU), in total U.S. selling expenses.

• We amended our calculation of cost of production and constructed value to exclude the cost of products (CONNUMs) produced by non-Mexican manufacturers.

• We revised Mexinox's general and administrative ("G&A") expense ratio by excluding "stock strip devaluation," "finished product returns to WIP," and "finished product inventory movements" from the cost of goods sold denominator. We then applied the revised G&A ratio to the cost of manufacture ("COM") prior to making the adjustments for major inputs.

• We applied the financial expense ratio used in the preliminary results to the COM prior to making the major input adjustments.

These changes are discussed in the relevant sections of the Decision Memorandum.

**Final Results of Review**

We determine that the following weighted-average percentage margin exists for the period July 1, 2001 to June 30, 2002:

| Manufacturer/Exporter | Weighted Average Margin (percentage) |
|---|---|
| Mexinox | 7.43 |

**Assessment**

The Department shall determine and Customs and Border Protection ("Customs") shall assess antidumping duties on all appropriate entries. In accordance with 19 C.F.R. §351.212(b)(1), we have calculated importer-specific *ad valorem* duty assessment rates. Where the importer-specific assessment rate is above *de minimis*, we will instruct Customs to assess duties on all entries of subject merchandise by that importer. The Department will issue appropriate assessment instructions directly to Customs within 15 days of publication of these final results of review. We will direct Customs to assess the resulting assessment rate against the entered Customs values for the subject merchandise on each of the importer's entries under the relevant order during the POR. *See* 19 C.F.R. §351.212(a).

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, as provided by section 751(a)(1) of the Tariff Act: (1) the cash deposit rate for the reviewed company will be the rate listed above; (2) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value ("LTFV") investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) the cash deposit rate for all other manufacturers or exporters will continue to be the "all others" rate of 30.85 percent, which is the "All Others" rate established in the LTFV investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 30790 (June 8, 1999). These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

**Notification to Interested Parties**

This notice also serves as a final reminder to importers of their responsibility under 19 C.F.R. §351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders ("APOs") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 C.F.R. §351.305, that continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: February 3, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

**Appendix Issues in Decision Memorandum**

Adjustments to Normal Value and U.S. Price

*Comment 1:* Home Market and U.S. Post-Sale Price Adjustments

Adjustments to Normal Value

*Comment 2:* Level of Trade
*Comment 3:* Whether the Home Market Sales Database is Complete
*Comment 4:* Indirect Selling Expenses Incurred in the Home Market
*Comment 5:* Treating Certain Home Market Adjustments as Commissions

Adjustments to United States Price

*Comment 6:* U.S. Indirect Selling Expenses
*Comment 7:* U.S. Credit Expenses
*Comment 8:* U.S. Inventory Carrying Costs
*Comment 9:* Duty Drawback
*Comment 10:* U.S. Direct Selling Expenses
*Comment 11:* Billing Adjustment for U.S. Surprise Sale 12
*Comment 12:* CEP Profit Rate

Cost of Production

*Comment 13:* Weight-Averaging Costs of Subject and Non-Subject Merchandise
*Comment 14:* General and Administrative Expenses
*Comment 15:* Financial Expenses
*Comment 16:* Major Inputs
*Comment 17:* Verification Findings from Companion Reviews
*Comment 18:* Offset to Production Costs

[FR Doc. 04–2861 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–428–825]**

### Stainless Steel Sheet and Strip in Coils From Germany; Notice of Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative review.

**SUMMARY:** On August 7, 2003, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. *See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 47039 (August 7, 2003) (*Preliminary Results*). This review covers ThyssenKrupp Nirosta GmbH and ThyssenKrupp VDM (collectively, TKN). The merchandise covered by this order is stainless steel sheet and strip in coils as described in the "Scope of the Review" section of the **Federal Register** notice. The period of review (POR) is July 1, 2001, through June 30, 2002. We invited parties to comment on our *Preliminary Results*. Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of the Review."

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Patricia Tran, Michael Heaney, or Robert James at (202) 482–1121, (202) 482–4475, or (202) 482–0649, respectively, Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

#### Background

We published the *Preliminary Results* on August 7, 2003. On September 5, 2003, October 29, 2003, and December 30, 2003, the Department issued supplemental questionnaires to TKN; TKN responded on October 3, 2003, November 12, 2003, and January 12, 2004. Petitioners (Allegheny Ludlum Corporation, AK Steel Corporation, J&L Specialty Steel, Inc., North American Stainless, United Steelworkers of America, AFL–CIO/CLC, Butler Armco Independent Union, Zanesville Armco Independent Organization, Inc.) and TKN filed case briefs on November 17, 2003; rebuttal briefs from both parties were filed on November 24, 2003. TKN requested a hearing, but later withdrew its request, so the Department did not hold a hearing.

#### Scope of the Review

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing. The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.1300.81,[1] 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the review of this order are the following: (1) Sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. See chapter 72 of the HTS, "Additional U.S. Note" 1(d).

Flapper valve steel is also excluded from the scope of the order. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of

[1] Due to changes to the HTS numbers in 2001, 7219.13.0030, 7219.13.0050, 7219.13.0070, and 7219.13.0080 are now 7219.13.0031, 7219.13.0051, 7219.13.0071, and 7219.13.0081, respectively.

suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as "Arnokrome III."[2]

Certain electrical resistance alloy steel is also excluded from the scope of this order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (ASTM) specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as "Gilphy 36."[3]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System (UNS) as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as "Durphynox 17."[4]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this order. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[5] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as "GIN4 Mo." The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is "GIN5" steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, "GIN6."[6]

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) from Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration to James J. Jochum, Assistant Secretary for Import Administration, dated February 3, 2004, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in room B–099 of the main Department of Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at www.ia.ita.doc.gov. The paper copy and electronic version of the Decision Memorandum are identical in content.

**Changes Since the Preliminary Results**

Based on our analysis of comments received, we have made changes in the margin calculations. The changes are listed below:

- We included the entered quantity and entered value of subject merchandise entered for consumption in the United States but sold to unaffiliated parties outside of the United States in the denominator of the assessment rate.
- We have also corrected certain programming and clerical errors in our preliminary results, where applicable. Any alleged programming errors with which we do not agree are discussed in the relevant sections of the Decision Memorandum, accessible in B–099 of the main Department of Commerce building and on the Web at www.ia.ita.doc.gov.

[2] Arnokrome III" is a trademark of the Arnold Engineering Company.

[3] "Gilphy 36" is a trademark of Imphy, S.A.

[4] "Durphynox 17" is a trademark of Imphy, S.A.

[5] This list of uses is illustrative and provided for descriptive purposes only.

[6] "GIN4 Mo," "GIN5" and "GIN6" are the proprietary grades of Hitachi Metals America, Ltd.

**Final Results of the Review**

We determine the following percentage weighted-average margin exists for the period July 1, 2000 through June 30, 2001:

| Manufacturer/Exporter | Weighted average margin (percentage) |
|---|---|
| TKN | 3.72 |

**Liquidation**

The Department shall determine, and U.S. Customs and Border Protection (Customs) shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer-specific assessment rates. The Department will issue appropriate assessment instructions directly to Customs within 15 days of publication of these final results of review. With respect to constructed export price sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting assessment rate against the entered Customs values for the subject merchandise on each of the importer's entries during the POR.

**Cash Deposit Requirements**

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of stainless steel sheet and strip in coils from Germany entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for the reviewed company will be the rate shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 13.48 percent. This rate is the "All Others" rate from the amended final determination in the LTFV investigations. *See Stainless Steel Sheet and Strip in Coils From Germany: Amended Final Determination of Antidumping Duty Investigation*, 67 FR 15178, 15179 (March 29, 2002).

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i) of the Tariff Act.

Dated: February 3, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

**Appendix**

**Comments and Responses**

1. Assessment Rate Methodology
2. Interest Expenses
3. Packing Costs
4. Downstream Home Market Sales
5. Treatment of Non-Dumped Sales
6. Other Revisions to Calculation

[FR Doc. 04–2863 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

**[Docket No. 030429105–3270–02]**

### Announcing Approval of Federal Information Processing Standard (FIPS) Publication 199, Standards for Security Categorization of Federal Information and Information Systems

**AGENCY:** National Institute of Standards and Technology (NIST), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Secretary of Commerce has approved FIPS Publication 199, Standards for Security Categorization of Federal Information and Information Systems, and has made it compulsory and binding on Federal agencies for the protection of: (i) All information within the Federal government other than that information that has been determined pursuant to Executive Order 12958, as amended by Executive Order 13292, or any predecessor order, or by the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure and is marked to indicate its classified status; and (ii) all Federal information systems other than those information systems designated as national security systems as defined in the United States Code.

The Federal Information Security Management Act (FISMA) requires all Federal agencies to develop, document, and implement agency-wide information security programs to provide information security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. FIPS Publication 199 addresses one of the requirements specified in the FISMA. It provides security categorization standards for information and information systems.

The purpose of security categorization standards is to provide a common framework and method for expressing security and to promote effective management and oversight of information security programs, including the coordination of information security efforts throughout the civilian, national security, emergency preparedness, homeland security, and law enforcement communities; and consistent reporting to the Office of Management and Budget (OMB) and Congress on the adequacy and effectiveness of information security policies, procedures, and practices.

**DATES:** This standard is effective February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Dr. Ron Ross, (301) 975–5390, National Institute of Standards and Technology, 100 Bureau Drive, STOP 8930, Gaithersburg, MD 20899–8930.

A copy of FIPS Publication 199 is available electronically from the NIST Web site at: *http://csrc.nist.gov/publications/.*

**SUPPLEMENTARY INFORMATION:** A notice was published in the **Federal Register** (68 FR 26573) on May 16, 2003, announcing the proposed FIPS Publication 199 on Standards for

Security Categorization of Federal Information and Information Systems for public review and comment. The **Federal Register** notice solicited comments from the public, academic and research communities, manufacturers, voluntary standards organizations, and Federal, state, and local government organizations. In addition to being published in the **Federal Register**, the notice was posted on the NIST Web pages; information was provided about the submission of electronic comments. Comments and responses were received from thirteen private sector organizations, individuals and groups of individuals, from eighteen federal government organizations, and from one Canadian government organization.

Many of the comments received recommended editorial changes, expressed concerns about the discussion of risk, risk assessment, threats, and security controls, and asked for clarification about the requirements of the FISMA. None of the comments opposed the adoption of this Federal Information Processing Standard. Many comments supported the concept of categorization of information and information systems and commended the clear, well-written presentation of the standard. All of the editorial and related comments were carefully reviewed, and changes were made to the standard where appropriate. Specifically, certain terminology in FIPS 199 was modified to be consistent with other NIST publications. All future publications will reflect consistent terminology.

Following is an analysis of the comments dealing with technical and implementation issues.

*Comment:* The major issue raised by a majority of the comments was concern about perceived errors and inconsistencies in the initial draft's discussion of risk, risk assessment, threats, and the determination of security controls. Some of the comments suggested that NIST consider using the term "level of impact" instead of "level of risk" to apply to the categorization process.

*Response:* NIST recognizes that some of the initial discussion about risk, risk assessment, threats and the determination of security controls was abbreviated and concise, and that the discussion could have been misinterpreted. The original discussion described three potential levels of risk (low, moderate and high) for each of three security objectives (confidentiality, integrity and availability of information and information systems, which were defined in the FISMA). The levels of risk considered both impact of adverse events and threats to systems, but were more heavily weighted toward impact. The categorization process involves matching the agency's assessment of levels of potential risk to each security objective, considering the occurrence of events that could jeopardize the information and information systems of the agency.

As some of the comments pointed out, risk assessment is part of a well-defined management process conducted by agencies to identify and evaluate risks and risk impacts, and to recommend risk-reducing measures that balance costs and organizational requirements. NIST agrees that the issues of determining levels of risk and conducting risk assessments are part of a structured management process. These issues are covered comprehensively in other NIST publications. Therefore, the focus of the categorization process should be on "level of impact" that undesired events could have on information and information systems.

The text of FIPS Publication 199 was changed to describe three levels of potential impact (low, moderate and high) on organizations or individuals if any of the security objectives of confidentiality, integrity and availability of information and information systems were compromised. The security categories are to be used in conjunction with vulnerability and threat information in assessing the risk to the agency. This change responds to the many comments received on this issue, and clarifies the text for agency users. Terms and definitions relating to risk and risk assessments that had been included in the initial draft were removed from the final standard.

*Comment:* Some comments expressed confusion about the information included in the initial draft about the Federal Information Security Management Act (FISMA) and its requirements, particularly those requirements that are addressed by FIPS Publication 199.

*Response:* NIST agrees that some of the original discussion in draft FIPS Publication 199 could have been misinterpreted. Therefore, the text was revised to delete extraneous material and to clarify the purpose of FIPS Publication 199. FIPS Publication 199 now clearly defines the impact levels to be used in categorizing information and information systems, and indicates that the standard addresses one of the tasks assigned to NIST by the FISMA. That task is the development of standards to be used by all Federal agencies to categorize information and information systems collected or maintained by or on behalf of each agency based on the objectives of providing appropriate levels of information security according to a range of risk levels. Other requirements of the FISMA, such as determination of the types of information and information to be included in each category, will be addressed in future NIST standards and guidelines.

*Comment:* Some comments suggested changes to Table 1 in the original draft, and asked for an explanation of the use of the table. Examples of impacts for each impact definition were requested.

*Response:* FIPS Publication 199 was revised to clarify the text and to provide examples of impacts for each definition of impact for each security objective.

*Comment:* There are no provisions for the use of new technologies or updating of legacy systems.

*Response:* The provisions of FIPS Publication 199 are independent of the technology used, and can be applied to electronic and non-electronic information.

*Comment:* An objective for privacy should be added to the objectives of confidentiality, integrity and availability. The loss of privacy and identity theft should be added to the impact definitions.

*Response:* FIPS Publication 199 was revised to clarify the issue of privacy by specifying that loss of privacy and identify theft are examples of impacts on individuals. The objective of confidentiality, as defined in the FISMA (44 USC, Sec. 3542), encompasses privacy: Preserving authorized restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information.

*Comment:* The definition of availability should be modified. Other security objectives (non-repudiation and authentication) should be added

*Response:* The definition of availability is taken directly from the FISMA legislation and thus, cannot be modified. However, the security objectives mentioned in the public comment, namely nonrepudiation and authenticity are specifically covered in FIPS Publication 199 under the definition of integrity. FISMA's definition of integrity includes the security objectives of nonrepudiation and authenticity so there is no need to modify the definition of availability to include those objectives. Adding additional security objectives independently would make the simple three by three matrix more complex for federal agencies during implementation and not add any appreciable value in

helping to assess the potential impact of loss of information systems supporting those agencies.

*Comment:* An impact level of "none" should be added to the levels of low, moderate and high.

*Response:* A note was added that an impact level of "none" was appropriate only for confidentiality of some information (such as public information). Impact levels of "none" are not appropriate for the security objectives of availability and integrity since all agency information and information systems should be protected for availability and integrity.

*Comment:* The category of information designation should be separate from the category of system designation.

*Response:* FIPS Publication 199 treats systems categorization separately from information categorization.

*Comment:* The security objectives of confidentiality, integrity, and availability could be expanded.

*Response:* FIPS Publication 199 allows agencies to develop and use additional security designators.

*Comment:* Only two impact levels are needed for non-national security information and systems.

*Response:* NIST believes that three levels of impact are needed for non-national security systems. Two levels of impact do not provide sufficient granularity to describe the range of potential impacts on federal agency missions resulting from the loss of confidentiality, integrity, or availability of information and information systems. Three impact levels are necessary to adequately describe the potential impact of loss to agency operations and assets ranging from routine administrative support systems at the low end to the most critical systems that are a part of the nation's critical information infrastructure at the high end. The moderate impact level provides another important category to address those systems that are deemed significantly more important than routine support systems, but not critical to the operations of the U.S. government. Three impact levels strike an adequate balance between providing too many categories and making the categorization process too complex and providing too few categories which forces agencies to either undervalue or overvalue the potential impact of loss to their operations and assets.

*Comment:* FIPS Publication 199 could define what level of risk is to be associated with a security objective required by law. More explicit information is needed to categorize systems. FIPS Publication 199 should present definitive guidance on vulnerabilities, impact and risk management methodology.

*Response:* These issues are discussed in current NIST publications, or will be addressed in future NIST publications.

*E.O. 12866:* This notice has been determined to be not significant for the purposes of E.O. 12866.

Dated: February 4, 2004.

**Arden L. Bement, Jr.,**

*Director.*

[FR Doc. 04–2885 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### Announcement of the American Petroleum Institute's Standards Activities

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice.

**SUMMARY:** The American Petroleum Institute (API), with the assistance of other interested parties, continues to develop standards, both national and international, in several areas. This notice lists the standardization efforts currently being conducted by API committees. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of API is being undertaken as a public service. NIST does not necessarily endorse, approve, or recommend the standards referenced.

**ADDRESSES:** American Petroleum Institute, 1220 L Street, NW., Washington, DC 20005; telephone (202) 682–8000, *http://www.api.org.*

**FOR FURTHER INFORMATION CONTACT:** All contact individuals listed in the **SUPPLEMENTARY INFORMATION** section of this notice may be reached at the American Petroleum Institute.

**SUPPLEMENTARY INFORMATION:**

#### Background

The American Petroleum Institute develops and publishes voluntary standards for equipment, materials, operations, and processes for the petroleum and natural gas industry. These standards are used by both private industry and by governmental agencies. All interested persons should contact the appropriate source as listed for further information.

#### Pipeline Committee

New Std 1163 ILI Systems Qualification
New Std 1164 SCADA Security
New Std 1165 SCADA Display

*For Further Information Contact:* Andrea Johnson, Standards Department, e-mail: *johnsona@api.org.*

#### Committee on Marketing

Std 2610 Design, Construction, Operation, Maintenance, and Inspection of Terminal and Tank. Facilities
NEW API/IP RP 1540, Design Construction, Modification and Maintenance of Aircraft Fueling Facilities
New API/IP Std 1529 Aviation Fueling Hose
RP 1626 Recommended Practice for Storing and Handling Ethanol and Gasoline-ethanol Blends at Distribution Terminals and Service Stations.

*For Further Information Contact:* David Soffrin, Standards Department, e-mail: *soffrind@api.org.*

#### Committee on Refining

*Corrosion & Materials:*

RP 651 Cathodic Protection of Aboveground Petroleum Storage Tanks
RP 652 Lining of Aboveground Petroleum Storage Tanks
New RP 938–C Use of Duplex Stainless Steels in the Oil Refining Industry

*Inspection:*

Std 510 Pressure Vessel Inspection Code
RP 575 Inspection of Atmospheric and Low Pressure Storage Tanks

*Pressure Vessel and Tanks:*

Std 620 Design & Construction of Large, Welded, Low-Pressure Storage Tanks
Std 650 Welded Tanks for Oil Storage
Std 653 Tank Inspection, Repair, Alteration, and Reconstruction

*Electrical Equipment:*

New Std 547 General Purpose Form-wound Squirrel-cage Induction Motors larger than 250 HP
Std 541 Form-Wound Squirrel-cage Induction Motors 500 HP and Larger

*Mechanical Equipment:*

Std 672 Packaged, Integrally Geared Centrifugal Air Compressors for Petroleum, Chemical, and Gas Industry Services
Std 618 Reciprocating Compressors for Petroleum, Chemical, and Gas Industry Services
Std 619 Rotary Type Positive Displacement Compressors
Std 677 General Purpose Gear Units
Std 684 Tutorial on Rotor Dynamics and Balancing
Std 686 Machinery Installation and Installation Design
Std 610, National Adoption of ISO 13709, Centrifugal Pumps for

Petroleum, Petrochemical and Natural Gas Industries
Std 682, National Adoption of ISO 21049, Pumps-Shaft Sealing Systems for Centrifugal and Rotary Pumps

*Heat Transfer Equipment:* None due in 2004

*Piping:*

Std 598 Valve Inspection and Testing
Std 609 Butterfly Valves: Double Flanged, Lug- and Wafer-Type
Std 594 Check Valves
Std 600, National Adoption of ISO 10434, Bolted Bonnet Steel Gate Valves
Std 602, National Adoption of ISO 15761, Compact Steel Gat Valves-Flanged, Threaded,
Welding, and Extended Body Ends
Pressure Relieving Systems:
RP 521 Guide for Pressure-Relieving and Depressuring Systems

*Instrument & Control Systems:*

RP 552 Transmission Systems
RP 554 Part 1 Process Instrumentation and Control
Technical Data Book—Petroleum Refining:
Electronic Version of the Technical Data Book—Petroleum Refining, Release 3.0

*For Further Information Contact:* David Soffrin, Standards Department, e-mail: *soffrind@api.org.*

*Meetings/Conferences:* The Spring Refining Meeting will be held at the Hyatt Regency Atlanta, Atlanta, Georgia, May 17–19, 2004. The Fall Refining Meeting will be held at the Manchester Grand Hyatt, San Diego, California, October 25–27, 2004. Interested parties may visit the API Web site at *http://www.api.org/events* for more information regarding participation in these meetings.

**Committee on Safety and Fire Protection**

RP 2001 Fire Protection in Refineries
RP 2026 Safe Access/Egress Involving Floating Roofs of Storage Tanks (possible reaffirmation)
RP 2030 Application of Water Spray Systems for Fire Protection in the Petroleum Industry (probable reaffirmation)
RP 2207 Preparing Tank Bottoms for Hot Work (possible reaffirmation)
RP 2214 Spark Ignition Properties of Hand Tools (probable reaffirmation)
RP 2217A Guidelines for Work in Inert Confined Spaces in the Petroleum Industry
RP 2218 Fireproofing Practices in Petroleum and Petrochemical Processing Plants (possible reaffirmation)
RP 2219 Safe Operation of Vacuum Trucks in Petroleum Service (possible reaffirmation)
RP 2220 Improving Owner and Contractor Safety Performance
RP 2221 Managers Guide to Implementing a Contractor Safety and Health Program
RP 2350 Overfill Protection for Petroleum Storage Tanks

*For Further Information Contact:* David Soffrin, Standards Department, e-mail: *soffrind@api.org.*

**Committee on Petroleum Measurement**

*Manual of Petroleum Measurement Standards:*

New Chapter 2.2E Tank Calibration—Manual Methods (National Adoption of ISO 12917–1)
New Chapter 2.2F Tank Calibration—Calibration of Horizontal Cylindrical Tanks by the Internal Electro-optical Distance-ranging Method (National Adoption of ISO 12917–2)
Chapter 4.1 Introduction to Proving Systems
New Chapter 4.9.1 Introduction to Determination of the Volume of Displacement and Tank Provers
New Chapter 4.9.2 Determination of the Volume of Displacement and Tank Provers by the Waterdraw Method of Calibration
New Chapter 4.9.3 Determination of the Volume of Displacement and Tank Provers by the Master Meter Method of Calibration
New Chapter 4.9.4 Determination of the Volume of Displacement and Tank Provers by the Gravimetric Method
New 12.1.3 Calculation Procedures for Liquefied Petroleum Gases (New document)
New Chapter 17.9 Vessel Experience Factors
New Chapter 17.10 Measurement of Refrigerated and Pressurized Cargo on Marine Tank Vessels
New MPMS Technical Report: Multiphase Flowmeters
Chapter 6.2 3rd Edition Loading Rack and Tank Truck Metering Systems for Non-LPG Products

*For Further Information Contact:* Jon Noxon, Standards Department, e-mail: *noxonj@api.org.*

**API/ASTM/GPA Standards**

MPMS Ch. 10.6/ASTM D1796 Water & Sediment in Fuel Oils by Centrifuge
MPMS Ch. 11.2.4/GPA TP–27/ASTM Temperature Correction for the Volume of NGL and LPG Tables 23E, 24E, 53E, 54E, 59E, 60E
MPMS Ch. 11.2.5/GPA TP–15/ASTM Simplified Vapor Pressure Correlation for Commercial NGLs

*For Further Information Contact:* Paula Watkins, Standards Department, e-mail: *watkinsp@api.org.*

*Meetings/Conferences:* The Spring Committee on Petroleum Measurement Meeting will take place at the Hyatt Regency Atlanta, Atlanta, Georgia, March 29–April 2, 2004. The Fall Committee on Petroleum Measurement Meeting will take place at the Wilshire Grand Hotel, Los Angeles, California, September 20–24, 2004. Interested parties may visit the API Web site at *http://www.api.org/events* for more information regarding participation in these meetings.

**Committee on Exploration and Production**

*Production Equipment:*

Spec 6A, 19th new edition, National Adoption of ISO 10423, Specification for Wellhead and Christmas Tree Equipment
Addendum, Spec 6D Specification for Pipeline Valves
Spec 6A718, 1st edition Specification of Nickel Base Alloy 718 (UNS N07718) for Oil and Gas Drilling and Production Equipment
Spec 14A, 11th edition, National Adoption of ISO 10432, Specification for Subsurface Safety Valve Equipment

*Oil Country Tubular Goods:*

Addendum, RP 5B1 Threading, Gauging, and Thread Inspection of Casing, Tubing and Line Pipe Threads
Spec 5L, 43rd edition Specification for Line Pipe
OCTG Tonnage Reports
Line Pipe Tonnage Reports
Offshore Structures, Drill Through Equipment, and Subsea Production Equipment:
RP 2A–WSD, new edition Planning, Designing and Constructing Fixed Offshore-Platforms-Working Stress Design
Spec 2C, new edition Specification for Offshore Cranes
Bulletin 2U, new edition Bulletin on Stability Design for Cylindrical Shells
Bulletin 2V, new edition Bulletin on Design of Flat Plate Structures
RP 2X, new edition Recommended Practice for Ultrasonic and Magnetic Examination of Offshore Structural Fabrication and Guidelines for Qualification of Technicians
RP 17H, 1st edition, National Adoption of ISO 13628–8, Recommended Practice for Remotely Operated Vehicle (ROVs) Interfaces on Subsea Production Systems
RP 17M, 1st edition, National Adoption of ISO 13628–9, Recommended Practice for Remotely Operated Tool (ROT) Intervention Systems

*Drilling Operations and Equipment:*

RP 4G, new edition Recommended Practice for Use and Procedures for inspections, Maintenance, and Repair of Drilling and Well Servicing Structures

Spec 9A, new edition, National Adoption of lSO 10425, Specification for Wire Rope

RP 10B, new edition, National Adoption of ISO 10426–2, Recommended Practice for Testing Well Cements

RP10X, new edition, National Adoption of ISO 10426–3, Recommended Practice for Deep Water Cementing

Spec 13A, new edition, National Adoption of ISO 13500, Specification for Drilling Fluid Materials

RP 13I, new edition, National Adoption of ISO 10416, Recommended Practice for Standard Procedures for Laboratory Testing Drilling Fluids

RP 13B–2, new edition, National Adoption of ISO 10414–2, Recommended Practice for Standard Procedures for Field Testing Oil-based Drilling Fluids

Spec 16A, new edition, National Adoption of ISO 13533, Specification for Drill-through Equipment

Spec 16C, new edition Specification for Choke and Kill Systems

Spec 16D, new edition Specification for Control Systems for Drilling Well Control Equipment

Spec 16F, new edition Specification for Marine Drilling Riser Equipment

RP 56/58/60 combine as adopt back of 13503–2 Recommended Practice for Frac Sands, Proppants, and Gravel Packing Materials

*For Further Information Contact:* Mike Spanhel, Standards Department, e-mail: *spanhel@api.org.*

*Meetings/Conferences:* The 2003 Summer Standardization Conference on Oilfield Equipment & Materials will take place at the Hyatt Regency Dallas, Dallas, Texas, June 14–18, 2004. Interested parties may visit the API Web site at *http://www.api.org/events* for more information regarding participation in this meeting.

**Executive Committee on Drilling and Production Operations**

RP59, RP on Well Control

RP75, RP on Safety and Environmental Management Program

New RP76, RP on Contractor Safety for Oil and Gas Drilling and Production Operations

*For Further Information Contact:* Tim Sampson, Upstream Department, e-mail: *sampson@api.org.*

*For additional information on the overall API standards program, contact:* David Miller, Standards Department, e-mail: *miller@api.org.*

Dated: February 4, 2004.

**Arden L. Bement, Jr.,**

*Director.*

[FR Doc. 04–2886 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 020404E]**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** The groundfish subcommittee of the Pacific Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a work session to review analytical portions of the Environmental Impact Statement (EIS) for Groundfish Essential Fish Habitat (EFH). The work session is open to the public.

**DATES:** The SSC groundfish subcommittee will meet from 9 a.m. until 5 p.m. on Monday, February 23, 2004. The meeting will continue on Tuesday, February 24, 2004 from 9 a.m. until business for the day is completed.

**ADDRESSES:** The groundfish subcommittee work session will be held at NMFS Alaska Fisheries Science Center, Traynor Seminar Room, 7600 Sand Point Way N.E., Building 4, Seattle, WA 98115; telephone: 206–526–4000.

*Council address*: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dan Waldeck, Staff Officer: 503–820–2280.

**SUPPLEMENTARY INFORMATION:** NMFS, in cooperation with the Council, is developing an EIS for EFH under the Pacific Coast Groundfish Fishery Management Plan. As a precursor to the EFH EIS, a risk assessment is being developed. A significant output of the risk assessment is an analytical tool composed of geo-referenced Bayesian Network models designed to assist the Council in developing (and comparing the consequences of) management alternatives related to the EFH EIS. Through a series of public meetings, the Council's Ad Hoc Technical Review Committee has facilitated development of the risk assessment process. Currently, as the Council prepares for actions related to the EFH EIS, the SSC, in their role of ensuring Council decisions are informed by the best available science, will review the risk assessment process and analytical tool. The SSC will report their findings at the April 2004 Council meeting.

Entry to the Alaska Fisheries Science Center requires identification with a photograph (such as a student ID, state drivers license, etc.) A security guard will review the identification and issue a Visitor's Badge valid for the date of the meeting.

Although non-emergency issues not contained in this notice may come before the SSC groundfish subcommittee for discussion, those issues may not be the subject of formal action during this meeting. SSC groundfish subcommittee action will be restricted to those issues specifically listed in this notice, and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the subcommittee's intent to take final action to address the emergency.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at 503–820–2280 at least 5 days prior to the meeting date.

Dated: February 4, 2004.

**Tracey Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E4–219 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 012904B]**

### Western Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** The 85th meeting of the Western Pacific Fishery Council's Scientific and Statistical Committee (SSC) will convene February 24–26, 2004, in Honolulu, HI.

**DATES:** The SSC meeting will be held on February 24–26, 2004. The meeting will be held from 9 a.m. to 5 p.m. on February 24, 2004, and from 8:30 a.m. to 5 p.m. on February 25–26, 2004.

**ADDRESSES:** The 83rd SSC meeting will be held at the Council office conference room, 1164 Bishop St., Suite 1400, Honolulu, HI; telephone: 808–522–8220.

Council address: Western Pacific Fishery Management Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director; telephone: 808–522–8220.

**SUPPLEMENTARY INFORMATION:** The SSC will discuss and may make recommendations to the Council on the agenda items below. The order in which agenda items will be addressed can change.

*Tuesday, February 24, 2004, 9 a.m.*

1. Introductions
2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Approval of the Minutes of the 84th Meeting
4. Ecosystem and Habitat
   A. Ecosystem-based management on a Archipelagic basis
   B. Draft Report on the Coral Reef Fish Stock Assessment Workshop
   C. Development of Northwestern Hawaiian Islands Sanctuary Alternatives: Criteria and Rationale
   D. Review of the Council draft Marine Protected Area Policy
   E. National Bycatch Implementation Plan
   F. Public comment
   G. Discussion and recommendations
5. Bottomfish
   A. New Zealand Deep-slope fishery workshop
   B. Status of Seamount groundfish moratorium
   C. Summary of Opakapaka tagging study in Main Hawaiian Islands in the late 1980s
   D. Report on Hawaii Undersea Research Laboratory bottomfish survey
   E. Report on stock assessment workshop
   F. Public comment
   G. Discussion and recommendations
6. Protected Species
   A. Council Sea Turtle Conservation Program
   B. Hawaii Exclusive Economic Zone (EEZ) Marine Mammal Surveys
   C. Northwestern Hawaiian Islands (NWHI) Ecosystem modeling
   D. Public comment
   E. Discussion and recommendations
7. Crustaceans Fisheries (NWHI, lobsters)
   A. Update on MULTIFAN C-L Lobster Model
   B. Public comment
   C. Discussion and recommendations
8. Precious Corals
   A. New Precious Coral Beds in NWHI
   B. Public comment
   C. Discussion and recommendations

*Wednesday, February 25, 2004, 8:30 a.m.*

9. Pelagic Fisheries
   A. American Samoa and Hawaii Longline Fisheries
   *1.* Quarterly Reports
   *2.* Southern albacore Catch Per Unit Effort in 2003
   B. Turtle management
   *1.* Council's Regulatory Amendment and Draft Supplemental Environmental Impact Statement.
   *2.* Post-hooking mortality workshop
   *3.* Risk assessment seminar
   C. Methods of analyzing observer data
   D. Seabird conservation
   *1.* Update on Hawaiian archipelago albatross nesting populations
   *2.* Consideration of side-setting as a seabird mitigation option for Hawaii-based longliners
   E. Marlin Management
   F. Private Fish Aggregating Devices
   G. Shark management
   H. International Meetings
   *1.* Bellagio Conference: Conservation and Sustainable Multilateral Management of Sea Turtles in the Pacific Ocean
   *2.* 4th meeting of the Interim Scientific Committee for Tuna and Tuna-like species in the North Pacific
   *3.* Inter-American Tropical Tuna Commission 4th Bycatch Working Group
   *4.* Asia-Region Seabird Bycatch Workshop
   *5.* Western Pacific Sea-turtle Database Meeting
   *6.* 2nd Meeting of the Parties to the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia
   I. Public comment
   J. Discussion and recommendations

*Thursday, February 26, 2004, 8:30 a.m.*

10. Other Business
   A. Guam voluntary community monitoring program options
   B. Pacific Islands Region and Council streamline strategic plan
   C. 86th SSC meeting
11. Summary of SSC Recommendations to the Council

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, 808–522–8220 (voice) or 808–522–8226 (fax), at least 5 days prior to the meeting date.

Dated: February 5, 2004.

**Tracey Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E4–238 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### Technology Administration

### Technology Administration Performance Review Board Membership

The Technology Administration Performance Review Board (TA PRB) reviews performance appraisals, agreements, and recommended actions pertaining to employees in the Senior Executive Service and reviews performance-related pay increases for ST–3104 employees. The Board makes recommendations to the appropriate appointing authority concerning such matters so as to ensure the fair and equitable treatment of these individuals.

This notice lists the membership of the TA PRB and supersedes the list published in **Federal Register** Document 01–29675, Vol. 66, No. 230, page 59575, dated _____.

Belinda L. Collins (C), Deputy Director for Technology Services, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/05.

Stephen Freiman (C), Deputy Director, Materials Science & Engineering Laboratory, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/04.

Cita Furlani (C), Chief Information Officer, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/05.

Daniel Hurley (C), Director of Communication and Information, Infrastructure Assurance Program, National Telecommunications and Information Administration, Washington, DC 20230, Appointment Expires: 12/31/05.

Deirdre Jones, Director of Systems Engineering Center, Office of Science and Technology, National Weather Service, National Oceanic and Atmospheric Administration, Silver Spring, MD 20910, Appointment Expires: 12/31/05.

Karen Laney Cummings, Director, Technology Competitiveness, Office of Technology Policy, Technology Administration, Washington, DC 20230, Appointment Expires: 12/31/05.

William F. Koch (C), Deputy Director, Chemical Science & Technology Laboratory, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/04.

Dated: January 28, 2004.

**Benjamin H. Wu,**

*Deputy Under Secretary of Commerce for Technology, Technology Administration, Department of Commerce.*

[FR Doc. 04–2830 Filed 2–9–04; 8:45 am]

**BILLING CODE 3510–18–M**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Proposed Information Collection; Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (hereinafter the "Corporation"), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning the Financial Management Survey Form. Copies of the information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section by April 12, 2004.

**ADDRESSES:** You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, Office of Grants Management; Attention Ms. Lois W. Paul, Grants Management Specialist; Room 9712–A, 1201 New York Avenue, NW, Washington, DC, 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 6010 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) By fax to: (202) 565–2850, Attention Ms. Lois W. Paul, Grants Management Specialist.

(4) Electronically through the Corporation's e-mail address system: *lpaul@cns.gov.*

**FOR FURTHER INFORMATION CONTACT:** Lois W. Paul, (202) 606–5000, ext. 200 or by e-mail at *lpaul@cns.gov.*

**SUPPLEMENTARY INFORMATION:**

The Corporation is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and,
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

### I. Background

The Corporation developed the Financial Management Survey in fulfillment of its pre-award policy (CFO–029, effective 1/17/02) that provides reasonable assurance that federal grant funds will be expended in ways that meet program objectives, the award terms and conditions; and applicable federal statutes, regulations and guidelines. The Financial Management Survey will standardize the pre-award process and will ensure uniform consideration of the capacity of potential grantees of the Corporation to manage federal funds.

The Financial Management Survey will be used for the following purposes:

(1) As a pre-award assessment tool of the capacity of a potential grantee to manage federal funds in excess of $100,000; and

(2) As part of the basis for determining the financial management areas in which a potential grantee, should it receive an award from the Corporation, may warrant technical assistance.

### II. Current Action

The Corporation is seeking public comment for approval of the Financial Management Survey which will be used by Corporation Grants Management Specialists to assess the capacity of potential grantees to manage Federal funds. This assessment involves a review of the potential grantee's responses to general questions about its organizational type, financial systems, how it manages funds, and the internal controls it has in place to segregate and report on Federal funds it might receive. The public affected will be grant applicants that have not previously received Federal funds through an award from the Corporation, or current grantees that are re-competing for funding at the beginning of a new 3-year grant cycle and have been identified as not meeting the exemption critical of the Corporation's pre-award review policy.

Should the entity become a grantee of the Corporation, the information gathered will be maintained in the new grantee's official file and become part of the basis for determining specific areas of its financial management and systems that may benefit from technical assistance from the Corporation, its staff and Training and Technical Assistance (T/TA) providers.

*Type of Review:* New information collection.

*Agency:* Corporation for National and Community Service.

*Title:* Financial Management Survey Form.

*OMB Number:* None.

*Agency Number:* None.

*Affected Public:* First-time grant applicants or current grantees recompeting for funding.

*Total Respondents:* 25–30 annually.

*Frequency:* One (1) time.

*Average Time Per Response:* 5 minutes.

*Estimated Total Burden Hours:* 2½ hours.

*Total Burden Cost (capital/startup):* $648.90.

*Total Burden Cost (operating/maintenance):* None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 4, 2004.

**Peg Rosenberry,**

*Director, Office of Grants Management.*

[FR Doc. 04–2798 Filed 2–9–04; 8:45 am]

BILLING CODE 6050–$$–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Extension of a Currently Approved Collection; Comment Request

**AGENCY:** Office of the Secretary of Defense.

**ACTION:** Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Deputy Under Secretary of Defense (Installations and Environment), Office of Economic Adjustment announces the proposed extension of a public information collection and seeks public comment on the provisions thereof. 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 information collection; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by April 12, 2004.

**ADDRESSES:** Written comments and recommendations on the proposed information collection should be sent to the Director, Office of Economic Adjustment, 400 Army Navy Drive, Suite 200, Arlington, VA 22202–4704.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal, please write to the above address, or call the Director, Office of Economic Adjustment at (703) 604–6020.

*Title and OMB Number:* Revitalizing Base Closure Communities, Economic Development Conveyance Annual Financial Statement; OMB Number 0790–0004.

*Needs and Uses:* The information collection requirement is necessary to verify that Local Redevelopment Authority (LRA) recipients of no-cost Economic Development Conveyances (EDCs) are in compliance with the requirement that the LRA reinvest proceeds from the use of EDC property for seven years.

*Affected Public:* State, Local or Tribal Governments; and Not-for-Profit Institutions.

*Annual Burden Hours:* 3,160.

*Number of Respondents:* 79.

*Responses Per Respondent:* 1.

*Average Burden Per Response:* 40 hours.

*Frequency:* Annual.

**SUPPLEMENTARY INFORMATION:**

**Summary of Information Collection**

Respondents are LRAs that have executed no-cost EDC agreements with a Military Department that transferred property from a closed military installation. As provided by Section 2821(a)(3)(B)(i) of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106–65), such agreements require that the LRA reinvest the proceeds from any sale, lease or equivalent use of EDC property (or any portion thereof) during at least the first seven years after the date of the initial transfer of the property to support the economic redevelopment of, or related to, the installation. The Secretary of Defense may recoup from the LRA such portion of these proceeds not used to support the economic redevelopment of, or related to, the installation. LRA's are subject to this same seven-year reinvestment requirement if their EDC agreement is modified to reduce the debt owed to the Federal Government. Military Departments monitor LRA compliance with this provision by requiring an annual financial statement certified by an independent Certified Public Accountant. No specific form is required.

Dated: February 4, 2004.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 04–2754 Filed 2–9–04; 8:45 am]

BILLING CODE 5001–06–M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Threat Reduction Advisory Committee

**AGENCY:** Department of Defense, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics).

**ACTION:** Notice of advisory committee meeting.

**SUMMARY:** Threat Reduction Advisory Committee will meet in closed session on Thursday, April 1, 2004, at the Institute for Defense Analyses (IDA), and on Friday, April 2, 2004 in the Pentagon, Washington, DC.

The mission of the Committee is to advise the Under Secretary of Defense (Acquisition, Technology and Logistics) on technology security, counterproliferation, chemical and biological defense, transformation of the nuclear weapons stockpile, and other matters related to the Defense Threat Reduction Agency's mission.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. Appendix II), it has been determined that this Committee meeting concerns matters listed in 5 U.S.C. 552b(c)(1), and that accordingly the meeting will be closed to the public.

**DATES:** Thursday, April 1, 2004, (8 a.m. to 4 p.m) and Friday, April 2, 2004, (8 a.m. to 9:30 a.m.)

**ADDRESSES:** Institute for Defense Analyses, Board Room, 4850 Mark Center Drive, Alexandria, Virginia and the USD (AT&L) Conference Room (3D1019), the Pentagon, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Contact Lieutenant Colonel Don Culp, USAF, Defense Threat Reduction Agency/AST, 8725 John J. Kingman Road MS 6201, Fort Belvoir, VA 22060–6201, Phone: (703) 767–5717.

Dated: February 4, 2004.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 04–2753 Filed 2–9–04; 8:45 am]

BILLING CODE 5001–06–M

## DEPARTMENT OF DEFENSE

### Department of the Army

### Proposed Collection; Comment Request

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Department of the Army announces a proposed public information collection and seeks public comment on the provisions thereof. 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

information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by April 12, 2004.

**ADDRESSES:** Written comments and recommendations on the proposed information collection should be sent to Department of the Army, U.S. Army Corps of Engineers, Institute for Water Resources, Corps of Engineers, Waterborne Commerce Statistics Center, P.O. Box 61280, New Orleans, LA 70161–1280, ATTN: CEWRC–NDC–C (Doug Blakemore). Consideration will be given to all comments received within 60 days of the date of publication of this notice.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call Department of the Army Reports Clearance Officer at (703) 325–8433.

*Title, Associated Form, and OMB Number:* Record of Arrivals and Departures of Vessels at Marine Terminals, ENG Form 3926, OMB Control Number 0710–0005.

*Needs and Uses:* The Corps of Engineers uses ENG Form 3926 in conjunction with ENG Form 3925, 3925B, and 3925P as the basic source of input to conduct the Waterborne Commerce Statistics data collection program. The annual publications "Waterborne Commerce of the United States, Parts 1–5" are the results of this program.

*Affected Public:* Business Or Other For-Profit.

*Annual burden Hours:* 2,500.

*Number of Respondents:* 400.

*Responses per Respondent:* 5,400.

*Average Burden per Response:* 5 minutes.

*Frequency:* Monthly.

**SUPPLEMENTARY INFORMATION:** The Corps of Engineers uses ENG Form 3926 as a quality control instrument by comparing the data collected on the Corps Vessel Operation Report with that collected on 3926. The information is voluntarily submitted by the respondents to assist the Waterborne Commerce Statistics Center in the identification of vessel operators who fail to report significant vessel moves and tonnage. This information is invaluable in documenting the movement of petroleum products out of Valdez, Alaska. Without the information furnished on the ENG Form 3926 at least 50,000,000 tons of petroleum products would go unreported each year.

**Luz D. Ortiz,**

*Army Federal Register Liaison Officer.*

[FR Doc. 04–2849 Filed 2–9–04; 8:45 am]

**BILLING CODE 3710–08–M**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Availability of Non-Exclusive, Exclusive License or Partially Exclusive Licensing of U.S. Patent Camouflage Pattern for Sheet Material [US D485,992 S]

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice.

**SUMMARY:** In accordance with 37 CFR 404.6, announcement is made of the availability for licensing of U.S. Patent No. US D485,992 S entitled "Camouflage Pattern for Sheet Material" issued February 3, 2004. This patent has been assigned to the United States Government as represented by the Secretary of the Army.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Rosenkrans at U.S. Army Soldier and Biological Chemical Command, Kansas Street, Natick, MA 01760, Phone; (508) 233–4928 or E-mail: *Robert.Rosenkrans@natick.army.mil.*

**SUPPLEMENTARY INFORMATION:** Any licenses granted shall comply with 35 U.S.C. 209 and 37 CFR part 404.

**Luz D. Ortiz,**

*Army Federal Register Liaison Officer.*

[FR Doc. 04–2850 Filed 2–9–04; 8:45 am]

**BILLING CODE 3710–08–M**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Availability of Non-Exclusive, Exclusive License or Partially Exclusive Licensing of U.S. Patent Camouflage Pattern for Sheet Material [US D485,685 S]

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice.

**SUMMARY:** In accordance with 37 CFR 404.6, announcement is made of the availability for licensing of U.S. Patent No. US D485,685 S entitled "Camouflage Pattern for Sheet Material" issued January 27, 2004. This patent has been assigned to the United States Government as represented by the Secretary of the Army.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Rosenkrans at U.S. Army Soldier and Biological Chemical Command, Kansas Street, Natick, MA 01760, Phone: (508) 233–4928 or E-mail: *Robert.Rosenkrans@natick.army.mi.*

**SUPPLEMENTARY INFORMATION:** Any licenses granted shall comply with 35 U.S.C. 209 and 37 CFR part 404.

**Luz D. Ortiz,**

*Army Federal Register Liaison Officer.*

[FR Doc. 04–2851 Filed 2–9–04; 8:45 am]

**BILLING CODE 3710–08–M**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Performance Review Board Membership for the U.S. Army Aviation and Missile Command

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice.

**SUMMARY:** Notice is given of the names of members of a Performance Review Board for the Department of the Army.

**EFFECTIVE DATES:** February 3, 2004.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Ervin, U.S. Army Senior Executive Service Office, Assistant Secretary of the Army, Manpower & Reserve Affairs, 111 Army Pentagon, Washington, DC 20310–0111.

**SUPPLEMENTARY INFORMATION:** Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

The members of the Performance Review Board for the U.S. Army Aviation and Missile Command, U.S. Army Materiel Command are:

1. Major General John Doesburg, Commanding General, U.S. Army Research, Development and Engineering (RDE) Command, Aberdeen Proving Ground, MD.

2. Mr. Jerry Chapin, Deputy to the Commander, U.S. Army Tank-automotive & Armaments Command, Warren, MI.

3. Dr. James Chang, Director, Army Research Office, Research Triangle Park, NC.

4. Mr. Michael A. Parker, Deputy to the Commander, U.S. Army Soldier &

Biological Chemical Command, Aberdeen Proving Ground, MD.

5. Ms. Barbara A. Leiby, Deputy Chief of Staff for Resource Management, Headquarters, U.S. Army Materiel Command, Fort Belvoir, VA.

6. Ms. Sue L Baker, Principal Deputy for G–3 Operations, Headquarters, U.S. Army Materiel Command, Fort Belvoir, VA.

7. Ms. Grace M. Bochenek, Vice President for Research, Tank-Automotive Research, Development and Engineering Center, Warren, MI.

**Luz D. Ortiz,**

*Army Federal Register Liaison Officer.*

[FR Doc. 04–2847 Filed 2–9–04; 8:45 am]

BILLING CODE 3710–08–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 March 11, 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: February 4, 2004.

**Angela C. Arrington,**

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

**Office of the Chief Financial Officer**

*Type of Review:* Extension.

*Title:* Streamlined Clearance Process for Discretionary Grant Information Collections.

*Frequency:* Annually.

*Affected Public:* Individuals or household; businesses or other for-profit; not-for-profit institutions; State, local, or tribal gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:* Responses: 1.—Burden Hours: 1.

*Abstract:* The information collection plan provides the U.S. Department of Education with the option of submitting its discretionary grant information collections through a streamlined Paperwork Reduction Act clearance process which do not fit under the Generic Application (1890–0009). This streamlined clearance process will begin when the Department submits the information collection to the OMB and, at the same time, publishes a 30-day public comment period notice in the **Federal Register**. OMB will then have 60 days after the start of the public comment period to reach a decision on the information collection.

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 2421. 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 Kathy Axt at her e-mail address *Kathy.Axt@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. 04–2755 Filed 2–9–04; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Fernald

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Fernald. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register.**

**DATES:** Wednesday, February 18, 2004; 6 p.m.–9 p.m.

**ADDRESSES:** Fernald Closure Project Site, 7400 Willey Road, Trailer 214, Hamilton, OH 45013–9402.

**FOR FURTHER INFORMATION CONTACT:** Doug Sarno, The Perspectives Group, Inc., 1055 North Fairfax Street, Suite 204, Alexandria, VA 22314, at (703) 837–1197, or e-mail; *djsarno@theperspectivesgroup.com.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

*Tentative Agenda*

6 p.m.—Call to Order
6–6:30 p.m.—Chair's Remarks, Ex Officio Announcements and Updates
6:30–8:15 p.m.—Discuss Groundwater Treatment Alternatives
—Review Options Presented in January
—Evaluate and Compare Options
—Discuss Other Potential Alternatives
8:15–8:45 p.m.—Update on Stewardship Issues
—Request for Recommendation on Artifacts and Photographic Resources
—Use of Existing Buildings for Education Facility
—8:45–9 p.m.—Public Comment
—9 p.m. Adjourn

*Public Participation:* The meeting is open to the public. Written statements may be filed with the Board chair either

before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact the Board chair at the address or telephone number listed below. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer, Gary Stegner, Public Affairs Office, Ohio Field Office, U.S. Department of Energy, is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments. This **Federal Register** notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

*Minutes:* The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, 20585, between 9 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available by writing to the Fernald Citizens' Advisory Board, Phoenix Environmental Corporation, MS–76, Post Office Box 538704, Cincinnati, OH 43253–8704, or by calling the Advisory Board at (513) 648–6478.

Issued at Washington, DC on February 5, 2004.

**Rachel Samuel,**

*Deputy Advisory Committee Management Officer.*

[FR Doc. 04–2804 Filed 2–9–04; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL02–126–000]**

### City of Corona, California v. Southern California Edison Company; Notice of Technical Conference

February 3, 2004.

In an order issued on January 28, 2004,[1] the Commission directed that a technical conference be held to discuss the technical information needed for the Commission to establish the terms and conditions under which Southern California Edison Company's system will be physically interconnected with the City of Corona, California.

The Commission Staff will convene a technical conference to discuss this technical information. The conference has been scheduled for February 18, 2004, at 10 a.m. in Hearing Room No. 4 at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

All parties to this proceeding may attend.

For further information, please contact Heidi Gruner at *heidi.gruner@ferc.gov.*

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–223 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

[1] *City of Corona, California.*

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. RP04–65–000 and RP04–99–000]**

### Indicated Shippers v. ANR Pipeline Company and Indicated Shippers v. Tennessee Gas Pipeline Company; Notice of Technical Conference

February 3, 2004.

Take notice that on February 24, 2004, a conference will be held to discuss gas quality standards on ANR Pipeline Company (ANR) and Tennessee Gas Pipeline Company (Tennessee). The conference will be held at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 in a room to be designated at a later date. The first session will be from 8:30 a.m. to 12:30 p.m. on the ANR system. The second session will be from 1:30 p.m. to 5:30 p.m. on the Tennessee system.

The technical conference is intended to assist the pipelines and their customers to establish gas quality standards on the pipelines' systems.

Questions about the conference should be directed to: Keith Pierce, Office of Markets, Tariffs, and Rates, 888 First Street NE., Washington, DC 20426, (202) 502–8525, *Keith.Pierce@ferc.gov.*

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–234 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–119–001]**

### Dominion Transmission, Inc.; Notice of Compliance Filing

February 3, 2004.

Take notice that on January 28, 2004, Dominion Transmission, Inc. (DTI) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Substitute Original Sheet No. 1504, effective January 22, 2004.

DTI states that the purpose of this filing is to comply with the Commission's Order issued in the captioned docket on January 22, 2004, which accepted, subject to conditions, tariff sheets filed by DTI on December 23, 2003 authorizing the sale of excess gas that it has obtained through system operations and wishes to remove from its system for operational purposes.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–227 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–109–001]

## Eastern Shore Natural Gas Company; Notice of Compliance Filing

February 3, 2004.

Take notice that on January 30, 2004, Eastern Shore Natural Gas Company (Eastern Shore) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets proposed to be effective January 16, 2004 :

Third Revised Tariff Sheet No. 217
Third Revised Tariff Sheet No. 221

Eastern Shore states that the purpose of this filing is to comply with the Commission's Order issued on January 15, 2004 in this proceeding. The Commission directed Eastern Shore to make certain clarifications regarding its tariff language within fifteen days of its order.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–226 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–518–055]

## Gas Transmission Northwest Corporation; Notice of Negotiated Rates

February 3, 2004.

Take notice that on January 30, 2004, Gas Transmission Northwest Corporation (GTN) tendered for filing to be part of its FERC Gas Tariff, Third Revised Volume No. 1–A, Fifth Revised Sheet No. 15.

GTN states that this sheet is being filed to reflect the continuation of a negotiated rate agreement pursuant to evergreen provisions contained in the agreement. GTN requests that the Commission accept the proposed tariff sheet to become effective February 1, 2004.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–222 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–361–022]

## Gulfstream Natural Gas System, L.L.C.; Notice of Negotiated Rates

February 3, 2004.

Take notice that on January 29, 2004, Gulfstream Natural Gas System, L.L.C. (Gulfstream) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Fifth Revised Sheet No. 8 and Original Sheet No. 8S, reflecting an effective date of February 1, 2004.

Gulfstream states that this filing is being made to implement a negotiated rate transaction under Rate Schedule FTS pursuant to Section 31 of the General Terms and Conditions of Gulfstream's FERC Gas Tariff.

Gulfstream states that copies of its filing have been mailed to all affected customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the eFiling link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–225 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP96–272–051]**

### Northern Natural Gas Company; Notice of Negotiated Rates

February 3, 2004.

Take notice that on January 29, 2004, Northern Natural Gas Company (Northern) tendered for filing to become part of its FERC Gas Tariff, Fifth Revised Volume No. 1, 32 Revised Sheet No. 66 and Sheet No. 66A, proposed to be effective on February 1, 2004.

Northern states that the above sheets are being filed to implement a specific negotiated rate transaction with Spirit Lake Ethanol, LLC. in accordance with the Commission's Policy Statement on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines. Northern further states that in addition, this filing deletes certain transactions that have terminated.

Northern states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–235 Filed 2–9–04; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–145–000]**

### Northwest Pipeline Corporation; Notice of Proposed Changes In FERC Gas Tariff And Filing of Non-Conforming Service Agreements

February 3, 2004.

Take notice that on January 28, 2004, Northwest Pipeline Corporation (Northwest) tendered for filing and acceptance two Rate Schedule TF–1 non-conforming service agreements. Northwest is also requesting as part of its FERC Gas Tariff, Third Revised Volume No. 1, First Revised Sheet No. 371, to be effective February 28, 2004.

Northwest states that the purpose of this filing is to submit two Rate Schedule TF–1 service agreements containing receiving party provisions that do not conform to the Rate Schedule TF–1 form of service agreement contained in Northwest's tariff, and to add these agreements to the list of non-conforming service agreements in Northwest's tariff.

Northwest states that a copy of this filing has been served upon Northwest's customers and interested state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–228 Filed 2–9–04; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–147–000]**

### Panhandle Eastern Pipe Line Company, LLC; Notice of Proposed Changes In FERC Gas Tariff

February 3, 2004.

Take notice that on January 30, 2004, Panhandle Eastern Pipe Line Company, LLC (Panhandle) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective March 1, 2004:

First Revised Sheet No. 226
First Revised Sheet No. 227
First Revised Sheet No. 228

Panhandle states that this filing is being made to remove the five year matching cap from the right of first refusal (ROFR) provisions in section 7.2 of the General Terms and Conditions of Panhandle's tariff and to clarify its rights to allow a shipper and Panhandle to agree to a ROFR when an agreement might not otherwise be eligible for such rights.

Panhandle further states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance,

please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–230 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–151–000]**

### Panhandle Eastern Pipe Line Company, Notice of Proposed Changes In FERC Gas Tariff

February 3, 2004.

Take notice that on January 30, 2004, Panhandle Eastern Pipe Line Company, LLC (Panhandle) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the revised tariff sheets listed in Appendix A attached to the filing, to become effective March 1, 2004.

Panhandle states that this filing is being made to add an additional discount category to the forms of service agreement for transportation and storage services. Panhandle proposes to offer its shippers a fluctuating index-based or formula rate for discounted transactions.

Panhandle further states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–233 Filed 02–09–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP04–58–000]**

### Sound Energy Solutions; Notice Of Application

February 2, 2004.

Take notice that on January 26, 2004, Sound Energy Solutions (SES); 301 East Ocean Boulevard, Suite 1510, Long Beach, California 90802, filed an application pursuant to Section 3(a) of the Natural Gas Act and part 153 of the Commission's regulations, seeking authorization to site, construct and operate a liquefied natural gas (LNG) terminal located in the Port of Long Beach, Los Angeles County, California for the purpose of importing LNG into the United States. SES also requests approval of the Long Beach terminal as the place of entry for the imported LNG under Section 3. SES requests that the Commission issue a final order on their application by October 20, 2004. SES states that this proposed regulatory schedule will enable it to commence construction activities in the fourth quarter of 2004, and meet an in-service date in 2008.

This application is on file with the Commission and open to public inspection. It is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. Any initial questions regarding these applications should be directed to Ms. Tetsuko Egawa, Assistant Director, Development, Sound Energy Solutions, 301 East Ocean Boulevard, Suite 1510, Long Beach, CA 90802; Telephone: (562) 495–9885.

In June 2003, SES requested the use of the National Environmental Policy Act (NEPA) Pre-filing Process offered by Commission Staff to begin the environmental review of SES's intention to request authority to site, construct and operate its LNG import terminal. The purpose of the NEPA Pre-filing Process is to encourage the early involvement of interested stakeholders, facilitate interagency cooperation, and identify and resolve issues before an application was filed with the Commissions. On July 11, 2003, the Commission Staff granted SES's request, and at the same time announced that the Port of Long Beach will be the lead agency for review of the project pursuant to the California Environmental Quality Act, and that the two agencies will produce a joint Environmental Impact Statement/Environmental Impact Report and Application Summary Report (ASR) (EIS/EIR/ASR).[1]

Then on September 22, 2003, the Commission and the Port of Long Beach issued a Notice of Intent to Prepare a Joint Environmental Impact Statement and Notice of Preparation of Joint Environmental Impact Report. That notice announced the opening of the scoping process that was used by the Commission Staff and the Port of Long Beach to gather input from the public and interested agencies on the project to help determine which issues need to be evaluated in the EIS/EIR/ASR. Please note that the initial EIS/EIR/ASR scoping period closed on October 30, 2003. Later, on November 10, 2003, the Port of Long Beach issued a supplemental scoping notice and received additional comments through December 12, 2003 on project information that was not initially available. Now, as of the filing of SES's application on January 26, 2004, the NEPA Pre-filing Process for SES's project is also closed.

SES says that its proposed LNG import terminal is designed to import LNG from Asia and elsewhere abroad to the United States for sale in California's non-core natural gas markets, and to provide liquid vehicle fuel to customers in the Los Angeles Basin. SES's LNG import terminal will receive LNG from ocean-going tankers, temporarily store it in its liquid state, and then vaporize the LNG for transport via a new natural gas pipeline to be constructed, owned, and

[1] The NEPA pre-filing docket at the Commission was PF03–06–000, and the related Port of Long Beach proceeding is designated POLB Application No. HDP 03–079.

operated by a third party. This 2.3 mile pipeline will connect with the Southern California Gas Company's existing pipeline system at its Salt Work's Station, Line 765. The vaporized LNG will be sent out from SES's LNG import terminal at an average rate of 700,000 Mcf per day, with a peak capacity of 1,000,000 Mcf per day, or 1 Bcf per day.

Some of the LNG will not be vaporized, but will be sold as liquid vehicle fuel for LNG vehicles in the Port of Long Beach and other vehicle fleets in the Los Angeles Basin. The LNG liquid fuel will be delivered from SES's LNG import terminal by truck to LNG fueling station(s) or directly to vehicles via a mobile fueling vehicle.

In order to import the LNG supplies for sale to natural gas and vehicle fuel markets, SES requests Commission authorization to construct, install, and operate the following facilities :

- An LNG ship berth with LNG unloading arms;
- Two full containment LNG receiving tanks, each with a gross liquid volume of 160,000 cubic meters (1,006,000 barrels), the regasified equivalent of 3.5 Bcf;
- Various LNG pumping equipment;
- Three direct-fired shell and tube vaporizers each sized for 350,000 Mcf per day;
- Three boil-off gas compressors and associated condensing system;
- Natural gas liquids recovery system, including storage facilities;
- LNG trailer truck loading facility, with a dedicated LNG vehicle fuel storage tank with a capacity of 3,800 cubic meters (23,901 barrels) of vehicle quality LNG;
- Various metering, odorizing utilities, buildings, and service facilities; and,
- Associated hazard detection, control and prevention systems, cryogenic piping and insulation, electrical and instrumentation systems.

All components will be constructed in accordance with governing Federal and State regulations, including 33 CFR part 127 for marine facilities, 49 CFR part 193, and National Fire Protection Association Standard 59A for LNG facilities and the codes and standards referenced therein.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date listed below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of this filing and all subsequent filings made with the Commission and must mail a copy of all filing to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

The parties listed in Appendix A of this notice "filed" motions to intervene in the NEPA Pre-filing Process, Docket No. PF03–06–000. The filing of those motions was inappropriate in the NEPA Pre-filing Process and were not requested in the September 22, 2003, NEPA Notice of Intent. In spite of the foregoing and in this instance, the Commission will carry-over the motions to intervene "filed" in Docket No. PF03–06–000 into the proceeding herein, Sound Energy Solutions, Docket No. CP04–58–000. Thus, those parties need not refile their motions to intervene at this time, but may file additional comments on or before the below listed comment date.

However, other persons do not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to this project provide copies of their protests only to the party or parties directly involved in the protest.

Persons may also wish to comment further only on the environmental review of this project. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents issued by the Commission, and will be notified of meetings associated with the Commission's environmental review process. Those persons, organizations, and agencies who submitted comments during the NEPA Pre-filing Process in Docket No. PF03–06–000 are already on the Commission Staff's environmental mailing list for the proceeding in this docket, CP04–58–000 and may file additional comments on or before the below listed comment date. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, environmental commenters are also not parties to the proceeding and will not receive copies of all documents filed by other parties or non-environmental documents issued by the Commission. They will not have the right to seek court review of any final order by Commission in this proceeding.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; *see*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link. The Commission strongly encourages electronic filings. Electronic filing eliminates the burden of filing original and 14 copies of paper filings with the Commission, but does not change the Commission's requirement of service of filings on other parties to the proceeding, see, 18 CFR 385.2010.

*Comment Date:* February 23, 2004.

**Magalie R. Salas,**

*Secretary.*

**Appendix A**

| Filing Date | Party |
|---|---|
| 12/10/2003 | CAlifornians for Renewable Energy, Inc. |
| 11/20/2003 | Kern River Gas Transmission Company |
| 11/10/2003 | Union Oil Company of California |
| 10/29/2003 | California Public Utilities Commission |
| 10/24/2003 | ConocoPhillips Company |
| 10/8/2003 | BHP Billiton LNG International Inc. |
| 10/8/2003 | Freeport LNG Development, L.P. |

Note: Shell NA LNG, LLC filed a Motion to Intervene on 9/26/2003, but withdrew its motion on 10/3/2003.

[FR Doc. E4–236 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–148–000]**

### Southern LNG Inc.; Notice of Proposed Changes to FERC Gas Tariff

February 3, 2004.

Take notice that on January 30, 2004, Southern LNG Inc. (SLNG) tendered for filing as part of its FERC Gas Tariff,

Original Volume No. 1, Eighth Revised Sheet No. 5 and Eighth Revised Sheet No. 6, to be effective March 1, 2004.

SLNG states that the revised sheets track maintenance costs associated with the turning basin and berths for ships calling on the LNG import terminal on Elba Island, Georgia. SLNG states that the Commission approved the tracker as part of a settlement in Docket No. RP02–129.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–231 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP04–146–000]**

## Southwest Gas Storage Company; Notice of Proposed Changes in FERC Gas Tariff

February 3, 2004.

Take notice that on January 30, 2004, Southwest Gas Storage Company (Southwest) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the revised tariff sheets listed on Appendix A to the filing, proposed to become effective March 1, 2004.

Southwest states that the purpose of this filing, made in accordance with the provisions of section 154.204 of the Commission's regulations, is to update Southwest's tariff by removing or revising provisions that have expired, to update certain provisions and to make minor modifications and corrections.

Southwest further states that copies of this filing are being served on all affected customers and applicable State regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–229 Filed 02–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP04–149–000]**

## Texas Gas Transmission, LLC; Notice of Annual Cash-Out Report

February 3, 2004.

Take notice that on January 30, 2004, Texas Gas Transmission, LLC (Texas Gas) tendered for filing a report, which compares its cash-out revenues with its cash-out costs incurred for the annual billing period November 1, 2002, through October 31, 2003, in accordance with its tariff. Texas Gas states that there is no rate impact to customers as a result of this filing.

Texas Gas states that the filing has been served upon Texas Gas' jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed on or before the date as indicated below . 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

*Comment Date:* February 10, 2004.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–232 Filed 2–9–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. EL00–79–001, et al.]**

## West Texas Utilities Company, et al.; Electric Rate and Corporate Filings

February 3, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

### 1. West Texas Utilities Company

[Docket No. EL00–79–001]

Take notice that on January 26, 2003, West Texas Utilities Company tendered for filing a refund report in compliance

with the Commission's Order, dated December 24, 2003, in Docket No. ER01–2658–000, *et al.*, 105 FERC ¶61,368.

*Comment Date:* February 17, 2004.

**2. Wisconsin Electric Power Company**

[Docket No. ER98–855–003]

Take notice that on January 29, 2004, Wisconsin Electric Power Company (Wisconsin Electric) tendered for filing its triennial market-power update and an amendment to its Market Rate Power Sales and Resale Transmission Tariff to include Market Behavior Rules pursuant to the Commission's November 17, 2003, Order Adopting Market Behavior Rules in Docket Nos. EL01–118–000 and EL01–118–001.

*Comment Date:* February 19, 2004.

**3. Indeck-Olean Limited Partnership**

[Docket No. ER99–2915–001]

Take notice that on January 29, 2004, Indeck-Olean Limited Partnership (Indeck-Olean) tendered for filing: (1) An updated market power analysis in compliance with the Federal Energy Regulatory Commission's Order authorizing Indeck-Olean to engage in wholesale sales of electric power at market based rates in Docket No. ER99–2915–000; and (2) an amendment to its market-based rate tariff to adopt the Commission's new Market Behavior Rules issued in Docket Nos. EL01–118–000 and EL01–118–001 on November 17, 2003.

*Comment Date:* February 19, 2004.

**4. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER04–106–001]

Take notice that on January 28, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing proposed revisions to Attachment P (List of Grandfathered Agreements) of the Midwest ISO Open Access Transmission Tariff (OATT) in compliance with the Commission's December 29, 2003, Order, 105 FERC ¶61,387 (2003). The Midwest ISO has requested an effective date of October 31, 2003, which is the same effective date as that requested by the Midwest ISO in its initial filing in these proceedings.

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 *www.midwestiso.org* under the heading "Filings to FERC" for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

*Comment Date:* February 18, 2004.

**5. Central Mississippi Generating Company, LLC**

[Docket No. ER04–180–001]

Take notice that on January 28, 2004, Central Mississippi Generating Company, LLC submitted a filing to comply with the Director's Letter Order issued in Docket No. ER04–180–000 on December 30, 2003, to incorporate the Market Behavior Rules adopted by the Commission in the November 17, 2003, order in Docket Nos. EL01–118–000 and 001.

*Comment Date:* February 18, 2004.

**6. Midwest Generation EME, LLC**

[Docket No. ER04–190–001]

Take notice that on January 29, 2004, Midwest Generation EME, LLC tendered for filing certain corrections to its FERC Electric Tariff, Original Volume No. 3 for the provision of Reactive Power and Voltage Control from Generation Sources Service which was accepted by the Commission in Docket No. ER04–190–000, 106 FERC ¶61, 011.

*Comment Date:* February 19, 2004.

**7. Kentucky Utilities Company**

[Docket No. ER04–203–001]

Take notice that on January 29, 2004, Kentucky Utilities Company (KU) pursuant to section 205 of the Federal Power Act, 16 U.S.C. 824 (2000) and section 35.11 of the Federal Energy Regulatory Commission's regulations, 18 CFR 35.11, filed a Supplement to its November 18, 2003, filing of the Amendment to the Contract for Electric Service by and between Kentucky Utilities Company and the City of Providence.

*Comment Date:* February 19, 2004.

**8. Gilroy Energy Center, LLC**

[Docket No. ER04–321–001]

Take notice that on January 28, 2004, Gilroy Energy Center, LLC (Gilroy) filed substitute rate schedule sheets to the December 22, 2003, filing in Docket No. ER04–321–000, setting forth revisions to the Amended and Restated Reliability Must-Run Agreement between Gilroy and the California Independent System Operator Corporation for calendar year 2004.

*Comment Date:* February 18, 2004.

**9. Los Esteros Critical Energy Facility, LLC**

[Docket No. ER04–323–001]

Take notice that on January 28, 2004, Los Esteros Critical Energy Facility, LLC (Los Esteros) filed substitute rate schedule sheets to the December 22, 2003, filing in Docket No. ER04–323–000, setting forth revisions to the Reliability Must-Run Agreement between Los Esteros and the California Independent System Operator Corporation for calendar year 2004.

*Comment Date:* February 18, 2004.

**10. Creed Energy Center, LLC**

[Docket No. ER04–324–001]

Take notice that on January 28, 2004, Creed Energy Center, LLC (Creed) filed substitute rate schedule sheets to the December 22, 2003, filing in Docket No. ER04–324–000, setting forth revisions to the Reliability Must-Run Agreement between Creed and the California Independent System Operator Corporation for calendar year 2004.

*Comment Date:* February 18, 2004.

**11. Goose Haven Energy Center, LLC**

[Docket No. ER04–325–001]

Take notice that on January 28, 2004, Goose Haven Energy Center, LLC (Goose Haven) filed substitute rate schedule sheets to the December 22, 2003, filing in Docket No. ER04–325–000, setting forth revisions to the Reliability Must-Run Agreement between Goose Haven and the California Independent System Operator Corporation for calendar year 2004.

*Comment Date:* February 18, 2004.

**12. Avista Corporation**

[Docket No. ER04–477–000]

Take notice that on January 28, 2004, Avista Corporation, tendered for filing with the Federal Energy Regulatory Commission pursuant to 18 CFR 35.13, the following unexecuted Service Agreements under Avista Corporation's FERC Electric Tariff Original Volume No. 10:

Bonneville Power Administration, Rate Schedule No. 307
Public Utility District No. 1 of Douglas County, Rate Schedule No. 308
Public Utility District No. 2 of Grant County, Rate Schedule No. 309
Sierra Pacific Power Company, Rate Schedule No. 310
Powerex, Rate Schedule No. 311.

Avista Corporation requests waiver of the prior notice requirements and requests an effective date of January 1, 2004.

Avista states that copies of this filing have been served upon Bonneville Power Administration, PUD No. 1 of

Douglas County, PUD No. 2 of Grant County, Sierra Pacific Power Company and Powerex.

*Comment Date:* February 18, 2004.

**13. Avista Corporation**

[Docket No. ER04–479–000]

Take notice that on January 28, 2004, Avista Corporation (Avista), tendered for filing a Notice of Cancellation of Avista Electric Tariff Original Volume No. 10, Rate Schedule FERC No. 3 between Avista and Puget Sound Energy, Inc. Avista requests that the Commission grant all waivers necessary to allow the cancellation to become effective on January 1, 2004.

Avista states that copies of the filing have been served on Puget Sound Energy, Inc.

*Comment Date:* February 18, 2004.

**14. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER04–480–000]

Take notice that on January 28, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) pursuant to section 205 of the Federal Power Act and section 35.12 of the Commission's regulations, 18 CFR 35.12, submitted for filing an Interconnection and Operating Agreement among Hoosier Energy Rural Electric Cooperative, Inc., as Transmission Owner, the Midwest ISO and Project Developers, Hoosier Energy Rural Electric Cooperative, Inc. and Wabash Valley Power Association, Inc.

Midwest ISO states that a copy of this filing was served on all parties.

*Comment Date:* February 18, 2004.

**15. American Transmission Company LLC**

[Docket No. ER04–487–000]

Take notice that on January 28, 2004, American Transmission Company LLC (ATCLLC) tendered for filing a Distribution-Transmission Interconnection Agreement between ATCLLC and Gladstone Power & Light. ATCLLC requests an effective date of December 31, 2003.

*Comment Date:* February 18, 2004.

**16. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER04–491–000]

Take notice that on January 29, 2004, pursuant to section 205 of the Federal Power Act and section 35.12 of the Commission's regulations, 18 CFR 35.12 (2002), the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing an Interconnection and Operating Agreement among Louisville Gas & Electric Company and Kentucky Utilities, the Midwest ISO and Louisville Gas & Electric Company.

Midwest ISO states that a copy of this filing was served on all parties.

*Comment Date:* February 19, 2004.

**17. Consumers Energy Company**

[Docket No. ER04–492–000]

Take notice that on January 29, 2004, Consumers Energy Company (Consumers) tendered for filing Original Sheet Nos. 25 and 26 as part of its First Revised Rate Schedule No. 116, to add the Midwest Independent Transmission System Operator, Inc., as a customer.

*Comment Date:* February 19, 2004.

**18. Indeck-Oswego Limited Partnership**

[Docket No. ER04–493–000]

Take notice that on January 29, 2004, Indeck-Oswego Limited Partnership tendered for filing a revised market-based rate tariff in order to participate in other organized markets besides the New York Independent System Operator's market.

*Comment Date:* February 19, 2004.

**19. Caithness VG Wind, LLC**

[Docket No. ER04–494–000]

Take notice that on January 29, 2004, Caithness VG Wind, LLC tendered for filing a notice of succession and revised rate schedules in the above-referenced docket.

*Comment Date:* February 19, 2004.

**20. Idaho Power Company**

[Docket No. ER04–495–000]

Take notice that on January 29, 2004, Idaho Power Company tendered for filing Service Agreement No. 174 under its Open Access Transmission Tariff.

*Comment Date:* February 19, 2004.

**21. Caithness 251 Wind, LLC**

[Docket No. ER04–496–000]

Take notice that on January 29, 2004, Caithness 251 Wind, LLC tendered for filing a notice of succession and revised rate schedules in the above-referenced docket.

*Comment Date:* February 19, 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. E4–221 Filed 2–9–04;8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket Nos. PL04–2–000 and EL03–236–000]**

## Compensation for Generating Units Subject to Local Market Power Mitigation in Bid-Based Markets, PJM Interconnection, L.L.C.; Notice of Technical Conferences

February 3, 2004.

As previously announced in notices issued January 12 and 28, 2004, conferences will be held on February 4 and 5, 2004, to discuss issues related to local market power mitigation and the methods of compensating must-run generators in organized markets.[1] The conferences will begin at 9 a.m. at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The Commissioners may attend all or part of the conferences.

The February 4, 2004 technical conference will include perspectives from key industry experts and market participants on local market power mitigation and Reliability Must-Run (RMR) issues. A notice issued on

[1] In an Order issued December 19, 2003, the Commission directed staff to convene a two-part technical conference on compensation of must run generating units. Compensation for Generating Units Subject to Local Market Power Mitigation in Bid-Based Markets, 105 FERC ¶61,312 (2003).

January 28, 2004, presented a list of speakers for February 4, 2004. A revised list of speakers for February 4, 2004 follows.

**Agenda for the February 4, 2004 Conference**

*Morning Session #1 (9–9:20 a.m.)*

Presentation on capital commitment/ investment decision-making
Frank Napolitano—Lehman Brothers Inc.
Jonathan Baliff—Credit Suisse First Boston Corporation
Michael Thomas—Calpine Corporation

*Morning Session #2 (9:30 a.m.–12:15 p.m.)*

William Hogan—Harvard University
Michael Schnitzer—The NorthBridge Group, representing Exelon Corp.
Roy Shanker—Consultant to generators and financial market participants
David Patton—Potomac Economics, MISO Market Monitor
Joe Bowring—PJM Market Monitor
Roy Thilly—Wisconsin Public Power Inc.
Abram Klein—Edison Mission Marketing & Trading
Mssrs. Napolitano, Baliff, and Thomas will participate in the Question and Answer session.

*Lunch Break (12:15–1:30 p.m.)*

*Afternoon Session #1 (1:30–3 p.m.)*

John Anderson—John Hancock Financial Services
Jonathan Baliff—Credit Suisse First Boston Corporation
Mark Reeder—New York Public Service Commission
Steve Wemple—Con Edison and EEI Alliance of Energy Suppliers
Robert Rapp—KeySpan Energy
Jonathan Falk—NERA, representing PPL
Steve Corneli—NRG Power Marketing Inc
Bob Ethier—ISO–NE Market Monitor
Gunnar Jorgensen—Northeast Utilities/Select Energy

*Afternoon Session #2 (3:15–4:45 p.m.)*

Howard Newman—Warburg Pincus
Danielle Jassaud—Public Utility Commission of Texas
John Meyer—Reliant Resources, Inc.
Judi Mosley—Pacific Gas & Electric Company
Keith Casey—CAISO
Ron McNamara—MISO
Steve Beuning—Xcel Energy

Transcripts of the conference will be immediately available from Ace Reporting Company (202–347–3700 or 1–800–336–6646), for a fee. They will be available for the public on the Commission's e-Library two weeks after the conference. The Capitol Connection offers the opportunity for remote listening and viewing of the conference. It is available for a fee, live over the Internet, via C-Band Satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.gmu.edu* and click on "FERC".

Questions about the February 4 conference should be directed to: Michael Coleman, Office of Markets, Tariffs, and Rates, 888 First Street NE., Washington, DC 20426, (202) 502–8236, *michael.coleman@ferc.gov*.

Questions about the February 5 PJM conference should be directed to: David Kathan, Office of Markets, Tariffs, and Rates, 888 First Street NE., Washington, DC 20426, (202) 502–6404, *david.kathan@ferc.gov*.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–224 Filed 2–9–04; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7617–4]**

### Notice of Approval of Federal Operating Permits to Clearwater Forest Industries (CFI); Three Rivers Timber, Inc. (Three Rivers); Empire Lumber Company, dba Kamiah Mills (Empire Lumber); Northwest Pipeline Corporation, Pocatello Compressor Station (Northwest Pipeline); Colville Tribal Enterprise Corporation, dba Colville Indian Power & Veneer (CIPV)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This is notice that five federal Part 71 Tribal Operating permits have been issued from EPA Region 10.

**FOR FURTHER INFORMATION CONTACT:** If you have any questions or would like a copy of any of the permits listed above, please contact Lucita Valiere, at U.S. Environmental Protection Agency, Office of Air Quality (OAQ–107), 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553–8087.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that EPA Region 10 has issued Federal operating permits to the applicants listed below:

| Name | Permit No. | Location | Reservation | Issuance date | Effective date |
|---|---|---|---|---|---|
| CFI | R10T5–ID–00–01. | Kooskia, ID | Nez Perce | 2/15/01 | 4/30/01 |
| Empire Lumber | R10T5–ID–00–02. | Kamiah, ID | Nez Perce | 8/8/01 | 8/8/01 |
| Three Rivers | R10T5–ID–00–03. | Kamiah, ID | Nez Perce | 8/23/02 | 10/7/02 |
| Northwest Pipeline | R10T5–ID–02–01. | Pocatello, ID | Fort Hall | 10/17/02 | 12/2/02 |
| CIPV | R10T5–WA–03–01. | Omak, WA | Colville | 6/10/03 | 6/10/03 |

These permits grant approval to the facilities identified in the permits to operate the air emission sources identified in the permits in accordance with the terms and conditions of the respective permits. This notice is published in accordance with 40 CFR 71.11(l)(7), which requires notice of any final agency action regarding a Federal operating permit to be published in the **Federal Register**.

The Federal operating permits issued by EPA to the facilities identified above incorporate all applicable air quality requirements and require monitoring to ensure compliance with these requirements. Submittal of periodic reports of all required monitoring, as well as submittal of an annual compliance certification, are also required. The Federal operating permits have a term not to exceed five years, and a timely application for permit renewal must be submitted to EPA prior to permit expiration in order to continue operation of the permitted source.

The provisions of 40 CFR part 71 govern issuance of these permits. EPA received public comments on the CFI, Three Rivers, and Northwest Pipeline permits. In accordance with the requirements of 40 CFR 71.11(j), EPA responded to all comments received on

these permits. EPA received no comments on the permits for Empire Lumber and CIPV. Pursuant to 40 CFR 71.11(i), EPA provided copies of the final permits to the applicant and each person who submitted written comments on a permit or requested notice of the final permit decision. No one requested review of any of the final permits by the Environmental Appeals Board within 30 days of receipt of the final permits in accordance with 40 CFR 71.11(l). Thus, pursuant to 40 CFR 71.11(i) and (l), the permits became final on the dates indicated in the chart above. A petition to the Environmental Appeals Board under 40 CFR 71.11(l) is, under 42 U.S.C. 307(b), a prerequisite to seeking judicial review of the final agency action. *See* 40 CFR 71.11(l)(4). 40 CFR 71.11(l)(7) requires notice of any final agency action regarding a Federal operating permit to be published in the **Federal Register**. This notice satisfies that requirement.

Dated: January 21, 2004.

**L. John Iani,**

*Regional Administrator, Region 10.*

[FR Doc. 04–2816 Filed 2–9–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7620–4]**

### Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Section 104(k); "Announcement of Proposal Deadline for a Reopening of the Competition for the 2004 National Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants"

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice reopening of Fiscal Year 2004 Brownfields grant competition, of the availability of amended Brownfields grant application guidelines and deadline for submissions of proposals.

**SUMMARY:** The Environmental Protection Agency (EPA) is reopening the competition for Fiscal Year 2004 brownfields grants to accept applications for funding for certain brownfield sites that were not eligible under the *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants* ("The October 2003 Proposal Guidelines"), published in the **Federal Register** at 68 FR 59611, on October 16, 2003, and subsequent corrections published in the **Federal Register** at 68 FR 64623, on November 14, 2003. The Consolidated Appropriations Act, 2004, Public Law 108–199, which President Bush signed into law on January 23, 2004, temporarily expands the number of brownfields sites that are eligible for funding under EPA's brownfields assessment, revolving loan fund, and cleanup grants awarded under section 104(k) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. EPA's Fiscal Year 2004 appropriations may be used by recipients of brownfields grants and loans for eligible and allowable costs at brownfields sites as long as the recipient of a brownfield grant or loan satisfies all of the elements required to qualify as a bona fide prospective purchaser under CERCLA section 101(40) notwithstanding the fact that the property was acquired prior to the enactment of the Small Business Liability Relief and Brownfields Revitalization Act of 2001, Pub. L. 107–118, on January 11, 2002. EPA is reopening the Fiscal Year 2004 brownfields grant competition to allow entities who are affected by the above-referenced change to submit (or resubmit) proposals for brownfields funding.

To qualify for participation in the reopened competition, applicants must have specific brownfields sites identified, and these sites must now be eligible for EPA funding in Fiscal Year 2004 due to the above-referenced provision of the Consolidated Appropriations Act, 2004. There is an additional change to the guidelines that is posted at *www.epa.gov/brownfields.* The change is summarized below. The deadline for proposals to be *received* by EPA's contractor is 6 p.m. EST on March 9, 2004.

**FOR FURTHER INFORMATION CONTACT:** The U.S. EPA's Office of Solid Waste and Emergency Response, Office of Brownfields Cleanup and Redevelopment, (202) 566–2777.

**SUPPLEMENTARY INFORMATION:** The following correction has been made to the guidelines that are posted at *www.epa.gov/brownfields:*

On page 5 of the *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants,* the first bullet under *Additional Uses/ Restrictions of Grant Funds* is revised to implement the language in the Consolidated Appropriation Act, 2004. This language now reads:

"Funds appropriated to EPA under the Consolidated Appropriation Act, 2004, to carry out CERCLA 104(k) may be used by recipients of brownfields grants and loans for eligible and allowable costs when a recipient satisfies all of the elements required to qualify as a bona fide prospective purchaser under CERCLA section 101(40) notwithstanding the fact that the property was acquired prior to the enactment of the Small Business Liability Relief and Brownfields Revitalization Act of 2001, Public Law 107–118, on January 11, 2002."

The entities that otherwise meet all of the requirements to be eligible for brownfield funding and that are affected by this provision may apply for grants (including Revolving Loan Fund capitalization grants) to address hazardous waste contamination at eligible brownfield sites. However, applicants who submitted proposals by the December 4, 2003, deadline for brownfields assessment, revolving loan fund, and cleanup grants and who otherwise satisfied all of the requirements to be eligible to receive brownfields funding, as well as satisfied all of the elements required to qualify as a bona fide prospective purchaser, and were determined by EPA to be prohibited from using brownfield funds at the proposed site(s) because the applicant acquired the brownfield site prior to the January 11, 2002, enactment date, may choose to resubmit their proposal(s) to EPA for consideration. This change only has the affect of allowing EPA to award Brownfield grants to certain applicants that were previously prohibited from receiving grants under section 104(k)(4)(B)(i)(IV) and does not result in a change to the CERCLA definition of bona fide prospective purchaser or to any EPA enforcement authorities or policy. *Please note that applicants with sites contaminated solely by petroleum are not eligible to participate in the reopened competition.*

To be considered in this competition, every proposal must identify specific brownfield sites, meet the threshold requirements described in the *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants* (including the requirements for community notification and a letter from state or tribal environmental officials) and address the ranking factors in the *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants.* An original proposal and/or a request for reconsideration of a proposal that was submitted by the December 4, 2003, deadline must be received by 6 p.m. EST on or before March 9, 2004. by Environmental Management Support, Inc. (EMS), Attention: Don West, 8601 Georgia Avenue, Suite 500, Silver Spring, MD 20910, phone 301–589–

5318. Applicants must also send a copy to the EPA Regional Brownfields Coordinator at the addresses shown in Appendix 1 of the October 2003 Proposal Guidelines. EPA strongly encourages applicants to send their proposals by express courier or hand delivery to the address above to avoid potential delays in regular U.S. Postal Service mail delivery. *Proposals received by EMS at the address above after 6 p.m. EST March 9, 2004, will not be considered.*

Dated: February 4, 2004.

**Linda Garczynski,**

*Director, Office of Brownfields Cleanup and Redevelopment, Office of Solid Waste and Emergency Response.*

[FR Doc. 04–2819 Filed 2–9–04; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–OW–7620–6]**

## Wetland Program Development Grant Guidelines

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Solicitation of applications.

**SUMMARY:** Wetland Program Development Grants (WPDGs) provide eligible applicants an opportunity to conduct projects that promote the coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution. While WPDGs submitted for this competition can continue to be used by recipients to build and refine any element of a comprehensive wetland program, emphasis for the competition will be given to funding projects that address the three areas identified by EPA: (1) Developing a comprehensive monitoring and assessment program; (2) improving the effectiveness of compensatory mitigation; and (3) refining the protection of vulnerable wetlands and aquatic resources. States, Tribes, local governments (S/T/LGs), interstate associations, intertribal consortia, and national non-profit, non-governmental organizations are eligible to apply for the competition. This document describes the grant selection and award process for eligible applicants interested in applying for WPDGs under the competitive process.

**DATES:** The deadline for receipt of proposals is set by EPA Headquarters and each EPA Regional Office, independently. Please contact the appropriate Headquarters or Regional Office Wetland Grant Coordinator for that offices' deadline or to confirm a deadline. (See Section VII for Agency Contact information.) Deadlines will also be posted on the EPA Web site at *http://www.epa.gov/owow/wetlands/grantguidelines/.*

**ADDRESSES:** Application proposals must be submitted to the appropriate EPA Headquarters or Regional Office and postmarked or emailed by the appropriate Headquarters or Regional Office deadline. Application proposals may be submitted electronically, by mail, or by hand delivery/courier. Applicants interested in being put on a mailing list to obtain more details should contact the appropriate Headquarters or Regional Office Wetland Grant Coordinator (see Section VII for Agency Contact information).

**FOR FURTHER INFORMATION CONTACT:** Connie Cahanap, Office of Wetlands, Oceans, and Watersheds, Wetlands Division (MC 4502T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone: (202) 566–1382, fax: (202) 566–1349, e-mail: *cahanap.concepcion@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Federal Agency Name:* US Environmental Protection Agency, Office of Water, Office of Wetlands, Oceans, and Watersheds, Wetlands Division.

*Funding Opportunity Title:* Wetland Program Development Grants.

*Announcement Type:* Notice.

*Catalog of Domestic Assistance Number:* 66.461.

### Overview

The goals of the Environmental Protection Agency's (EPA's) wetland program include increasing the quantity and quality of wetlands in the U.S. by conserving and restoring wetland acreage and improving wetland health. In pursuing these goals, EPA seeks to build the capacity of all levels of government to develop and implement effective, comprehensive programs for wetland protection and management. The six program areas central to achieving these goals are: regulation, monitoring and assessment, restoration, wetland water quality and watershed management, public-private partnerships, and coordination among agencies with wetland or wetland-related programs.

The Wetland Program Development Grants (WPDGs), initiated in FY90, provide States, Tribes, local governments (S/T/LGs), interstate associations, intertribal consortia, and national non-profit, non-governmental organizations (hereafter referred to as applicants or recipients) an opportunity to carry out projects to develop and refine comprehensive wetland programs. WPDGs provide eligible applicants an opportunity to conduct projects that promote the coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution.

While WPDGs can continue to be used by recipients to build and refine any element of a comprehensive wetland program, emphasis through the competition process will be given to funding projects that address these three areas as identified by EPA: (1) Developing a comprehensive monitoring and assessment program; (2) improving the effectiveness of compensatory mitigation; and (3) refining the protection of vulnerable wetlands and aquatic resources. States, Tribes, local governments (S/T/LGs), interstate associations, intertribal consortia are eligible to apply. In order to provide greater assistance to S/T/LGs, non-profit, non-governmental organizations which undertake activities that advance wetland programs on a national basis are eligible to apply for WPDG funding. Local/regional chapters/affiliations of a nonprofit organization are not eligible for WPDGs.

Interest in the grant program has continued to grow over the years and Congress has appropriated $15 million annually to support the wetland grant program. Since the Wetland Grant Development Program started in FY90, grant funds are awarded on a competitive basis to support development of State and Tribal wetland programs.

The statutory authority for WPDGs is section 104(b)(3) of the Clean Water Act (CWA). Section 104(b)(3) of the CWA restricts the use of these grants to developing and refining wetland management programs by conducting or promoting the coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution. These competed grants may not be used for the operational support of wetland programs unless it is included in a Performance Partnership Grant (PPG). States and Tribes may not use WPDG funds for implementation of a wetlands program. However, funds available for WPDG grants may be

combined in a PPG which may, in certain circumstances, provide the authorization to undertake implementation activities. For further information, see the final rules on Environmental Program Grants for State, Interstate, and local government agencies at 40 CFR part 35, subpart A and Tribes at 40 CFR part 35, subpart B. All projects funded through this program must contribute to the overall development and improvement of S/T/LG wetland programs. Grant applicants must demonstrate that their proposed project integrates with S/T/LG wetland programs.

This document describes the grant selection and award process for eligible applicants interested in applying for WPDGs under the competitive process. EPA Regions and Headquarters may supplement this notice with additional information pertaining specifically to each Regional/Headquarters competition. These guidelines stay in effect until new ones are published for the competitive process.

**I. Funding Opportunity Description**

The types of projects that award recipients can undertake to develop and refine their comprehensive wetland programs are diverse. In the past, award recipients have pursued a wide range of activities, such as developing management tools for wetland resources, advancing scientific and technical tools for protecting wetland health, improving availability of data and information about wetlands, developing and disseminating local wetland ordinances that complement Federal and State management, and training wetland managers and the public about wetland and watershed values.

For the WPDG competitive process, the wetland program has identified three areas for improving S/T/LGs ability to protect and restore their wetlands: (1) Developing a comprehensive wetland monitoring and assessment program; (2) improving the effectiveness of compensatory mitigation; and (3) refining the protection of vulnerable wetlands and aquatic resources. Regions are encouraged to target at least two-thirds of their competitive WPDG funds to projects that focus on one or more of the program priorities. In this competitive grant program, EPA will emphasize funding diverse levels of government and various entities involved in innovative wetland and watershed issues. Applicants are encouraged to develop WPDG applications that address these program areas.

*A. Developing a Comprehensive Monitoring and Assessment Program*

This solicitation seeks proposals that support the development of a comprehensive S/T/LG wetland monitoring and assessment program. State and Tribal adoption of an ambient wetland monitoring and assessment program is the primary goal of this solicitation (*i.e.*, projects that build S/T/LG capacity to determine the causes, effects, and extent of pollution to wetland resources and develop pollution prevention, reduction, and elimination strategies). More information related to wetland monitoring and assessment can be found at *http://www.epa.gov/owow/wetlands/facts/monitor.pdf* and *http://www.epa.gov/owow/wetlands/facts/devgrants.pdf*.

Project proposals may address development, testing, and demonstration of methods and programs to monitor and assess wetlands. For example, proposed work may include the use of biological and hydrogeomorphic (HGM) assessment procedures and surveys to test the accuracy of (a) rapid wetland assessment methods or (b) other types of assessment methods that use geographical information systems (GIS) to describe wetland condition or trends in wetland extent. Also, EPA encourages the submission of proposals for work that will demonstrate the use of wetland assessment methods for:

1. Assessing the ecological consequences of a given regulatory action or group of actions;
2. Improving the evaluation and ranking of potential wetland sites for restoration or acquisition at various levels;
3. Evaluating the ecological effectiveness of wetland restoration projects, including compensatory mitigation;
4. Developing design or performance standards for wetland restoration, including compensatory mitigation;
5. Evaluating the cumulative effect of wetland loss and restoration in terms of change in the ambient condition of wetlands and other waterbodies within a watershed;
6. Gathering information to refine water quality standards or related administrative code to bring added protection to wetlands, including isolated wetlands; and/or
7. Gathering information to develop management strategies to control the spread and adverse effects of non-indigenous, invasive wetland species.

Proposals should address how work to accomplish the particular objective(s) will assist S/T/LGs in developing comprehensive wetland monitoring and assessment programs. Proposals also should describe how methods under development will improve decision-making across various surface water management programs. For example, EPA encourages the submissions of proposals for work that will demonstrate how information about ambient wetland condition can be used by local authorities when making decisions affecting land and water use, including their adoption of stormwater and smart growth management strategies. Provisional reporting of ambient wetland condition, relative to reference conditions, in Clean Water Act section 305(b) reports is a logical first step toward meeting that particular objective. When preparing proposals, care should be given to ensure that any data collected under the grant is of a known and documented quality.

Accordingly, applicants may host technical training workshops, establish regional or State interagency wetland monitoring and assessment workgroups, develop volunteer monitoring programs, and improve wetland inventories (*e.g.*, use of hydrogeomorphic (HGM) wetland classification system). Examples of case studies illustrating wetland monitoring and assessment methods can be found at *http://www.epa.gov/owow/wetlands/bawwg/case.html* and *http://www.epa.gov/region01/eco/wetland/index.html*. Many of the case studies listed on those Web sites were funded by WPDGs.

Additionally, recipients of grants for wetland monitoring projects will be required to submit all data from monitoring activities to STORET (short for STOrage and RETrieval). STORET provides an accessible, nationwide central repository of water information of known quality. Grantee submission of monitoring data into STORET or monitoring data made available in the Advisory Council for Water Information (ACWI) Core Monitoring Data Element Standard (or Data Exchange Template) will facilitate exchange of monitoring data between EPA and its partners. Information on STORET is at *http://www.epa.gov/storet* and information on the standard is at *http://www.epa.gov/edr*.

*B. Improving the Effectiveness of Compensatory Mitigation*

S/T/LGs should consider projects that improve the capacity to ensure ecologically effective compensatory mitigation for unavoidable impacts. For example, WPDGs can be used to develop mitigation performance standards. They also can be used to

develop and verify assessment methods and/or tracking (reporting) systems that document:

1. The technical adequacy of compensatory mitigation project plans (*e.g.*, plan review standards);
2. The ecological suitability of proposed compensatory mitigation project sites (*e.g.*, develop site review standards that have a watershed context);
3. The compliance of mitigation projects at various stages of implementation; and
4. The adequacy of compensatory mitigation for managing cumulative wetland impacts under the Federal CWA section 404/401 program.

The National Wetlands Mitigation Action Plan, released in December 2002 by EPA and the U.S. Army Corps, describes seventeen action items that the Federal agencies will complete by 2005 in order to improve the ecological performance and results of compensatory mitigation. The tasks identified in the Plan convey the major areas of interest regarding mitigation that are being supported by the Federal agencies. Proposed projects that support such endeavors at the S/T/LG level are encouraged. A copy of the Plan and related documents can be found at *http://www.epa.gov/owow/wetlands/guidance/index.html#mitigation.*

Background information describing concepts and methods for improving the effectiveness of compensatory mitigation can be found in a National Academy of Science publication entitled "Compensating for Wetland Losses Under the Clean Water Act." The document can be found at *http://www.nap.edu/books/0309074320/html/.*

Wetland program grant funds can only be used for research, investigations, experiments, training, demonstrations, surveys, and studies to support (or to improve or develop) mitigation programs; they cannot be used for specific mitigation activities (*e.g.*, implementation of individual mitigation projects, mitigation banks, or in-lieu-fee mitigation programs).

*C. Refining the Protection of Vulernable Wetlands and Aquatic Resources*

While wetlands provide important ecological functions on a watershed scale, some are better protected than others. For example, isolated wetlands and waters may be particularly at risk as may wetlands subject to damage from activities other than the discharge of dredged or fill material. S/T/LGs wishing to develop comprehensive wetland protection programs to protect such vulnerable waters from a variety of potential impacts are encouraged to do so and encouraged to incorporate wetland issues into ongoing watershed plans. Efforts can include, but are not limited to, information dissemination, data exchange, studying S/T/LG regulatory improvement opportunities, and surveying opportunities for land acquisition, conservation easements, and tax incentive provisions. Funds received through the WPDG competition cannot be used to fund activities to implement a wetlands program, or fund the purchase of land or conservation easements.

*D. Other Program Areas*

WPDGs that are awarded may be used by recipients to also develop and refine all elements of a comprehensive wetland program. The Regions may also supplement the above program areas with Regional efforts that they want to emphasize, while still targeting two-thirds of the WPDG funds toward the three program priority areas described previously in this notice.

**II. Award Information**

EPA's Wetlands Division intends to continue to award $15 million of WPDG funds through a competitive process to eligible applicants through assistance agreements. Most of the WPDG funds for the competition are allocated to EPA Regional Offices, based on the number of States and Territories within the Region, to fund S/T/LGs, interstate agencies, and intertribal consortia. Headquarters reserves a portion of the WPDG funds for national non-profit, non-governmental organizations, interstate agencies, and intertribal consortia under the competitive process. Funding decisions for the competition are made by EPA Regional and Headquarters Offices and are based on the quality of the proposals received and adherence to the selection criteria. EPA typically receives requests for funding far in excess of available funds. Therefore EPA cannot provide grant funds to all applicants.

The number of applicants that will be requested to submit a complete application and the number of applications recommended for award depend on the quality of the proposals received and the relative amount of funding requests. The quality of the proposals will be evaluated according to the criteria and selection process noted below. Total funding available for award by EPA depends each year on the Wetlands Program's yearly fiscal appropriation. (Previous grant awards ranged from $11,000 to $496,000.) The terms of the period of performance will be determined at time of award. EPA reserves the right to reject all proposals and make no awards.

**III. Eligibility Information**

*A. Eligible Applicants for Competitive Process*

States, Tribes, local government agencies, interstate agencies, intertribal consortia, and national, nonprofit, non-governmental organizations are eligible. Typical wetland or wetland related agencies include, but are not limited to, wetland regulatory agencies, water quality agencies (section 401 water quality certification), planning offices, wild and scenic rivers agencies, departments of transportation, fish and wildlife or natural resources agencies, agriculture departments, forestry agencies, coastal zone management agencies, park and recreation agencies, non-point source or storm water agencies, city or county and other S/T/LG agencies that conduct wetland-related activities.

In order to be eligible for WPDG funds, Tribes must be Federally recognized, although "Treatment as a State" status is not a requirement. Intertribal consortia that meet the requirements of 40 CFR part 35.504 are eligible for direct funding.

Interstate agency and intertribal consortia projects must be broad in scope and encompass more than one State, Tribe, or local government.

In order to provide greater assistance to S/T/LGs, non-profit, non-governmental organizations which undertake activities that advance wetland programs on a national basis are eligible for WPDG funding. Activities must help S/T/LGs develop and refine wetland programs. For example, projects can involve advancing wetland science, providing training on how various S/T/LG wetland programs across the nation protect, manage and restore their wetland resources, and about initiatives to improve S/T/LG wetland programs. Local/regional chapters/affiliations of nonprofit organizations are not eligible for WPDGs and applications will only be accepted from the national headquarters level of nonprofit, non-governmental organizations. National nonprofit organizations are only eligible to submit their proposals to the Headquarters Wetland Grant Coordinator for this competition. (See Section VII for Agency Contact information.)

*B. Cost Sharing/Match Requirements*

S/T/LGs, interstate agencies, and intertribal consortia must provide a minimum of 25% of each award's total project costs in accordance with 40 CFR

31.24, 35.385, and 35.615. We encourage States, Tribes and local governments to provide a larger share of the project's cost whenever possible (*i.e.*, in excess of the required 25% of total project costs). Non-profit, non-governmental organizations must also provide a minimum of 25% of each award's total project costs.

Forty CFR 35.536(c) (the Environmental Program Grants for Tribes Regulation), states that "the required cost share shall be five percent of the allowable cost of the work plan budget for that program" if the Tribal applicant puts the funds into a PPG. Tribal applicants can submit budgets with a 5% match if the Tribe is going to put the funds into a PPG. The following term and condition will be included in the assistance agreement awarded to the Tribe: If the Wetland Program Grant Funds are not or could not be included in a PPG, then the Tribe must provide a 25% match.

The match requirement can be met with contributions from entities other than the award recipient. Other Federal money cannot be used as the match for this grant program unless authorized by the statute governing the award of the other Federal funds. However, Indian Tribes can use funds provided under the Indian Self-Determination and Education Act (25 U.S.C. 450 *et seq.*) to provide the required matching funds to the extent authorized by that Act and implementing regulations.

Matching funds are considered grant funds. They may be used for the reasonable and necessary expenses of carrying out the work plan. Any restrictions on the use of grant funds (*i.e.*, prohibition of land acquisition with grant funds) also apply to the use of matching funds.

*C. Local and Tribal Funding Targets*

Each Regional Office will support the local government initiative and Tribal efforts by targeting at least 15% of their Regional allocation to local government and Tribal applications.

*D. Performance Partnership Grants*

A Performance Partnership Grant (PPG) is a multi-program grant made to a State, Tribe, interstate agency, or intertribal consortium from funds appropriated for many of EPA's environmental program grants. Local governments are not eligible for PPGs. PPGs are voluntary and provide recipients the option to combine funds from two or more environmental program grants into one or more PPGs. PPGs can provide administrative and/or programmatic flexibility.

Funds for a WPDG may be included in a PPG. Under this competition, State proposals must first be selected under the competitive grant process and, in accordance with 40 CFR 35.138, the work plan commitments that would have been included in the WPDG work plan must be included in the PPG work plan. Similarly, Tribal proposals must first be selected under this competitive grant process, and in accordance with 40 CFR 35.535. States and Tribes may not use WPDG funds for implementation of a wetlands program. However, funds available for WPDG grants may be combined in a PPG which may, in certain circumstances, provide the authorization to undertake implementation activities. For further information, see the final rules on Environmental Program Grants for State, Interstate, and local government Agencies at 40 CFR part 35, subpart A and Tribes at 40 CFR part 35, subpart B. The rules are also available on EPA's Web site at: *http://www.epa.gov/fedrgstr/EPA-TOX/2001/Day-09/t218.htm* (State) and at *http://www.epa.gov/fedrgstr/EPA-GENERAL/2001January/Day-16/g219.htm* (Tribal).

## IV. Application and Submission Information

*A. Request for Application Packages*

Grant application forms are available at *http://www.epa.gov/ogd/AppKit/index.htm/* and by mail upon request by calling the Grants Administration Division at (202) 564–5305. If you have questions, contact your Headquarters or Regional Office Wetland Grant Coordinator (see Section VII for Agency Contact information) or visit our website at *http://www.epa.gov/owow/wetlands/grantguidelines/*.

*B. Content and Form of Application Submission*

Headquarters and Regional Offices may ask applicants to submit pre-application proposals. For specific Regional/Headquarters information, contact your Headquarters or Regional Office Wetland Grant Coordinator (see Section VII for Agency Contact information). As provided in 40 CFR 35.107 and 35.507, for States, Tribes, local governments, interstate agencies, and national non-profit organizations, work plans must include: (1) A summary of key objectives, work plan commitments and final products; (2) a detailed description of project tasks and an explanation of how the project will contribute to developing or improving a S/T/LG's wetland program; (3) a time-line and reporting schedule; (4) a budget and estimated funding amounts for each work plan component; (5) outcomes and expected environmental results; (6) performance measures and evaluation process; (7) roles and responsibilities of the recipient in carrying out the work plan commitments; and (8) contact information for the Program Manager, Grant Project Lead Manager, and Account Manager. Grant applicants will be required to provide a Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements. Organizations can receive a DUNS number in one day, at no cost, by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or by visiting *www.dnb.com*.

*C. Submission Dates and Times*

Submission deadlines are set by EPA Headquarters and Regional Offices. Please contact the appropriate Headquarters or Regional Office Wetland Grant Coordinator for information and/or to confirm competition deadlines (see Section VII for Agency Contact information). Deadlines will also be posted at *http://www.epa.gov/owow/wetlands/grantguidelines/*. Application proposals must be submitted to the appropriate EPA office and postmarked or emailed by the appropriate Regional or Headquarters deadline. Applicants interested in being put on a mailing list to obtain more details should contact the appropriate Headquarters or Regional Wetland Grant Coordinator (see Section VII for Agency Contact information).

*D. Intergovernmental Review*

Applicants requested to submit a full application may be required to comply with Intergovernmental Review Requirements (40 CFR part 29).

*E. Funding Restrictions*

Based on policy, regulation, and on experience gained from previous years we offer the following comments/restrictions on funding eligibility.

- Universities that are agencies of State government are eligible to receive grant funds from the Regional Offices through this competition. Universities must provide documentation acceptable to the EPA Regional Office to demonstrate that they function as a State agency. Universities that are not chartered as a part of State government are not eligible for direct funding from EPA Regional Offices. Also, any award recipients may award such entities contracts in accordance with 40 CFR 31.36, and subgrants in accordance with 40 CFR 31.37. The State, Tribe, local

agency, or national non-profit organization should not simply pass through funding to an organization that is not eligible to receive funding directly. Land grant schools do not automatically qualify for direct funding as an agency of a State because of their status as a land grant school.

• Under the WPDG competitive process, funds cannot be used for land acquisition or purchase of easements. However, it may support the coordination or acceleration of research, investigations, experiments, training, demonstrations, surveys, and study efforts directed at identifying areas for acquisition, which would help address water pollution problems including wetlands protection and restoration.

• This competitive grant program cannot fund payment of taxes for landowners who have a wetland on their property.

• While contractual efforts can be a part of these grants, each WPDG recipient must be significantly involved in the administration of the grant. EPA recommends that recipients use no more than 50% of the grant funds to contract with non-governmental entities. However, if the applicant wants to exceed this limit, the applicant may submit a written justification for greater involvement by non-governmental contractors as part of the grant application package. EPA will evaluate the need for greater contractual participation and may approve the request if there is adequate justification to exceed the 50% limit. If the contractual work is being done by another S/T/LG agency, interstate agency, or intertribal consortia, these entities should be clearly indicated in the grant application.

• Inventory or mapping for the sole purpose of locating wetlands is not eligible for funding under this competition. A description of how mapping or inventory projects will directly develop or improve the eligible applicant's wetland protection programs must be included in the grant application for these types of projects to be considered for funding under this grant program.

• Under the competition, each grant must be completed with the initial award of funds. Recipients should not anticipate additional funding beyond the initial award of funds for a specific project. Eligible applicants should request the entire amount of money needed to complete the project in the original grant application. Each grant should produce a final, discrete product. Funding and project periods can be for more than one year.

• Grant funds cannot be used to fund an honorarium under this competition.

• Any field work or research-type activities are limited to activities that have a direct, demonstrated link to program development or refinement included in the application.

• Purchase/lease of vehicles (including boats, motor homes) and office furniture is not eligible for funding under this program.

• Grant funds cannot be used to pay for travel by Federal agency staff.

**V. Application Review Information**

*A. Selection Criteria*

For the traditional competitive WPDG funding, proposals will be evaluated using the following general categories of criteria:

• Program Area Emphasis—priority in the selection process will be given to projects which support the development of a S/T/LG's monitoring and assessment program, improvement of the effectiveness of compensatory mitigation, or protection of vulnerable wetlands and aquatic resources.

• Clarity of Work Plan—clearly written and detailed proposals.

• Potential Environmental Results—likelihood of positive environmental results in the short- and long-term.

• Transferability of Results and/or Methods to other S/T/LGs.

• Involvement/Commitment of the applicant—significant financial and personnel contribution and involvement of partners.

• Incorporation of project into broad agency wetland goals (*e.g., Government Performance Results Act (GPRA) Goals, EPA Strategic Plan, or Core Elements of a Comprehensive Wetland Program.*) Please contact the Wetlands Helpline at (800) 832–7828) for more information.

• Data Management—capability to report monitoring data to STORET.

• Success of Previous Projects—for applicants who have received prior EPA funding.

Proposals are evaluated by the quality of the submission related to the above criteria. The last criterion is applied only to prior grant recipients. The last criterion does not add value in the rating process for prior wetland grant recipients to give an automatic advantage over new applicants. The last criterion, does, in cases of inadequate and inappropriate prior grant performance, lower an applicant's ranking; it allows consideration of poor past performance in the evaluation of current grant proposals.

*B. Review and Selection Process*

For the competitive process, WPDG applications from States, Tribes, and local governments are handled through EPA Regional Offices, while applications from national non-profit, non-governmental organizations are handled through EPA Headquarters. Applications from interstate agencies and intertribal consortia can be submitted to either a Regional Office or Headquarters, however, the same proposals from interstate and intertribal agencies cannot be submitted to more than one office. Headquarters and Regional Office staff will review the applications received in their respective offices and select the most competitive projects for funding on the basis of the selection criteria. Both the quality and quantity of the applications will play a significant role in the selection of grants for funding.

**VI. Award Administration Information for Competitive Process**

*A. Award Notices*

All applicants will be notified by the appropriate EPA Office (Region/Headquarters) on whether or not the applicant has been selected for funding. The notification is not an authorization to begin performance. A notice signed by the Grants Administration Division is the authorizing document to the applicant to begin performance.

*B. Administrative and National Policy Requirements*

The general award and administration process for all WPDGs is governed by regulations at 40 CFR part 30 ("Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"), 40 CFR part 31 ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments") and 40 CFR part 35, subpart A ("Environmental Program Grants for State, Interstate, and Local Government Agencies") and subpart B ("Environmental Program Grants for Tribes").

*C. Reporting*

WPDGs are currently covered under the following EPA grant regulations: 40 CFR part 30 (non-profit organizations); 40 CFR part 31 (States, Tribes, interstate agencies, intertribal consortia and local governments) and 40 CFR part 35, subpart A (States, interstate agencies and local governments) and subpart B (Tribes and intertribal consortia). These regulations specify basic grant reporting requirements, including performance and financial reports (see 40 CFR 30.51, 30.52, 31.40, 31.41, 35.115, and 35.515.) In negotiating these grants, EPA will work closely with recipients to

incorporate appropriate performance measures and reporting requirements into each grant agreement consistent with 40 CFR 30.51, 31.40, 35.115, and 35.515. These regulations provide some flexibility in determining the appropriate content and frequency of performance reports. At a minimum, however, the reporting schedule must require the recipient to report at least annually.

**VII. Agency Contacts**

*Headquarters and Regional Wetland Grant Coordinators*

Headquarters

Connie Cahanap, U.S. EPA Wetlands Division, 1200 Pennsylvania Avenue, NW., MC 4502T, Washington, DC 20460. Phone: 202–566–1382. *cahanap.concepcion@epa.gov.*

Region 1—CT, ME, MA, NH, RI, VT

Jeanne Cosgrove. U.S. EPA Region 1, 1 Congress Street, MC CSP, Suite 100, Boston, MA 02114. Phone: 617–918–1669. *cosgrove.jeanne@epa.gov.*

Region 2—NJ, NY, PR, VI

Kathleen Drake, U.S. EPA Region 2, 290 Broadway, NY, NY 10007. Phone: 212–637–3817. *drake.kathleen@epa.gov.*

Region 3—DE, MD, PA, VA, WV, DC

Alva Brunner, U.S. EPA Region 3, 1650 Arch Street, MC 3EA30, Philadelphia, PA 19103. Phone: 215–814–2715. *brunner.alva@epa.gov.*

Region 4—AL, FL, GA, KY, MS, NC, SC, TN

Sharon Ward, U.S. EPA Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303. Phone: 404–562–9269. *ward.sharon@epa.gov.*

Region 5—IL, IN, MI, MN, OH, WI

Cathy Garra, U.S. EPA Region 5, 77 West Jackson Blvd., MC WW16J, Chicago, IL 60604. Phone: 312–886–0241. *garra.catherine@epa.gov.*

Region 6—AR, LA, NM, OK, TX

Tyrone Hoskins, U.S. EPA Region 6, 1445 Ross Avenue, MC 6WQ–AT, Dallas, TX 75202. Phone: 214–665–7375. *hoskins.tyrone@epa.gov.*

Region 7—IA, KS, MO, NE

Jason Daniels, U.S. EPA Region 7, 901 North Fifth Street, Kansas City, KS 66101. Phone: 913–551–7443. *daniels.jason@epa.gov.*

Region 8—CO, MT, ND, SD, UT, WY

Brent Truskowski, U.S. EPA Region 8, 999 18th Street, Suite 300, Denver, CO 80202. Phone: 303–312–6235. *truskowski.brent@epa.gov.*

Region 9—AZ, CA, HI, NV, AS, GU

Cheryl McGovern, U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105. Phone: 415–972–3415. *mcgovern.cheryl@epa.gov.*

Region 10—AK, ID, OR, WA

David Kulman, U.S. EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101. Phone: 206–553–6219. *kulman.david@epa.gov.*

**VIII. Other Information**

*A. Quality Assurance/Quality Control (QA/QC)*

QA/QC and peer review are sometimes applicable to these grants (see 40 CFR 30.54 and 40 CFR 31.45.) QA/QC requirements apply to the collection of environmental data. Environmental data are any measurements or information that describe environmental processes, location, or conditions; ecological or health effects and consequences; or the performance of environmental technology. Environmental data include information collected directly from measurements, produced from models, and compiled from other sources such as databases or literature. Applicants should allow sufficient time and resources for this process. EPA can assist applicants determine whether QA/QC is required for the proposed project. If QA/QC is required for the project, the applicant is encouraged to work with the appropriate EPA quality staff to determine the appropriate QA/QC practices for the project. If the applicant has an EPA-approved quality assurance project plan and it covers the project in the application, then they need only reference the plan in their application. Contact the appropriate Headquarters or Regional Office Wetland Grant Coordinator (See Section VII for Agency Contact information) for referral to an EPA quality staff.

*B. Public Participation*

EPA regulations require public participation in various Clean Water Act programs including grants (40 CFR part 25). Each applicant for EPA financial assistance shall include tasks for public participation in their project's work plan submitted in the grant application (40 CFR 25.11.) The project work plan should reflect how public participation will be provided for, assisted, and accomplished.

*C. Annual Wetlands Meeting/Training*

EPA encourages S/T/LGs to include travel plans for wetland personnel to attend at least one national wetland meeting in support of the project or for training each year (*e.g.*, National EPA, State, Tribal, Local wetland meeting or wetland monitoring workshops.) Applicants should account for travel plans and costs in the work plans and the project budget. EPA's Wetlands Program does not anticipate providing travel for State, Tribal or local government staff to attend meetings other than through this grant program.

Dated: January 22, 2004.

**Diane Regas,**

*Director, Office of Wetlands, Oceans, and Watersheds.*

[FR Doc. 04–2818 Filed 2–9–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7620–5]**

## Region III Water Protection Division; Revision to Delaware's NPDES Program; State of Delaware's Submittal of a Substantial Program Revision to Its Authorized National Pollutant Discharge Elimination System (NPDES) Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of revision, public comment period, and opportunity to request a public hearing.

**SUMMARY:** The State of Delaware has submitted to EPA for review and approval revisions to the regulations implementing the State's National Pollutant Discharge Elimination System (NPDES) program, which was approved by EPA pursuant to section 402 of the Clean Water Act (CWA). The State has made significant revisions to sections 1 through 8 and sections 10 through 14 of its Department of Natural Resources and Environmental Control's (DNREC) March 15, 1974 Regulations Governing the Control of Water Pollution, and EPA has determined that the DNREC's Revision constitutes a substantial revision to Delaware's authorized NPDES program. Accordingly, EPA requests public comment and is providing notice of an opportunity to request a public hearing on the submitted regulations. EPA seeks public comments on whether to approve or disapprove the revisions to Delaware's authorized NPDES program, and a public hearing will be held if there is significant public interest based on the requests received. Copies of the Delaware Regulation Revisions are available for public inspection as indicated in the **ADDRESSES** section.

**DATES:** Comments and/or requests for public hearing must be received before March 26, 2004.

**ADDRESSES:** Comments should be addressed to Evelyn MacKnight, U.S. EPA, Region III, 3WP11, 1650 Arch Street, Philadelphia, Pennsylvania, 19103.

**FOR FURTHER INFORMATION CONTACT:** Evelyn MacKnight, (215) 814–5717, at the above address. Those who are deaf or hearing-impaired may use the Relay Service at 1–800–654–5984 and request that the call be relayed.

**SUPPLEMENTARY INFORMATION:** Section 402 of the Federal Clean Water Act (CWA) created the NPDES program under which the Administrator of EPA may issue permits for the discharge of pollutants into the waters of the United States under conditions required by the CWA. Section 402(b) allows States to assume NPDES program responsibilities upon approval by EPA. On April 1, 1974, Delaware was authorized by EPA to administer the NPDES program; the State also received the authority to administer the General Permits program on October 23, 1992.

EPA has issued a regulation at 40 CFR part 123 that establishes the requirements for NPDES State Programs. Section 123.62 establishes procedures for revision of authorized NPDES State Programs. Pursuant to § 123.62(a), a State may initiate a program revision and must keep EPA informed of proposed modifications to its regulatory authority. On July 28, 2003, the State of Delaware submitted its regulation revisions for formal review by EPA. Pursuant to § 123.62(b)(1), a State program submittal is complete whenever the State submits such documents as EPA determines are necessary under the circumstances. In this instance, EPA determined that the State submittal was complete on November 19, 2003, with the submission of a statement from the State's Attorney General's office which certified that the regulations were duly adopted pursuant to State law. Section 123.62(b)(2) requires EPA to issue public notice by publication in the **Federal Register** and in newspapers having Statewide coverage, and to provide a period of public comment of at least 30 days whenever the Agency determines that a program revision is substantial. EPA has determined that the Delaware Regulation Revision, which is described below, constitutes a substantial revision to Delaware's NPDES program. Section 123.62(b)(2) also requires EPA to hold a public hearing regarding the proposed revision "if there is significant public interest based on requests received."

The Delaware Regulation Revision includes amendments to sections 1 through 8 and sections 10 through 14 of the DNREC's Regulations Governing the Control of Water Pollution. The majority of the amendments focus on DNREC's issuance and administration of NPDES permits in the State of Delaware. In addition, DNREC updated its regulations for the construction and operation of wastewater/pollution control facilities and adopted regulations that formalize a periodic assessment of municipal treatment plant performance and infrastructure needs. Regulations were also adopted to address administrative procedures for evaluating and issuing a State certification that an activity will be conducted in such a manner that won't violate the applicable surface water quality criteria or standards, as required by Federal law. Delaware also included a number of water quality-based requirements, including the determination of Total Maximum Daily Loads (TMDLs), allowances for intake credits, and consideration for erosion and corrosion from facilities' piping.

At the close of the public comment period (including, if necessary, the public hearing), the EPA Regional Administrator, with the concurrence of the Associate General Counsel for Water and the Director of the Office of Compliance and Enforcement, will decide whether to approve or disapprove the Delaware Regulation Revision as a revision to the Delaware NPDES program. The decision to approve or disapprove will be based upon satisfying or meeting the requirements of the CWA and 40 CFR part 123. The Delaware Regulation Revision may be reviewed by the public from 8 a.m. to 4 p.m. at the EPA office in Philadelphia, Monday to Friday (excluding holidays), at the address appearing earlier in this notice. Copies of the submittal may be obtained for a fee by contacting Evelyn MacKnight as indicated in the **ADDRESSES** section.

All comments or objections received by March 26, 2004, will be considered by EPA before taking final action on the program revision.

Please bring the foregoing to the attention of persons whom you know are interested in this matter. All written comments and questions on this matter should be addressed to Evelyn MacKnight at the above address or telephone number.

Dated: February 4, 2004.

**Thomas Voltaggio,**

*Acting Regional Administrator, Region III.*

[FR Doc. 04–2817 Filed 2–9–04; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

**[CC Docket No. 99–294; FCC 03–331]**

### Federal-State Joint Conference on Advanced Telecommunications Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** This document increases the size of the Federal-State Joint Conference on Advanced Telecommunications Services ("Joint Conference") to include representatives from up to seven state commissions, in order to enhance its effectiveness and ensure a diversity of viewpoint. It also fills vacancies created by the addition of two state seats, as well as recent departures from the Joint Conference. These measures will allow greater federal-state cooperation, which is critical to facilitating the widespread deployment of, and access to, advanced services.

**FOR FURTHER INFORMATION CONTACT:** Jane Phillips, Intergovernmental Affairs, Consumer & Governmental Affairs Bureau, (202) 418–1761.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Order*, FCC 03–331, adopted December 19, 2003, and released December 23, 2003. The complete text of the *Order* is available on the Commission's Internet site, at *www.fcc.gov* and is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW, CY–A257, Washington, DC. The text may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY–B402, Washington, DC 20554 (telephone 202–863–2893). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0531 (voice), (202) 418–7365 (TTY). This *Order* can also be downloaded in text and ASCII formats at *http://www.fcc.gov/jointconference/*.

**Synopsis**

The Joint Conference was convened in 1999 as part of the Commission's ongoing efforts to ensure that advanced services are deployed as rapidly as possible to all Americans. It serves as a forum for an ongoing dialogue between the Commission, state regulators, and local and regional entities regarding the deployment of advanced telecommunications capabilities, and is comprised of commissioners from state public utilities commissions and from the Federal Communications Commission.

The Joint Conference is responsible for monitoring and collecting data regarding the practices of carriers as they deploy advanced services throughout the nation. It has also held a series of field hearings across the country and has conducted Broadband Summits to examine how best to accelerate the deployment of affordable advanced services to rural and other under-served telecommunications users. Through these and other activities, the Joint Conference has worked cooperatively to promote the widespread deployment of advanced services.

To help the Joint Conference achieve its broad mandate, and pursuant to section 410(b) of the Communications Act of 1934, 47 U.S.C. 410(b), the *Order* appoints Commissioner Susan P. Kennedy of the California Public Utilities Commission, Thomas L. Welch, Chairman of the Maine Public Utilities Commission, and Deborah Tate, Chairman of the Tennessee Regulatory Authority, to serve on the Federal-State Joint Conference on Advanced Telecommunications Services. The *Order* also appoints Bob Rowe, Chairman of the Montana Public Service Commission, formerly a non-voting member, to serve as a full member of the Federal-State Joint Conference on Advanced Telecommunications Services.

The number of members on the Joint Conference has been increased in order to augment diversity in Joint Conference membership and thereby widen the range of viewpoints and expertise. This is critical to informed decision-making as federal and state regulators join forces to encourage the deployment of advanced telecommunications services. Increasing the size of the Joint Conference is also consistent with the approach the Commission has taken with other joint boards, where the complexity and magnitude of the board's charter warranted a relatively large membership in order to address the broad range of issues presented.

The *Order* requires that a copy of all filings in CC Docket 99–294 be served on each of the following members of the Joint Conference at the following addresses:

- The Honorable Michael K. Powell, FCC Chairman, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.
- The Honorable Kevin J. Martin, Commissioner, Chair, Federal State Joint Conference on Advanced Telecommunications Services, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.
- The Honorable Kathleen Q. Abernathy, Commissioner, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.
- The Honorable Michael J. Copps, Commissioner, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.
- The Honorable Jonathan S. Adelstein, Commissioner, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.
- The Honorable G. Nanette Thompson, Commissioner, Regulatory Commission of Alaska, 701 West Eight Avenue, Suite 300, Anchorage, Alaska 99501–3469.
- The Honorable Irma Muse Dixon, Commissioner, Louisiana Public Service Commission, Office of the Commissioner, District 3—New Orleans, 1600 Canal Street, Suite 1400, New Orleans, Louisiana 70112.
- The Honorable Jo Anne Sanford, Chair, North Carolina Utilities Commission, 430 North Salisbury Street, Dobbs Building, Raleigh, NC 27603–5918.
- The Honorable Bob Rowe, Chairman, Montana Public Service Commission, 1701 Prospect Avenue, PO Box 20261, Helena, MT 59620–2601.
- The Honorable Susan P. Kennedy, Commissioner, California Public Utilities Commission, 505 Van Ness Ave., San Francisco, CA 94102.
- The Honorable Thomas L. Welch, Chairman, Maine Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, ME 04333–0018.
- The Honorable Deborah T. Tate, Chairman, Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37243.

**Ordering Clauses**

Pursuant to section 410(b) of the Communications Act of 1934, as amended, 47 U.S.C. 410(b), the Honorable Susan P. Kennedy, Commissioner of the California Public Utilities Commission, the Honorable Thomas L. Welch, Chairman of the Maine Public Utilities Commission, and Deborah Tate, Chairman of the Tennessee Regulatory Authority, are appointed to the Federal-State Joint Conference on Advanced Telecommunications Services.

Pursuant to section 410(b) of the Communications Act of 1934, as amended, 47 U.S.C. 410(b), the Honorable Bob Rowe, Chairman of the Montana Public Service Commission, formerly a non-voting member, is appointed as a full member to the Federal-State Joint Conference on Advanced Telecommunications Services.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 04–2831 Filed 2–9–04; 8:45 am]

BILLING CODE 6712–01–P

## 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 March 5, 2004.

**A. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

*1. Tradition Bancshares, Inc.*, Houston, Texas; to acquire up to 100 percent of the voting shares of Katy Bank, N.A., Katy, Texas.

Board of Governors of the Federal Reserve System, February 4, 2004.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 04–2772 Filed 2–9–04; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Federal Open Market Committee; Domestic Policy Directive of December 9, 2003

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on December 9, 2003.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long-run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with maintaining the federal funds rate at an average of around 1 percent.

By order of the Federal Open Market Committee, February 3, 2004.

**Vincent R. Reinhart,**

*Secretary, Federal Open Market Committee.*

[FR Doc. E4–239 Field 2–9–04; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

**[Docket No. OP–1182]**

### Policy Statement on Payments System Risk

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Board is giving notice that it intends to adopt two changes to its Policy Statement on Payments System Risk (PSR policy). First, the Board intends to modify the daylight overdraft measurement rules ("posting rules") for interest and redemption payments on securities issued by entities for which the Reserve Banks act as fiscal agents but whose securities are not obligations of, or guaranteed by, the United States—that is, securities issued by government-sponsored enterprises (GSEs) and certain international organizations. The planned modification would revise the Board's PSR policy to specify that the Reserve Banks will release interest and redemption payments on the Fedwire®-eligible securities issued by a GSE or international organization only when the issuer's Federal Reserve account contains funds equal to or in excess of the amount of the interest and redemption payments to be made.[1] The Board requests comment on how best to implement this policy change in order to promote a smooth market adjustment.

Second, the Board intends to align the PSR policy's treatment of the general corporate account activity (activity other than interest and redemption payments) of GSEs and certain international organizations with the treatment of account activity of other account holders that do not have regular access to the Federal Reserve's discount window. Such treatment includes strongly discouraging daylight overdrafts and applying a penalty fee to daylight overdrafts that nonetheless result from these entities' general corporate payment activity.

**DATES:** Comments must be received by April 16, 2004.

**ADDRESSES:** Comments should refer to Docket No. OP–1182 and may be mailed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. Please consider submitting your comments through the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*, by e-mail to *regs.comments@federalreserve.gov*, or by fax to the Office of the Secretary at 202/452–3819 or 202/452–3102. Rules proposed by the Board and other federal agencies may also be viewed and commented on at *www.regulations.gov*.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** Paul Bettge, Associate Director (202/452–3174), Stacy Coleman, Manager (202/452–2934), or Connie Horsley, Senior Financial Services Analyst (202/452–5239), Division of Reserve Bank Operations and Payment Systems; for the hearing impaired only: Telecommunications Device for the Deaf, Dorothea Thompson (202/452–3544).

**SUPPLEMENTARY INFORMATION:**

#### I. Background

*A. Foundation of the PSR Policy*

In 1985, the Board adopted a policy to reduce the risks that payment systems present to the Federal Reserve Banks, to the banking system, and to other sectors of the economy (50 FR 21120, May 22, 1985). An integral component of this PSR policy is managing the Federal Reserve's direct credit risk by controlling institutions' use of Federal Reserve intraday credit, commonly referred to as "daylight credit" or "daylight overdrafts." A daylight overdraft occurs when an account holder's Federal Reserve account is in a negative position during the business day. The PSR policy requires all depository institutions incurring daylight overdrafts in their Federal Reserve accounts to establish a maximum limit, or net debit cap, on those overdrafts. In addition, a Reserve Bank may apply other risk controls to an account holder's payment activity if the account holder incurs daylight overdrafts in violation of the PSR policy or if the Reserve Bank believes that the account holder poses credit risk in excess of what the Reserve Bank determines to be prudent. Under these circumstances, a Reserve Bank may place real-time controls on the account holder's payment activity, so as to reject requested payments, or require the account holder to pledge collateral to cover its daylight overdrafts as a means of deterring further the use of Federal Reserve daylight credit.[2]

Under the PSR policy, an institution's eligibility to access daylight credit is

[1] Copies of the Minutes of the Federal Open Market Committee meeting on December 9, 2003, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, DC 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

[1] Fedwire is a registered servicemark of the Federal Reserve Banks.

[2] The Reserve Banks have the ability to monitor an entity's account for certain payment types in real time and reject those payments that would create, or increase, a daylight overdraft in the entity's account. These payment types include Fedwire funds transfers, National Settlement Service transactions, and certain automated clearing house transactions.

contingent upon whether the institution is eligible for regular access to the Federal Reserve's discount window and whether it is in sound financial condition. By statute, regular access to the discount window generally is available to institutions that are subject to reserve requirements.[3] If such an institution fails to cover a daylight overdraft by the close of the business day, it either obtains a discount window loan or incurs an overnight overdraft. The Federal Reserve strongly discourages institutions from incurring overnight overdrafts by charging a penalty rate, equal to the federal funds rate plus four percentage points, on the amount of the overnight overdraft.

The Federal Reserve has long been concerned that an institution that does not have regular access to the discount window may nevertheless incur a daylight overdraft, which could, in turn, become an overnight overdraft. To address the risks arising from such overdrafts and to avoid the extension of overnight credit to institutions that lack regular access to the discount window, the PSR policy does not permit such institutions to adopt a positive net debit cap and strongly discourages them from incurring any daylight overdrafts. The Board's policy is consistent with Congress's intent in the Federal Reserve Act to allow depository institutions access to Federal Reserve overnight credit as a quid pro quo for being subject to reserve requirements and to impose additional conditions on the Federal Reserve's provision of overnight credit to other entities.[4]

*B. Introduction of Daylight Overdraft Fees*

Since the PSR policy was first adopted in 1985, the Board has modified and expanded it several times. Notably, in 1992, the Board approved a policy to charge institutions a fee for their use of Federal Reserve daylight credit, beginning in April 1994 (57 FR 47084, October 14, 1992). The Board's goal in adopting this policy was to induce behavior that would reduce risk and increase efficiency in the payment system. At that time, the Board also modified how it posted different types of transactions to institutions' Federal Reserve accounts to reflect more closely the time that transactions were processed (57 FR 47093, October 14, 1992).[5] The Board's objectives in designing these posting rules included minimizing intraday float, facilitating depository institutions' monitoring and control of their account balances during the day, and reflecting the legal rights and obligations of parties to payments. The Board's objective of minimizing intraday float is especially important in light of the daylight overdraft fee, which gives intraday credit an explicit value.

After the Board approved its policy of charging fees for daylight overdrafts and its revised posting rules, it adopted a penalty fee (the regular daylight overdraft fee, currently 36 basis points, plus 100 basis points) for daylight overdrafts incurred by certain institutions that, by statute, do not have regular discount window access (59 FR 8977, February 24, 1994). Because of concerns that a daylight overdraft could become an overnight overdraft, the Board determined that such account holders should not be permitted the same access to intraday credit as depository institutions and should be prohibited from incurring daylight overdrafts. Recognizing, however, that these account holders may, nonetheless, incur daylight overdrafts, the Board believed a penalty fee should be applied to these account holders' daylight overdrafts to provide such account holders a strong incentive to avoid incurring any, including inadvertent, daylight overdrafts. The Board's policy explicitly addressed the account holders that would be subject to the penalty fee, which included Edge and agreement corporations, limited purpose trust companies, and bankers' banks that do not waive their exemption from reserve requirements. At the time, however, the Board did not explicitly address whether certain aspects of the policy would be applied to GSEs and international organizations for which the Reserve Banks act as fiscal agents.[6, 7]

In 1994, the Board issued an interpretation of the PSR policy that stated GSEs should not incur daylight overdrafts in their accounts and would not be allowed to adopt positive net debit caps because they do not have regular access to the discount window (59 FR 25060, May 13, 1994). In its interpretation, the Board granted a temporary exemption from fees on daylight overdrafts resulting from the Reserve Banks' release of interest and redemption payments on Fedwire-eligible securities issued by GSEs prior to the issuers' full funding of such payments.[8] The Board granted this temporary exemption because it was uncertain of the effect that daylight overdraft fees would have on securities markets and did not want to introduce too much change at one time. The Board indicated that it would revisit the temporary exemption after market participants adjusted to the effects of daylight overdraft fees. In addition, the Board applied the regular daylight overdraft fee to the daylight overdrafts

[3] Before the passage of the Monetary Control Act of 1980, only banks that were members of the Federal Reserve System enjoyed regular access to the discount window. The Monetary Control Act extended reserve requirements to nonmember institutions and provided that any institution holding deposits subject to reserve requirements (transaction accounts and nonpersonal time deposits) would have the same access to the discount window as member institutions (12 U.S.C. 461(b)(7)).

[4] Section 13(3) of the Federal Reserve Act empowers the Board, by the affirmative vote of not less than five members (or, in certain cases, all available members), to authorize any Federal Reserve Bank to lend to individuals, partnerships, and corporations under "unusual and exigent circumstances" (12 U.S.C. 343 and 248(r)). Section 13(13) allows any Federal Reserve Bank to lend to any individual, partnership, or corporation when secured by U.S. government securities, subject to such limitations, restrictions, and regulations as the Board may prescribe (12 U.S.C. 347c). The Board's Regulation A applies the "unusual and exigent circumstances" requirement to discount window loans to any entity without regular discount window access, regardless of the type of collateral pledged. Regulation A also requires the Federal Reserve Banks to consult with the Board before lending to those entities. Lending under these provisions has been extremely rare, and such loans have not been extended since the 1930s.

[5] Prior to the 1992 posting rule modification, Fedwire funds and securities transfers were posted to institutions' Federal Reserve accounts as they were processed during the business day (as they still are today). The net of all automated clearing house transactions was posted as if the transactions occurred at the opening of business, regardless of whether the net was a debit or credit balance. All other, or "non-wire," activity was netted for a business day, and if the net balance was a credit, the credit amount was added to the opening balance. If the net balance was a debit, the debit amount was deducted from the closing balance. Under this method, an institution could use all of its non-wire net credits to offset any Fedwire funds or securities debits during the day but postpone the need to cover non-wire net debits until the close of the day.

[6] In their role as fiscal agents, the Reserve Banks maintain securities issued by GSEs and international organizations on the Fedwire Securities Service and make interest and redemption payments to depository institutions on each issuer's behalf, in addition to providing other payment services generally related to these fiscal agency services.

[7] These entities include the following GSEs: the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), entities of the Federal Home Loan Bank System (FHLBS), the Farm Credit System, the Federal Agricultural Mortgage Corporation (Farmer Mac), and the Student Loan Marketing Association (Sallie Mae). They also include the following international organizations: the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, and the African Development Bank. The Student Loan Marketing Association Reorganization Act of 1996 requires Sallie Mae to be completely privatized by 2008; however, Sallie Mae plans to complete privatization by September 2006. Upon privatization, Sallie Mae will no longer be considered a GSE, and the Reserve Banks will no longer add new issuances of Sallie Mae securities to the Fedwire Securities Service.

[8] The term "interest and redemption payments" refers to payments of principal and interest on securities maintained on the Fedwire Securities Service.

arising from the GSEs' general corporate funding activity, but did not apply the penalty fee that applies to other institutions that lack regular discount window access.[9] The Board stated it was not, however, ruling out the future application of the penalty fee.

In March 1995, the Board decided to raise the rate charged on daylight overdrafts to 36 basis points (60 FR 12559, March 7, 1995). At the time, the Board stated that it would evaluate further fee increases in a few years. When the Board began its evaluation of the effectiveness of the daylight overdraft fee in 2000, it recognized that significant changes had occurred in the banking, payments, and regulatory environment since the fee was introduced and, as a result, decided to broaden its review to include all aspects of the Federal Reserve's daylight credit policies. Based on its review, the Board determined that the PSR policy appears to be generally effective in controlling risk to the Federal Reserve and creating incentives for depository institutions to manage their intraday credit exposures (66 FR 64419, December 13, 2001).[10]

During its review, the Board also determined that market participants appear to have adjusted to daylight overdraft fees, which prompted an assessment of the temporary exemption granted to GSEs under the Board's 1994 interpretation of the PSR policy. In conducting this assessment, the Board evaluated the treatment of interest and redemption payments on Fedwire-eligible securities issued by GSEs and certain international organizations as well as the treatment of other payment services these entities use for their general corporate payment activity. As a result of this evaluation, the Board plans to implement two modifications to its PSR policy as described below.

[9] To facilitate measurement of overdrafts arising from the different activity, the Board required the GSEs and Reserve Banks to establish separate GSE accounts for principal and interest activity (P&I account) and for general corporate payment activity (general account).

[10] Through its analysis, the Board identified growing liquidity pressures among certain payments system participants and, as a result, revised the policy to modify the net debit cap calculation for U.S. branches and agencies of foreign banks, to modify the time electronic check presentments are posted to depository institutions' Federal Reserve accounts for purposes of measuring daylight overdrafts, and to allow certain depository institutions to pledge collateral to the Federal Reserve in order to access additional daylight overdraft capacity above their net debit caps, subject to Reserve Bank approval. These changes to the policy were intended to benefit the few financially healthy institutions that had been constrained by their net debit caps by increasing their daylight overdraft capacity and to remove a potential impediment to the use of electronic check presentment.

## II. Discussion of Planned Policy Changes

### *A. Modification of Posting Rules for Interest and Redemption Payments*

In the course of the Board's assessment of its 1994 interpretation of the PSR policy, the Board found that the dollar volume of interest and redemption payments on Fedwire-eligible securities issued by GSEs and international organizations that are credited to the receiving depository institutions' Federal Reserve accounts prior to such payments being fully funded by the issuer has grown significantly over the past ten years. In large part this increase owes to the rapid growth in Fedwire-eligible securities issued by GSEs. In addition, for some issuers, the lag between the time the Reserve Banks credit depository institutions' accounts for the interest and redemption payments and the time the issuer covers the payments extends, at times, until shortly before the close of the Fedwire Funds Service.[11]

The Board's current daylight overdraft measurement rules specify that U.S. Treasury and government agency interest and redemption payments are posted, that is, debited from the issuers' accounts and credited to the receivers' accounts, by 9:15 a.m. Eastern Time (ET) and that original issues of securities are posted on a flow basis, as they are issued, but no earlier than 9:15 a.m. ET.[12] These posting rules were designed primarily to grant depository institutions the benefit of receiving interest and redemption payments on U.S. Treasury or government agency securities prior to debits being made to their accounts for the purchase of new issues.

For operational ease, the Reserve Banks have applied the same posting rules to interest and redemption payments on Fedwire-eligible securities issued by GSEs and international organizations. However, the practice of releasing such payments before they are fully funded by the issuer is neither necessary to achieve the Federal Reserve's statutory mission nor appropriate risk management policy for the central bank. Furthermore, this practice is inconsistent with that of private issuing and paying agents for their customers' securities. In general, these issuing and paying agents do not allow payments to be made for a securities issuer before the issuer has fully funded its payments. The Board, therefore, intends to revise its policy to specify that the Reserve Banks will release interest and redemption payments on Fedwire-eligible securities issued by a GSE or an international organization only when the issuer's Federal Reserve account contains funds equal to or in excess of the amount of the issuer's interest and redemption payments to be made.

Under the revised policy, a cut-off hour by which the issuers must fund their respective interest and redemption payments would be established on the Fedwire Securities Service in order to avoid disruptions to end-of-day processing for this and related systems. The latest this cut-off hour could be is 4 p.m. ET in order to allow the Reserve Banks to close other elements of the Fedwire Securities and Funds Services on time.[13] [14] In the event that an issuer did not fund its interest and redemption payments by the established cut-off hour, its payments would not be processed on that day. Requests by an issuer for extensions of the 4 p.m. ET funding deadline would not be granted.

The planned posting rule modification is intended to address the intraday credit that results from the current manner in which the Reserve Banks process and post interest and redemption payments on securities issued by GSEs and international organizations to the receiving depository institutions' Federal Reserve accounts prior to such payments being fully funded by the issuer. The Board recognizes that the removal of Federal

[11] Fedwire Funds messages other than settlement payment orders may be sent until 6 p.m. ET (settlement payment orders may be sent until 6:30 p.m. ET). Under the Reserve Banks' Operating Circular 6, a settlement payment order is a payment order in which the originator and the beneficiary are each either (i) a bank subject to reserve requirements (whether or not it actually maintains reserves), or (ii) a participant in a net settlement arrangement approved by a Reserve Bank as an eligible originator or beneficiary of a settlement payment order sent during the settlement period.

[12] While transactions for various payment types are processed throughout the business day, daylight overdrafts in an entity's Federal Reserve account are calculated on an ex post basis according to the daylight overdraft posting rules.

[13] Participants on the Fedwire Securities Service can reposition securities held in their own accounts against payment until 4:30 p.m. ET (repositioning securities without payment is permitted until 7 p.m. ET). Because interest and redemption payments on Fedwire-eligible securities are processed through the Fedwire Securities Service as funds-only transactions, they cannot be processed after 4:30 p.m. ET. A cut-off hour of 4 p.m. ET for issuers to fund these interest and redemption payments would provide the Reserve Banks a 30-minute window in which to complete the requisite processing for funds-related transactions in order to close the Fedwire Securities Service on time.

[14] The 4 p.m. ET cut-off hour would apply specifically to the interest and redemption on Fedwire-eligible securities issued by GSEs and international organizations and would be independent of any other established operating hours of the Fedwire Securities Service as published in the Reserve Banks' Operating Circular 7.

Reserve intraday credit that is currently extended between the time the Reserve Banks disburse interest and redemption payments and the time the Reserve Banks receive funding for such payments may require alternate sources of private funding. This is similar to the hour-by-hour funding that depository institutions arrange in the ordinary course of business for other types of transactions. When depository institutions have difficulty with intraday funding sources, they may be required to obtain alternative financing in the money and capital markets to facilitate their intraday operations. The Board is confident that payment practices and markets will adjust to the planned policy changes, and, in an effort to promote a smooth market adjustment and minimize market participants' adjustment costs, the Board requests comment on whether to implement the policy change through full implementation on a specified date or through a phased approach.

If implementing the planned policy change without a phase-in period would better promote a smooth market adjustment, the Reserve Banks would, beginning in July 2006, release interest and redemption payments on Fedwire-eligible securities issued by a GSE or an international organization only when the issuer's Federal Reserve account contains funds equal to or in excess of the amount of the issuer's interest and redemption payments to be made. Alternatively, if market participants believe that a phased approach would better facilitate implementation of the planned change, the Board requests comment on the specific structure and objectives of any suggested phased approach and the rationale for why such an approach is considered preferable to one of full implementation in terms of promoting a smooth market adjustment.[15]

*B. Uniform Policy Treatment of Account Holders That Lack Regular Access to the Discount Window*

As part of the Board's assessment of its 1994 interpretation of the PSR policy, the Board also evaluated the treatment of other payment services used by GSEs and international organizations for their general corporate payment activity, that is, payment activity unrelated to interest and redemption payments. While most of these entities only infrequently incur daylight overdrafts as a result of their general corporate payment activity, a few of these entities incur such daylight overdrafts on an almost daily basis.

The Board has determined that GSEs and international organizations for which the Reserve Banks act as fiscal agents should not be permitted the same access to intraday credit as depository institutions because, by statute, they do not have regular access to the discount window. Therefore, to provide uniform treatment of account holders that do not have regular access to the discount window, the Board intends to apply the penalty fee to daylight overdrafts that result from GSEs' and international organizations' general corporate payment activity. The Board plans to implement the penalty fee concurrent with the posting rule change for interest and redemption payments, either upon full implementation of that policy change or at the start of a phased implementation. This planned policy change would supersede the Board's 1994 temporary exemption pertaining to government-sponsored enterprises. As a result, the Board would rescind its 1994 interpretation upon implementation of the planned policy change.

## III. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. ch. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the policy statement under the authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the policy statement.

## IV. Federal Reserve Policy Statement on Payments System Risk

The Board plans to amend the "Federal Reserve Policy Statement on Payments System Risk." Section I.A., under the heading "Daylight overdraft definition and measurement" would be amended as follows with changes identified in *italics:*

**Procedures for Measuring Daylight Overdrafts**[2]

**Opening Balance (Previous Day's Closing Balance)**

Post Throughout Business Day:

± Fedwire funds transfers
± Fedwire book-entry securities transfers
+ *Fedwire book-entry interest and redemption payments on securities that are not obligations of, or guaranteed by, the United States*[3][4]
± Net settlement entries.

Post by 9:15 a.m. Eastern Time:

+ U.S. Treasury and government agency book-entry interest and redemption payments[5]

Post Beginning at 9:15 a.m. Eastern Time:

− Original issues of Treasury securities.[6]

Section I.E. under the heading "Special situations," would be amended as follows with changes identified in *italics:*

*E. Special Situations*

*Under the Board's policy, certain account holders warrant special treatment primarily because of their charter types. As mentioned previously, an institution must have regular access to the discount window and be in sound financial condition in order to adopt a net debit cap greater than zero. Account holders that do not have regular access*

[15] Under any phased approach, each issuer would be required to fund the amount of its interest and redemption payments to be made on a given day by the close of business, as is the case today. Regardless of the approach the Board ultimately adopts, at full implementation, each issuer would be required to fund the amount of its interest and redemption payments to be made on a given day by the established cut-off hour before the Reserve Bank would release the issuer's interest and redemption payments.

[2] This schedule of posting rules does not affect the overdraft restrictions and overdraft-measurement provisions for nonbank banks established by the Competitive Equality Banking Act of 1987 and the Board's Regulation Y (12 CFR 225.52).

[3] *The Reserve Banks act as fiscal agents for certain entities, such as government-sponsored enterprises (GSEs) and international organizations, whose securities are Fedwire-eligible but are not obligations of, or guaranteed by, the United States. These entities include the following GSEs: the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), entities of the Federal Home Loan Bank System (FHLBS), the Farm Credit System, the Federal Agricultural Mortgage Corporation (Farmer Mac), and the Student Loan Marketing Association (Sallie Mae). These entities also include the following international organizations: the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, and the African Development Bank. The Student Loan Marketing Association Reorganization Act of 1996 requires Sallie Mae to be completely privatized by 2008; however, Sallie Mae plans to complete privatization by September 2006. Upon privatization, Sallie Mae will no longer be considered a GSE, and the Reserve Banks will no longer add new issuances of Sallie Mae securities to the Fedwire Securities Services.*

[4] *The Reserve Banks will post these transactions, as directed by the issuer, provided that the issuer's Federal Reserve account contains funds equal to or in excess of the amount of the interest and redemption payments to he made. If a Reserve Banks does not receive funding from an issuer for the issuer's interest and redemption payments by the established cut-off hour of 4 p.m. ET, the issuer's payments will not be processed on that day.*

[5] *For purposes of this policy, government agencies are those entities (other than the U.S. Treasury) for which the Reserve Banks act as fiscal agents and whose securities are obligations of, or guaranteed by, the United States.*

[6] Original issues of government agency *GSE, or international organization* securities are delivered as book-entry securities transfers and will be posted when the securities are delivered to the purchasing institutions.

*to the discount window include Edge and agreement corporations, bankers' banks that are not subject to reserve requirements, limited-purpose trust companies, government-sponsored enterprises (GSEs), and international organizations. Depository institutions that have been assigned a zero cap by their Reserve Banks are also subject to special considerations under this policy based on the risks they pose.* In developing its policy for these *account holders*, the Board has sought to balance the goal of reducing and managing risk in the payments system, including risk to the Federal Reserve, with that of minimizing the adverse effects on the payments operations of these *account holders*.

Regular access to the Federal Reserve discount window generally is available to institutions that are subject to reserve requirements. If an *account holder* that is not subject to reserve requirements and thus does not have regular discount-window access were to incur a daylight overdraft, the Federal Reserve might end up extending overnight credit to that *account holder* if the daylight overdraft were not covered by the end of the business day. Such a credit extension would be contrary to the quid pro quo of reserves for regular discount-window access as reflected in the Federal Reserve Act and in Board regulations. Thus, *account holders* that do not have regular access to the discount window should not incur daylight overdrafts in their Federal Reserve accounts.

Certain *account holders* are subject to a daylight-overdraft penalty fee levied against the average daily daylight overdraft incurred by the *account holder*. These include Edge and agreement corporations, bankers' banks that are not subject to reserve requirements, limited-purpose trust companies, *GSEs, and international organizations*. The annual rate used to determine the daylight-overdraft penalty fee is equal to the annual rate applicable to the daylight overdrafts of other depository institutions (36 basis points) plus 100 basis points multiplied by the fraction of a 24-hour day during which Fedwire is scheduled to operate (*currently* 18/24). The daily daylight overdraft penalty rate is calculated by dividing the annual penalty rate by 360.

The daylight-overdraft penalty rate applies to the *account holder's* average daily daylight overdraft in its Federal Reserve account. The daylight-overdraft penalty rate is charged in lieu of, not in addition to, the rate used to calculate daylight overdraft fees for depository institutions described in section I.B. While daylight overdraft fees are calculated differently for these *account holders* than for depository institutions, overnight overdrafts at *Edge and agreement corporations, bankers' banks that are not subject to reserve requirements,* limited-purpose trust companies, *GSEs, and international organizations* are priced the same as overnight overdrafts *at depository institutions that have regular access to the discount window.*

A new heading "Government-sponsored enterprises and international organizations" and text would be added to read as follows in Section I.E.4.:

*4. Government-sponsored enterprises and international organizations*

*The Reserve Banks act as fiscal agents for certain GSEs and international organizations in accordance with federal statutes. These entities generally have Federal Reserve accounts and issue securities over the Fedwire Securities Service. The securities of these account holders are not obligations of, or guaranteed by, the United States. Furthermore, these account holders are not subject to reserve requirements, do not have regular discount-window access, and should refrain from incurring daylight overdrafts and post collateral to cover any daylight overdrafts they do incur. GSEs and international organizations are subject to the same daylight-overdraft penalty rate as other entities that do not maintain reserves and do not have regular discount-window access.*

Section I.E.4., under the heading "Problem institutions," would be renumbered as "I.E.5."

By order of the Board of Governors of the Federal Reserve System, February 4, 2004.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 04–2797 Filed 2–9–04; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[Program Announcement 04078]**

### Providing Technical Assistance Support for the Rapid Strengthening of Blood Transfusion Services in Selected Countries in Africa and the Caribbean Under the President's Emergency Plan for AIDS Relief; Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for Providing Technical Assistance Support for the Rapid Strengthening of Blood Transfusion Services in Selected Countries in Africa and the Caribbean Under the President's Emergency Plan for AIDS Relief was published in the **Federal Register** on December 1, 2003, volume 68, number 230, pages 67181–67186. The notice is amended as follows:

On page 67183, in the first column under "III.1. Eligible applicants," please include a fifth bullet allowing "For profit organizations" to apply.

On page 67185, in the first column under "IV.5. Funding restrictions," please incorporate the following as an additional restriction:

In accordance with CFR 45 74.81, no HHS funds may be paid as profit to any recipient even if the recipient is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs.

Dated: February 4, 2004.

**Sandra R. Manning,**

*Director, Procurement and Grants Office, Centers for Disease Control and Prevention.*

[FR Doc. 04–2778 Filed 2–9–04; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[FDA 225–03–8002]**

### Memorandum of Understanding Between the Food and Drug Administration and Virginia Polytechnic Institute and State University

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and the Virginia Polytechnic Institute and State University to establish terms of collaboration to support shared interests that can proceed through a variety of programs, such as sabbaticals, postdoctoral fellowships, and student internships.

**DATES:** The agreement became effective March 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Peter Pitts, Office of External Relations (HF–10), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3330.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 20.108(c), which states that all written agreements

and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: February 2, 2004.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

BILLING CODE 4160–01–S

225-03-8002

# MEMORANDUM OF UNDERSTANDING

between

THE UNITED STATES FOOD AND DRUG ADMINISTRATION

and the

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

The United States Food and Drug Administration (FDA) and the Virginia Polytechnic Institute and State University (Tech) have a shared interest in scientific progress through an exchange of scientific capital in the diverse fields of science and medicine that directly and indirectly affect human and animal health. Both institutions also endorse scientific training for academicians and students to foster a well-grounded foundation in interdisciplinary science on which scientific learning will grow.

This Memorandum of Understanding (MOU) establishes terms of collaboration between FDA and Tech to support these shared interests that can proceed through a variety of programs such as sabbaticals, postdoctoral fellowships, and student internships. The MOU also includes the Virginia Tech Center for Food and Nutrition Policy (VT-CFNP), which is a chartered research and education center of Tech. VT-CFNP is non-profit, dedicated to advancing rational, science-based food and nutrition policy. Their trademark is Ceres® which signifies the center's outreach and public service activities that include an email service of analyses (CeresNet), conferences, roundtables, seminars, and lectures. These provide a venue for stakeholders to debate current food and nutrition policy issues having impact in the United States and throughout the world. The VT-

CFNP publishes high-quality, scholarly proceedings and executive summaries commemorating these deliberations that are marketed through its website, scientific conferences, and other appropriate venues.

**I. FDA relationship with Tech**

For the programs listed below, FDA will provide the following:

- Laboratory and/or office space as needed.
- Openness and proactive efforts in collaborative research efforts with Tech faculty, students, and staff.
- Based on available resources, willingness to participate in graduate courses and seminars at Tech.
- Continuing and frequent communication with faculty and staff.
- Openness and welcome to faculty, staff, and students wishing to visit FDA laboratories.
- Promulgation and communication of this collaborative effort through web pages, informal conversations with colleagues, faculty and students. In addition to above, FDA will provide Tech personnel the following:

**Sabbatical Program:**

- Opportunities to apply for a sabbatical with the agency with terms of the sabbatical to be negotiated between the individual and the agency.
- Opportunities to apply for salary support, where appropriate, through a variety of funding mechanisms. Request for salary support must coincide with the current federal fiscal year.
- Opportunity to attend a variety of didactic courses.

**FDA Service Fellowship Program**:

- Opportunity to compete for appointments. For those who receive appointments, research training and mentoring of the Fellow will be the responsibility of the appointing office.

**Tech Graduate Student Internship Program:**

- Tech will select the graduate student and FDA will approve the student applying mutually agreeable criteria.
- With concurrence of both parties on a research project, FDA, as appropriate, will offer office support, laboratory support, and supplies.
- The student will have the opportunity to apply for salary support from the FDA through a variety of mechanisms including Internship Programs, the Student Career Experience Program, and other work-study programs by working with the appropriate FDA Center Director.
- Consistent with Tech and FDA rules and regulations, and negotiated on a case-by-case basis, FDA mentors can, where appropriate, serve on thesis committees, attend examination and committee meetings, and participate in other aspects of the student's educational program at Tech.
- As appropriate, openness and welcome to students wishing to rotate through FDA laboratories, as well as an opportunity to obtain short-term training in related areas.

**Education and Instruction:**

- FDA, when available, will be instructors as part of Tech distance learning.
- FDA, when available, will participate in VT-CFNP's summer education programs.

**General Appointments:**

- Opportunity to submit resumes to apply for Special Government Employee (SGE) appointments.

**II. FDA's relationship with the Center for Food and Nutrition Policy (CFNP)**

**Collaborative Research:**

- Collaborative research in statistical analyses and other areas of opportunity will be handled in accordance with federal law (e.g., Freedom of Information and Privacy Act) and Agency policy governing the sharing, disclosing and consultation on Agency data. This is required to ensure the protection of proprietary information whether it is pre- or post-marketing. When federal and Agency laws are met, any collaborative research in statistical analyses will be handled through appropriate federal documents such as Cooperative Research and Development Agreements. (CRADAs).
- FDA, when available, will participate in VT-CFNP Roundtables in food and nutrition policy.

**Outreach:**

- FDA, when available, will participate in lecture series sponsored by VT-CFNP. These lectures are ideal networking opportunities for students (and others) who wish to understand the science and policy problems and solutions. The tone for the seminars and ensuing discussion period is collegial, informal, and informative.

**III. Tech's relationship with FDA.**

For the programs listed below, Tech will provide FDA the following:

- Laboratory and/or office space as needed and as available in accordance with the resources, rules, laws and policies of Tech.
- Openness and proactive efforts in establishing collaborative research efforts with FDA scientists and staff.
- Continuing and frequent communication with FDA scientists and staff.
- Openness and welcome to FDA scientists and staff wishing to visit relevant Tech laboratories and participate in relevant programs.
- Promulgation and communication of this collaborative effort through web pages, informal conversations with colleagues, faculty and students.
- In addition to above, Tech will provide FDA personnel the following:

**Sabbatical Program at Tech:**

- Opportunities to apply for a sabbatical with Tech. Terms of the sabbatical will be negotiated between the individual and the appropriate University unit.
- Opportunity to attend and/or participate in a variety of courses at the graduate level.

**FDA Service Fellowship Program:**

- Opportunities to apply for funding through internal and external mechanisms for additional research support for collaborative research efforts between Tech and FDA laboratories, subject to the policies and practices of Tech and FDA.

**Tech Graduate Students:**

- The basic formal educational structure be adhered to by students within any of its programs. It is understood that all students will meet all requirements for courses and degree programs as set up by the appropriate department or program at Tech.
- Stipend support, health insurance coverage, and/or tuition support in the form of teaching assistantships, campus fellowships, or other mechanisms, where appropriate are based on available resources, to Tech Graduate Students taking classes full time at Tech.
- Opportunity to receive dissertation research credits from the Graduate School, when available and appropriate, for Tech students engaged in dissertation research while participating in an internship at an FDA Center.
- Long-term commitment from the Graduate School to offer continued education, typical of what is provided to other Tech graduate students in good standing in their program, to Tech graduate students engaged in dissertation research while participating in an internships with FDA.
- Encouragement of graduate students to rotate through, and/or have short-term research opportunities in FDA laboratories.

**Adjunct Faculty Appointments**:

- Adjunct faculty appointments in relevant Tech programs or departments, based on available resources and consistent with standard Tech policies, for those FDA staff members working with Tech students, and/or assisting in teaching at Tech.

**Education:**

- FDA will be invited to participate in Tech distance learning for continuing education credit.
- Tech will invite FDA staff to be adjunct faculty.

**IV. VT-CFNP's relationship with FDA.**

**Collaborative Research:**

- Collaborative research in statistical analyses will be handled through appropriate federal documents such as Cooperative Research and Development Agreements. (CRADAs)

**Lectures:**

- VT-CFNP will invite FDA to attend lecture series sponsored by VT-CFNP. FDA employees will be able to receive Continuing Education credit for attending in the lectures.
- VT-CFNP will invite FDA to participate in lecture series sponsored by VT-CFNP. Agency participation will be handled in accordance with federal law and Agency policy.

**Education and Instruction:**

- FDA individuals may consult with VT-CFNP on the development of their Masters of Public Policy degree program. FDA's availability to consult will be based on available resources, such as personnel and time. FDA will determine how the Agency can be of help. Furthermore, any commitment on behalf of FDA to permanently assist in the Master's program (e.g., curricula, research and design, faculty) will be handled in accordance with federal law and Agency policy.
- VT-CFNP will offer FDA adjunct faculty positions, should a Masters of Public Policy (MPP) degree program be developed. Graduate-level classes may include Food Safety and Regulatory Policy, Nutrition and Public Policy, Biotechnology and Public Policy, and Risk Analysis in Public Policy.

**V. Coverances**

Tech individuals participating in the MOU will be United States Citizens or Permanent Residents when their participation involves research subject to export controls restrictions, or select agents. Regarding the latter, all federal restrictions will be adhered to.

Patent, license, and other legal instruments will be prepared in accordance with federal law and Tech policy, and written notice referencing the policies will be provided to the individual prior to entering on duty with FDA. Tech and FDA may decide to enter into a Cooperative Research and Development Agreement (CRADA) at a future time to conduct collaborative research. The terms of such a CRADA will address Intellectual Property rights.

This MOU forms the basis for the initial relations between FDA and Tech for sabbaticals, research, and scientific education. However, as this collaborative effort progresses, it is expected that new and wider areas of mutual interest will evolve and be included in expansions of this document.

**VI. Finances and Resources**

Tech and FDA agree that this MOU does not commit either to make specific levels of financial or personnel support or to provide specific laboratory or office space for the programs and that the provision of such support will be based on available resources and provided in accordance with the rules, regulations and laws under which FDA operates and the policies of Tech.

**VII. Contact**

The individual to whom all inquiries to FDA should be addressed is:

Judy Blumenthal, Ph.D. jblument@oc.fda.gov

The individual to whom all inquiries to Tech should be addressed is:

Dr. Leonard K. Peters, Vice Provost for Research peters@vt.edu

**AGREED TO:**

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

BY: Maureen Storey February 27, 2003

Signature of authorized representative Date

Maureen Storey, Ph.D., Acting Director,
Virginia Tech Center for Food and Nutrition Policy

BY: C Wstegs 3/5/03

Signature of authorized representative Date

Charles W. Steger, Ph.D., President
Virginia Polytechnic Institute and State University

UNITED STATES FOOD AND DRUG ADMINISTRATION

BY: Linda Arey Skladany March 12, 2003

Signature of authorized representative Date

Linda Arey Skladany, Esq.
Associate Commissioner
for External Relations
Food and Drug Administration

BY: Mark McClellan 3/13/03

Signature of authorized representative Date

Mark B. McClellan, M.D., Ph.D.
Commissioner of Food and Drugs

[FR Doc. 04–2738 Filed 2–9–04; 8:45 am]
BILLING CODE 4160–01–C

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**[Docket No. 2004D–0042]**

## Draft Guidances for Industry on Improving Information About Medical Products and Health Conditions; Withdrawal; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of three draft guidances for industry designed to improve information provided to consumers and health care practitioners by medical product firms about medical products and health conditions. The three guidances are entitled: "Brief Summary: Disclosing Risk Information in Consumer-Directed Print Advertisements" (Brief Summary Guidance), "Help-Seeking and Other Disease Awareness Communications by or on Behalf of Drug and Device Firms" (Disease Awareness Guidance), and "Consumer-Directed Broadcast Advertising of Restricted Devices " (Device Broadcast Advertising Guidance). FDA is also announcing the withdrawal of the draft guidance for industry entitled "Using FDA-Approved Patient Labeling in Consumer-Directed Print Advertisements."

**DATES:** Written comments on the draft guidances may be submitted by May 10, 2004. General comments on agency guidance documents are welcome at any time.

**ADDRESSES:** Submit written requests for single copies of the draft guidances to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857; or to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidances to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:**

Regarding prescription human drugs: Lesley R. Frank, Center for Drug Evaluation and Research (HFD–42), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–2831.

Regarding prescription human biological products: Glenn N. Byrd, Center for Biologics Evaluation and Research (HFM–600), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–3028.

Regarding medical device products: Deborah Wolf, Center for Devices and Radiological Health (HFZ–300), 2098 Gaither Road, Rockville, MD 20850, 301–594–4589.

**SUPPLEMENTARY INFORMATION:**

### I. Background

FDA is announcing the availability of three draft guidances designed to improve information provided to consumers and health care practitioners by medical product firms about medical products and health conditions. The guidances were prepared in part based on discussions and presentations at an open public meeting on consumer-directed advertising that FDA held in September 2003, *http://www.fda.gov/cder/ddmac/DTCmeeting2003.html.* The three guidances are entitled "Brief Summary: Disclosing Risk Information in Consumer-Directed Print Advertisements" (Brief Summary Guidance), "Help-Seeking and Other Disease Awareness Communications by or on Behalf of Drug and Device Firms" (Disease Awareness Guidance), and "Consumer-Directed Broadcast Advertising of Restricted Devices " (Device Broadcast Advertising Guidance). The draft guidances are intended to provide clear advice to medical product firms on the rules applicable to certain communications to consumers and health care practitioners.

One of the principal objectives of the three guidances is to encourage prescription drug firms to present risk information in their consumer-directed advertisements using language that is understandable by a lay user. Another purpose of the guidances is to encourage drug and medical device firms to disseminate truthful, nonmisleading, scientifically accurate information on medical products and health conditions to consumers and health care practitioners. The agency believes that, given clear guidelines, firms will be more likely to provide such information, and that this increased information flow will encourage consumers to seek, and health care practitioners to provide, appropriate diagnosis and treatment, particularly of under-diagnosed and under-treated conditions. The guidances are discussed in more detail in section II of this document.

This notice is also announcing the withdrawal of the draft guidance for industry entitled "Using FDA-Approved Patient Labeling in Consumer-Directed Print Advertisements," which was issued by FDA on April 23, 2001 (66 FR 20468), and which is being superseded by the Brief Summary Guidance.

### II. The Draft Guidances

#### *A. The Brief Summary Guidance*

FDA has responsibility under the Federal Food, Drug, and Cosmetic Act (the act) for regulating advertising for prescription drugs. Section 502(n) of the act (21 U.S.C. 352(n)), requires that an advertisement for a prescription drug contain information about the risks of using the advertised product. This requirement is further defined in the prescription drug advertising regulations in part 202 (21 CFR part 202), and is known as the "brief summary" requirement. Currently, it is commonplace for manufacturers to comply with the brief summary requirement by presenting verbatim and in small type the entire risk-related sections of the FDA-approved professional labeling.

The agency believes that a print advertisement that discloses the most serious and the most common risks of a product is a better way of communicating risk information to patients than the current lengthy and technical brief summary. Accordingly, the Brief Summary Guidance describes how sponsors can use FDA-approved patient labeling or Highlights of the FDA-approved professional labeling to provide risk information in consumer-directed print advertisements for prescription drugs.

The guidance also encourages the use of consumer-friendly language in advertisements that use highlights of FDA-approved professional labeling (or, before the proposed rule revising the format and content requirements of professional labeling become effective, the risk information that would appear in Highlights) to present risk information. At the same time, FDA is making clear that it remains permissible under section 502(n) of the act to present the entire risk-related sections of FDA-approved professional labeling verbatim in a consumer-directed print advertisement for prescription drugs.

#### *B. The Disease Awareness Guidance*

FDA has authority under the act to regulate the "labeling" and "advertising" of prescription drugs and

restricted devices. Ordinarily, these categories include promotional messages disseminated by or on behalf of a drug or device firm recommending use of a drug or device or containing some claim of safety or effectiveness for a drug or device. One of the principal requirements for labeling and advertising is the disclosure of risk information (either the full FDA-approved professional labeling or the brief summary). The labeling and advertising rules do not apply to certain other forms of communication by or on behalf of drug and device firms. One of these categories is disease awareness communications.

The Disease Awareness Guidance is intended to eliminate any confusion as to what principles FDA will apply in determining whether communications by or on behalf of drug and device firms qualify as "labeling"or "advertising," or as disease awareness communications. FDA believes that firms are already engaged in a substantial amount of disease awareness communication aimed at consumers (so-called "help-seeking" communications). Manufacturers may, however, be less familiar with disease awareness communications directed at health care professionals. Accordingly, this draft guidance contains examples of materials currently distributed to health care practitioners by government entities and educational organizations about health conditions to help demonstrate to drug and device firms the kinds of disease awareness materials they might also disseminate. FDA believes that this will encourage firms to distribute disease awareness information not only to patients, but also to health care practitioners, thereby encouraging more widespread diagnosis and treatment of under-diagnosed and under-treated health conditions.

The draft guidance also addresses the important issue of when disease awareness communications become subject to FDA regulation as "labeling" or "advertising" by virtue of their presentation in combination with so-called "reminder" advertisements or labeling or product-claim advertisements or labeling.

*C. The Device Broadcast Advertising Guidance*

In 1999, FDA issued final guidance to industry on a manner in which consumer-directed broadcast advertisements for prescription drugs could satisfy statutory and regulatory requirements for the presentation of risk information. The Device Broadcast Advertising Guidance adopts the same approach for restricted devices, with minor revisions recognizing the differences in statutory provisions relating to prescription drugs and restricted devices.

## III. Good Guidance Practices

These draft guidances are being issued consistent with FDA's good guidance practices (GGPs) regulations (21 CFR 10.115). They represent the agency's current thinking on certain issues relating to certain types of communications about medical products and health conditions. They do not create or confer any rights for or on any person and do not operate to bind FDA or the public. Alternative approaches may be used if such approaches satisfy the requirements of the applicable statutes and regulations.

## IV. Comments

FDA specifically requests comments on the following issues:

1. The Device Broadcast Advertising Guidance, like its CDER counterpart issued in 1999, does not address the meaning of "major statement" in §202.1(e)(1) (21 CFR 202.1(e)(1)). Should FDA issue guidance on this issue? If the agency should, what should the guidance provide?

2. The Brief Summary Guidance contemplates that firms will disclose risk information in their consumer-directed print advertisements for prescription drugs in ways that focus on the most serious and the most common risks, and explains that this includes all warnings, all contraindications, and certain precautions and adverse events. Does the draft guidance provide sufficiently concrete advice on this point? If it does not, how should the guidance be revised?

In the guidance documents themselves, FDA requests comments on the following issues:

1. In the Brief Summary Guidance, FDA requests comments, suggestions, or results of research to help the agency assess ways in which risk information can be presented to consumers (e.g., in a text box with accompanying brief summary-type disclosure, or in the main body of the advertisement without such accompanying disclosure).

2. In the Disease Awareness Guidance, FDA requests comments on whether data exist that help establish specific criteria for defining "close physical or temporal proximity" to use in evaluating whether bookend-type communications are within FDA's "labeling" or "advertising" authority under the act.

Interested persons may submit written or electronic comments on the draft guidances to the Division of Dockets Management (see **ADDRESSES**). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments should identify clearly which guidance they are commenting on. The draft guidances and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

## V. Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/cder/guidance/index.htm*, *http://www.fda.gov/cber/guidelines*, or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: February 4, 2004.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 04–2728 Filed 2–5–04; 9:36 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2004D–0277]**

### Draft Guidance for Industry on Time and Extent Applications; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Time and Extent Applications." This guidance is being written to assist those persons interested in adding a new condition to the over-the-counter (OTC) drug monograph system. A time and extent application (TEA) can be submitted for FDA to determine whether a condition is eligible to be considered for inclusion in an OTC drug monograph. This guidance is designed to clarify issues concerning the TEA in an effort to facilitate the application process.

**DATES:** Submit written or electronic comments on the draft guidance by April 12, 2004. General comments on agency guidance documents are welcome at any time.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane,

Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments. See* the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:** Matthew R. Holman, Center for Drug Evaluation and Research (HFD–560), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, (301) 827–2222.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Time and Extent Applications." The OTC drug monograph system was established to evaluate the safety and effectiveness of all OTC drug products for the following reasons: (1) Marketed in the United States before May 11, 1972, that were not covered by new drug applications (NDAs), and (2) covered by "safety" NDAs that were marketed in the United States before enactment of the 1962 drug amendments to the Federal Food, Drug, and Cosmetic Act (the act). In 1972, FDA began its OTC drug review of the following procedures: (1) To evaluate OTC drugs by categories or classes (e.g., antacids, skin protectants), rather than on a product-by-product basis, and (2) to develop "conditions" under which classes of OTC drugs are generally recognized as safe and effective (GRAS/E) and not misbranded.

FDA publishes these conditions in the **Federal Register** in the form of OTC drug monographs, which consist primarily of active ingredients, labeling, and other general requirements. Final monographs for OTC drugs that are GRAS/E and not misbranded are codified in part 330 (21 CFR part 330). Manufacturers seeking to market an OTC drug covered by an OTC drug monograph need not obtain FDA approval before marketing.

Previously, interested persons had to prepare and submit an NDA if they wanted to introduce into the United States an OTC drug condition that had been marketed solely in a foreign country. Companies also had to submit an NDA if their OTC drug products were initially marketed in the United States after the OTC drug review began in 1972. In the **Federal Register** of January 23, 2002 (67 FR 3060), FDA published a final rule that amended the OTC drug review procedures in part 330 and included additional criteria and procedures for classifying OTC drugs as GRAS/E and not misbranded. The final rule provided procedures for conditions that previously required an NDA for those conditions to become eligible for inclusion in the OTC drug monograph system. This final rule stated that an applicant must first submit a TEA to show marketing "to a material extent" and "for a material time." Once FDA has determined eligibility, safety and effectiveness data would be submitted and evaluated. This two-step process allows applicants to demonstrate that eligibility criteria are met before expending resources to prepare safety and effectiveness data.

This draft guidance is being issued consistent with FDA's good guidance practices (GGPs) regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on time and extent applications. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

## II. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) written or electronic comments on the draft guidance. Two copies of mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

## III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: January 29, 2004.

**William K. Hubbard,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. 04–2729 Filed 2–9–04; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Availability of Funds for Loan Repayment Program for Repayment of Health Professions Educational Loans

**AGENCY:** Indian Health Services, HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration's budget request for Fiscal Year (FY) 2004 includes $11,923,500 for the Indian Health Service (IHS) Loan Repayment Program (LRP) for health professions educational loans (undergraduate and graduate) in return for full-time clinical service in Indian health programs. It is anticipated that $11,846,474 will be available to support approximately 276 competing awards averaging $43,000 per award for a two year contract.

This program announcement is subject to the appropriation of funds. this notice is being published early to coincide with the recruitment activity of the IHS, which competes with other Government and private health management organizations to employ qualified health professionals. Funds must be expended by September 30 of the fiscal year. This program is authorized by section 108 of the Indian Health Care Improvement Act (IHCIA) as amended, 25 U.S.C. 1601 *et seq.* The IHS invites potential applicants to request an application for participation in the LRP.

**DATES:** Applications for the FY 2004 LRP will be accepted and evaluated monthly beginning March 12, 2004, and will continue to be accepted each month thereafter until all funds are exhausted. Subsequently monthly deadline dates are scheduled for Friday of the second full week of each month. Notice of awards will be mailed on the last working day of each month.

Loan Repayment Awards will be made only to those individuals serving at facilities which have a site score of 70 or above during the first and second quarters and the first month of the third quarter of FY 2004, if funding is available.

Applicants selected for participation in the FY 2004 program cycle will be expected to begin their service period no later than September 30, 2004.

Applications shall be considered as meeting the deadline if the are either:

1. Received on or before the deadline date; or

2. Sent on or before the deadline date. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a

commerical carrier or U.S. Postal Service. Private metered postmarks are *not* acceptable as proof of timely mailing.)

Applications received after the monthly closing date will be held for consideration in the next monthly funding cycle. Applicants who do not receive funding by September 30, 2004, will be notified in writing.

*Form to be Used for Application:* Applications must be submitted on the form entitled "Application for the Indian Health Service Loan Repayment Program," identified with the Office of Management and Budget approval number of OMB #0917–0014 (expires 12/31/05).

**ADDRESSES:** Application materials may be obtained by calling or writing to the address below. In addition, completed applications should be returned to: IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852, PH: 301/443–3396 [between 8 a.m. and 5 p.m. (EST) Monday through Friday, except Federal holidays].

**FOR FURTHER INFORMATION CONTACT:** Please address inquiries to Ms. Jacqueline K. Santiago, Chief, IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852, PH: 301/443–3396 [between 8 a.m. and 5 p.m. (EST) Monday through Friday, except Federal holidays].

**SUPPLEMENTARY INFORMATION:** Section 108 of the IHCIA, as amended by Public Laws 100–713 adn 102–573, authorizes the IHS LRP and provides in pertinent part as follows:

The Secretary, acting through the Service, shall establish a program to be known as the Indian Health Service Loan Repayment Program (hereinafter referred to as the "Loan Repayment Program") in order to assure an adequate supply of trained health professionals necessary to maintain accrediation of, and provide health care services to Indians though, Indian health programs.

Section 4(n) of the IHCIA, as amended by the Indian Health Care Improvement Technical Corrections act of 1996, Pub. L. 104–313, provides that:

"Health Profession" means *allopathic medicine,* family medicine, internal medicine, pediatrics, geriatric medicine, obstetrics and gynecology, podiatric medicine, nursing, public health nursing, dentistry, psychiatry, osteopathy, optometry, pharmacy, psychology, public health, social work, marriage and family therapy, chiropractic medicine, environmental health and engineering, and allied health profession, *or any other health profession.*

For the purposes of this program, the term "Indian health program" is defined in section 108(a)(2)(A), as follows:

(A) the term "Indian health program" means any health program or facility funded, in whole or in part, by the Service for the benefit of Indians and administered—

(i) Directly by the Service;

(ii) By and Indian tribe or tribal or Indian organization pursuant to a contract under—

(I) The Indian Self-Determination Act: or

(II) section 23 fo the Act of April 30, 1908, (25 U.S.C. 47), popularly known as the Buy Indian Act; or

(iii) By an urban Indian organization pursuant to Title V of this act.

Applicants may sign contractual agreements with the Secretary for 2 years. the IHS will repay all, or a portion of the applicant's health profession educational loans (undergraduate and graduate) for tuition expenses and reasonable educational and living expenses in amounts up to $20,000 per year for each year of contracted service. Payments will be made annually to the participant for the purpose fo repaying his/her outstanding health profession educational loans. Payment of health profession education loans will be made to the participant within 120 days, from the date the contract becomes effective.

The Secretary must approve the contract before the disbursement of loan repayments can be made to the participant. Participants will be required to fulfill their contract service agreements through full-time clinical practice at an Indian health program site determined by the Secretary. Loan repayment sites are characterized by physical, cultural, and professional isolation, and have histories of frequent staff turnover. All Indian health program sites are annually prioritized within the Agency by discipline, based on need or vacancy.

Section 108 of the IHCIA, as amended by Public Laws 100–713 and 102–573, authorizes the IHS to determine specific health professions for which Indian Health Loan Repayment contracts will be awarded. The list of priority health professions that follow are based upon the needs of the IHS as well as upon the needs of the American Indians and Alaska Natives.

(a) *Medicine:* Allopathic and Osteopathic.

(b) *Nurse:* Associate and B.S. Degree.

(c) *Clinical Psychology:* Ph.D. only.

(d) *Social Work:* Masters level only.

(e) *Chemical Dependency Counseling:* Baccalaureate and Masters level.

(f) Dentistry.

(g) Dental Hygiene.

(h) Pharmacy: B.S., Pharm.D.

(i) Optometry.

(j) Physician Assistant.

(k) Advanced Practice Nurses: Nurse Practitioner, Certified Nurse Midwife, Registered Nurse Anesthetist (Priority consideration will be given to Registered Nurse Anesthetists).

(l) Podiatry: D.P.M.

(m) Physical Therapy: M.S. and D.P.T.

(n) Diagnostic Radiology Technology: Certificate, Associate, and B.S.

(o) Medical Technology: B.S.

(p) Public Health Nutritionist/ Registered Dietitian.

(q) Engineering (Civil and Environmental): B.S. (Engineers must provide environmental engineering services to be eligible).

(r) Environmental Health (Sanitarian): B.S.

(s) Health Records: R.H.I.T. and R.H.I.A.

(t) Respiratory Therapy.

(u) Ultrasonograph.

Interested individuals are reminded that the list of eligible health and allied health professions is effective for applicants for FY 2004. These priorities will remain in effect until superseded.

All health professionals will receive up to $20,000 per year for the length of their contract. In addition to the loan repayments, participants are provided tax assistance payments in an amount not less than 20 percent and not more than 39 percent of the participant's total amount of loan repayments made for the taxable year involved. The loan repayments and the tax assistance payments are taxable income and will be reported to the Internal Revenue Service (IRS). The tax assistance payment will be paid to the IRS directly on the participant's behalf. LRP award recipients should be aware that the IRS may place them in a higher tax bracket than they would otherwise have been prior to their award.

Pursuant to section 108(b), to be eligible to participate in the LRP, an individual must:

(1)(A) be enrolled—

(i) in a course of study or program in an accredited institution, as determined by the Secretary, within any State and be scheduled to complete such course of study in the same year such individual applies to participate in such program; or

(ii) in an approved graduate training program in a health profession; or

(B) have a degree in a health profession and a license to practice; and

(2)(A) be eligible for, or hold an appointment as a Commissioned Officer in the Regular or Reserve Corps of the Public Health Service (PHS); or

(B) be eligible for selection for civilian service in the Regular or Reserve Corps of the (PHS); or

(C) meet the professional standards for civil service employment in the IHS; or

(D) be employed in an Indian health program without service obligation; and

(3) submit to the Secretary an application for a contract to the Loan Repayment Program.

All applicants must sign and submit to the Secretary, a written contract agreeing to accept repayment of educational loans and to serve for the applicable period of obligated service in a priority site as determined by the Secretary, and submit a signed affidavit attesting to the fact that they have been informed of the relative merits of the U.S. PHS Commissioned Corps and the Civil Service as employment options.

Once the applicant is approved for participation in the LRP, the applicant will receive confirmation of his/her loan repayment award and the duty site at which he/she will serve his/her loan repayment obligation.

The IHS has identified the positions in each Indian health program for which there is a need or vacancy and ranked those positions in order of priority by developing discipline-specific prioritized lists of sites. Ranking criteria for these sites include the following:

(a) Historically critical shortages caused by frequent staff turnover;

(b) Current unmatched vacancies in a Health Profession Discipline;

(c) Projected vacancies in a Health Profession Discipline;

(d) Ensuring that the staffing needs of Indian health programs administered by an Indian Tribe or Tribal or health organization receive consideration on an equal basis with programs that are administered directly by the Service; and

(e) Giving priority to vacancies in Indian health programs that have a need for health professionals to provide health care services as a result of individuals having breached LRP contracts entered into under this section.

(f) Consistent with this priority ranking, in determining applications to be approved and contracts to accept, the IHS will give priority to applications made by Americana Indians and Alaska Natives and to individuals recruited through the efforts of Indian Tribes or Tribal or Indian organizations.

(g) Funds appropriated for the LRP in FY 2004 will be distributed among the health professions as follows: allopathic/osteopathic practitioners will receive 27 percent, registered nurses 20 percent, mental health professionals 10 percent, dentists 12 percent, pharmacists 10 percents, optometrists 5 percent, physician assistants/advanced practice nurses 6 percent, podiatrists 4 percent, physical therapists 2 percent, other professions 4 percent. This requirement does not apply if the number of applicants from these groups, respectively, is not sufficient to meet the requirement.

Applicants whose applications were complete by September 30, 2000, and who want to compete in the FY 2004 award cycle, will receive a site score equal to either their FY 2000, FY 2001, FY 2002, FY 2003 or the FY 2004 score, whichever is higher.

The following factors are equal in weight when applied, and are applied when all other criteria are equal and a selection must be made between applicants.

One or all of the following factors may be applicable to an applicant, and the applicant who has the most of these factors, all other criteria being equal, would be selected.

(a) An applicant's length of current employment in the IHS, Tribal, or urban program.

(b) Availability for service earlier than other applicants (first come, first served).

(c) Date the individual's application was received.

Any individual who enters this program and satisfactorily completes his or her obligated period of service may apply to extend his/her contract on a year-by-year basis, as determined by the IHS. Participants extending their contracts will receive up to the maximum amount of $20,000 per year plus an additional 20 percent for Federal Withholding. Participants who were awarded loan repayment contracts prior to FY 2000 will be awarded extensions up to the amount of $30,000 a year and 31 percent in tax subsidy if funds are available, and will not exceed the total of the individual's outstanding eligible health profession educational loans.

Any individual who owes an obligation for health professional service to the Federal government, a State, or other entity is not eligible for the LRP unless the obligation will be completely satisfied before they begin service under this program.

The IHS Area Offices and Service Units are authorized to provide additional funding to make awards to applicants in the LRP, but must be in compliance with any limits in the appropriation and section 108 of the Indian Health Care Improvement Act not to exceed the amount authorized in the IHS appropriation (up to $27,000,000 for FY 2004.)

Should an IHS Area Office contribute to the LRP, those funds will be used for only those sites located in that Area. Those sites will retain their relative ranking from the national site-ranking list. For example, the Albuquerque Area Office identifies supplemental monies for dentists. Only the dental positions within the Albuquerque Area will be funded with the supplemental monies consistent with the national ranking and site index within that Area.

Should an IHS Service Unit contribute to the LRP, those funds will be used for only those sites located in that Service Unit. Those sites will retain their relative ranking from the national site-ranking list. For example, Chinle Service Unit identifies supplemental monies for pharmacists. The Chinle Service Unit consists of two facilities, namely the Chinle Comprehensive Health Care Facility and the Tsaile PHS Indian Health Center. The national ranking will be used for the Chinle Comprehensive Health Care Facility (Score = 44) and the Tsaile PHS Indian Health Center (Score = 46). With a score of 46, the Tsaile PHS Indian Health Center would receive priority over the Chinle Comprehensive Health Care Facility.

This program is not subject to review under Executive Order 12372.

The Catalog of Federal Domestic Assistance number is 93.164.

Dated: February 3, 2004.

**Charles W. Grim,**

*Assistant Surgeon General, Director, Indian Health Service.*

[FR Doc. 04–2727 Filed 2–9–04; 8:45 am]

BILLING CODE 4160–16–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Government-Owned Inventions; Availability for Licensing

**AGENCY:** National Institutes of Health, Public Health Service, DHHS.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

**ADDRESSES:** Licensing information and copies of the U.S. patents listed below may be obtained by contacting Susan S.

Rucker, J.D., at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301–435–4478; fax: 301–402–0220; email: *ruckersu@mail.nih.gov.*

**Met Proto-Oncogene and a Method for Predicting Breast Cancer Progression**

Ilan Tsarfaty, James H. Resau, Iafa Keydar, Donna Faletto, George F. Vande Woude (NCI); U.S. Patent 6,673,559 issued 06 Jan 2004 (DHHS Reference No. E–046–1991/3–US–01).

The invention described and claimed in this patent is generally applicable to assessing the prognosis of cancer. In particular, the invention is useful in assessing the whether or not breast cancer is likely undergo metastasis. The met proto-oncogene is located on the long arm of chromosome 7 at 7q31. Its activity has been linked to the invasive/metastatic phenotype of several cancers in addition to breast cancer, *e.g.* prostate, stomach.

According to this invention the likelihood of metastasis of breast cancer is assessed by measuring the amount of (a) protein produced by the met proto-oncogene, (b) levels of the met proto-oncogene itself, or (c) levels of mRNA produced by the met proto-oncogene in breast tumor tissue and comparing it with the amount present in normal ductal tissue of the breast. The methodology of this invention may be carried out, for example, using antibody-based assays (ELISA or Western Blot), PCR, or Northern Blots.

This work has been published at Tsarfaty, *et al., Science* 257(5074): 1258–61 (Aug 28 1992), Tsarfaty, *et al., Anal Quant Cytol Histol* 21(5): 397–408 (Oct 1999) and Hay, *et al., J Cell Biochem Suppl* 39(): 184–93 (2002). Foreign patent protection is not available for any of these inventions.

**Method of Targeting DNA**

Rafael D. Camerini-Otero, Margaret McIntosh, Carol S. Camerini-Otero and Lance J. Ferrin (NIDDK); U.S. Patent 5,460,941 issued 24 Oct 1995 (DHHS Reference No. E–006–1991/1–US–02).

**Cloning of the RecA Gene From Thermus Acquatics YT–1**

Rafael D. Camerini-Otero and Evelina Angov (NIDDK); U.S. Patent 5,510,473 issued 23 Apr 1996 (DHHS Reference No. E–196–1993/0–US–01).

**Rec-A Assisted Cloning of DNA**

Lance J. Ferrin, Rafael D. Camerini-Otero (NIDDK); U.S. Patent 5,707,811 issued 13 Jan 1998 (DHHS Reference No. E–166–1995/0–US–02).

**Promotion of Homologous DNA Pairing by RecA-derived Peptides**

Oleg Voloshin, Lijiang Wang, Rafael D. Camerini-Otero (NIDDK); U.S. Patent 5,731,411 issued 24 Mar 1998 (DHHS Reference No. E–139–1995/0–US–01).

These inventions are available for license separately or together. Foreign patent protection is not available for any of these inventions.

The inventions described in these patents are generally applicable to the process of homologous DNA recombination. The inventions may be used in conjunction with each other, to efficiently carry out the process of homologous recombination, or they may be used separately.

The inventions may be exploited generally in processes associated with therapeutic purposes such as gene inactivation, correction of gene mutations and the control of gene expression. For example, these inventions may be used to inhibit the transcription of a DNA sequence such as that encoding an oncogene or a virus. In addition, these inventions may be exploited in research applications such as sequence-specific mapping, cloning, and manipulation of complex genomes including the generation of transgenic animals.

Specific examples of the use of these inventions include (a) protecting a DNA sequence from modification by an enzyme such as methylase or cleavage by a restriction enzyme, (b) effecting site-specific cleavage by introducing a chemical cleavage moiety to the oligonucleotide, (c) cloning a genomic DNA fragment containing a predetermined sequence, (d) identifying a genetic mutation, *e.g.*, point mutations, insertions and deletions, and (e) increasing the stringency thereby improving the specificity of DNA-DNA, DNA-RNA or RNA-RNA interactions at high temperatures.

This work has been published at Hsieh *et al., Genes & Dev.* 4(11): 1951–63 (Nov 1990); Angov *et al., J. Bacteriol.* 176(5): 1405–12 (Mar 1994); Voloshin *et al., Science* 272(5263): 868–72 (May 10, 1996); and Ferrin LJ, *Genet. Eng. (NY)* 17: 21–30 (1995).

Dated: February 2, 2004.

**Steven M. Ferguson,**

*Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 04–2765 Filed 2–9–04; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group, Diabetes, Endocrinology and Metabolic Diseases B Subcommittee.

*Date:* March 22–24, 2004.

*Open:* March 22, 2004, 7 p.m. to 7:30 p.m.

*Agenda:* To review procedures and discuss policies.

*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Closed:* March 22, 2004, 7:30 p.m. to 10 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Closed:* March 23, 2004, 8 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Closed:* March 24, 2004, 8:00 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person:* John F. Connaughton, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 757, 6707 Democracy Boulevard, Bethesda, MD 20892. (301) 594–7797; *connaughtonj@extra.niddk.nih.gov.*

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group, Digestive Diseases and Nutrition C Subcommittee.

*Date:* March 22–24, 2004.
*Open:* March 22, 2004, 7 p.m. to 7:30 p.m.
*Agenda:* To review procedures and discuss policies.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Closed:* March 22, 2004, 7:30 p.m. to 10 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Closed:* March 23, 2004, 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Closed:* March 24, 2004, 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Contact Person:* Carolyn Miles, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892. (301) 594–7791; *milesc@extra.niddk.nih.gov.*
*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group, Kidney, Urologic and Hematologic Diseases D Subcommittee.
*Date:* March 23–24, 2004.
*Open:* March 23, 2004, 8 a.m.to 8:30 a.m.
*Agenda:* To review procedures and discuss policies.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Closed:* March 23, 2004, 8:30 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Closed:* March 24, 2004, 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
*Contact Person:* Neal A. Musto, PhD, Scientific Review Administrator, Review Branch, DEA NIDDK, National Institutes of Health, Room 751, 6707 Democracy Boulevard, Bethesda, MD 20892. (301) 594–7798; *muston@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS.)

Dated: February 4, 2004.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 04–2766 Filed 2–9–04; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institutes of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Microbiology, Infectious Diseases and AIDS Initial Review Group, Microbiology and Infectious Diseases Research Committee.
*Date:* February 25–27, 2004.
*Time:* 8 a.m. to 3 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.
*Contact Person:* Gary S. Madonna, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID, NIH, Room 2149, 6700–B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, Bethesda, MD 20892–7616, 301–496–3528; *gm12w@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS.)

Dated: February 4, 2004.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 04–2767 Filed 2–9–04; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Comprehensive International Program of Research on AIDS (CIPRA).
*Date:* February 26, 2004.
*Time:* 1 p.m. to 4 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health/NIAID, 6700B Rockledge Drive, 3125, Bethesda, MD 20895 (Telephone Conference Call).
*Contact Person:* Eugene R. Baizman, PhD, Scientific Review Administrator, NIH/NIAID/DEA, Scientific Review Program, Room 3126, 6700B Rockledge Drive, Bethesda, MD 20892–7616, 301 496–2550, *eb237e@nih.gov.* (Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 4, 2004.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 04–2768 Filed 2–9–04; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; ZRG1 SRBN J 02M:Member Conflict:Diagnostic Radiology.
*Date:* February 13, 2004.
*Time:* 1:30 p.m. to 2 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Catamaran Resort Hotel, 3999 Mission Boulevard, San Diego, CA 92109.
*Contact Person:* Behrouz Shabestari, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7854, Bethesda, MD 20892, 301–435–2409, *shabestb@csr.nih.gov.*
This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Cognitive Neuroscience Study Section.
*Date:* February 19–20, 2004.
*Time:* 8 a.m. to 6 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
*Contact Person:* Michael A. Steinmetz, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5172, MSC 7844, Bethesda, MD 20892, 301–435–1247, *steinmem@csr.nih.gov.*
This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Gene Therapy and Inborn Errors Study Section.
*Date:* February 25, 2004.
*Time:* 8 a.m. to 4 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
*Contact Person:* Barbara Whitmarsh, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2205, Bethesda, MD 20892, 301–435–4511, *whitmarshb@csr.nih.gov.*
*Name of Committee:* Biology of Development and Aging Integrated Review Group, Development—2 Study Section.
*Date:* February 26–27, 2004.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* The River Inn, 924 Twenty-Fifth Street, NW., Washington, DC 20037.
*Contact Person:* Sherry L. Dupere, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5136, MSC 7843, Bethesda, MD 20892, 301–435–1021, *duperes@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Bacterial, Fungal, Parasitic, and Viral Vaccines.
*Date:* February 26–27, 2004.
*Time:* 8:30 a.m. to 6 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.
*Contact Person:* Calbert A. Laing, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4210, MSC 7812, Bethesda, MD 20892, 301–435–1221, *laingc@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Cell Development and Function 2 Special Emphasis Panel ZRG1 90S.
*Date:* February 26–27, 2004.
*Time:* 1 p.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Latham Hotel, 3000 M Street, NW., Washington, DC 20007.
*Contact Person:* Ramesh K. Nayak, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5146, MSC 7840, Bethesda, MD 20892, 301–435–1026.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, NIH High End Shared Instrumentation Review Panel.
*Date:* February 27, 2004.
*Time:* 8:30 a.m. to 2 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.
*Contact Person:* David R. Jollie, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4156, MSC 7806, Bethesda, MD 20892, 301–435–1722, *jollieda@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Genetics Multi-Site Application.
*Date:* February 27, 2004.
*Time:* 8:30 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
*Contact Person:* Yvette M. Davis, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, 301–435–0906.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Exploratory Mind—Body Research Projects.
*Date:* February 27, 2004.
*Time:* 8:30 a.m. to 6 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Savoy Suites, 2505 Wisconsin Avenue, NW., Washington, DC 20007.
*Contact Person:* Maribeth Campoux, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3146, MSC 7759, Bethesda, MD 20892, 301–594–3163, *champoum@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Innovative Research Topics in Virology.
*Date:* March 1–2, 2004.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.
*Contact Person:* Joseph D. Mosca, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7808, Bethesda, MD 20892, 301–435–2344; *moscajos@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 SSS 8 10B: Small Business: Bioengineering and Physiology.
*Date:* March 1–2, 2004.
*Time:* 8 a.m. to 4:30 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.
*Contact Person:* Pushpa Tandon, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7854, Bethesda, MD 20892, 301–435–2397; *tandonpa@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel School Readiness.
*Date:* March 1, 2004.
*Time:* 8:30 a.m. to 6 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Embassy Suites at the Chevy Chase Pavallion, 4300 Military Road, NW., Washington, DC 20015.
*Contact Person:* Victoria S. Levin, MSW, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7848, Bethesda, MD 20892, 301–435–0912, *levinv@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Psychopathology and Adult Disorders.
*Date:* March 1–2, 2004.
*Time:* 9 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.
*Contact Person:* Dana Plude, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, AIDS and Related Research (SBIR).
*Date:* March 2, 2004.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Hyatt Regency Suites, 285 North Palm Canyon Dr, Palm Springs, CA 92262.
*Contact Person:* Kenneth A. Roebuck, Phd, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, 301–435–1166, *roebuckk@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Cardiac Deformation

*Date:* March 2, 2004.

*Time:* 1 p.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Joyce C. Gibson, DSC, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7814, Bethesda, MD 20892, 301–435–4522, *gibsonj@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 SSSW 50R:PA02–125 & PAR03–119; Bioengineering Nanotechnology Initiative & BISTI.

*Date:* March 2, 2004.

*Time:* 4:30 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Pushpa Tandon, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7854, Bethesda, MD 20892, 301–435–2397, *tandonp@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Gene and Drug Delivery.

*Date:* March 3–5, 2004.

*Time:* 7:30 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Four Points by Sheraton Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Zakir Bengali, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5150, MSC 7842, Bethesda, MD 20892, 301–435–1742, *bengaliz@csr.nih.gov*.

*Name of Committee:* AIDS and Related Research Integrated Review Group, AIDS Immunology and Pathogenesis Study Section.

*Date:* March 3–4, 2004.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Suites, 285 North Palm Canyon Drive, Palm Springs, CA 92262.

*Contact Person:* Abraham P. Bautista, MS, MSC, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5102, MSC 7852, Bethesda, MD 20892, 301–435–1506, *bautisa@csr.nih.gov*.

*Name of Committee:* AIDS and Related Research Integrated Review Group; AIDS Molecular and Cellular Biology Study Section.

*Date:* March 3–4, 2004.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Suites, 285 North Palm Canyon Dr, Palm Springs, CA 92262.

*Contact Person:* Kenneth A. Roebuck, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, 301–435–1166, *roebuckk@csr.nih.gov*.

*Name of Committee:* Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Rehabilitation Sciences Study Section.

*Date:* March 4–5, 2004.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

*Contact Person:* Jo Pelham, BA, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, 301–435–1786.

*Name of Committee:* Cardiovascular Sciences Integrated Review Group, Electrical Signaling, Ion Transport, and Arrhythmias Study Section.

*Date:* March 4–5, 2004.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.

*Contact Person:* Rajiv Kumar, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7802, Bethesda, MD 20892, 301–435–1212.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Biodefense.

*Date:* March 4–5, 2004.

*Time:* 8 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Holiday Inn Central, 1501 Rhode Island Ave., NW., Washington, DC 20005.

*Contact Person:* Fouad A. El-Zaatari, PhD, PhD, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3206, MSC 7808, Bethesda, MD 20892, 301–435–1149, *elzaataf@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG–1 F05 (20) L Fellowships: Cell Development.

*Date:* March 4–5, 2004.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The River Inn, 924 Twenty-Fifth Street, NW., Washington, DC 20037.

*Contact Person:* Richard D. Rodewald, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5142, MSC 7840, Bethesda, MD 20892, 301–435–1024, *rodewalr@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Developmental Brain Disorders Study Section (DBD).

*Date:* March 4–5, 2004.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

*Contact Person:* Sherry L. Stuesse, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5188, MSC 7846, Bethesda, MD 20892, 301–435–1785, *stuesses@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 ASG 01 Q: Aging Systems and Geriatrics: Quorum.

*Date:* March 4–5, 2004.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Charles G. Hollingsworth, DRPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5179, MSC 7840, Bethesda, MD 20892, 301–435–2406, *hollinc@csr.nih.gov*.

*Name of Committee:* Infectious Diseases and Microbiology Integrated Review Group, Bacteriology and Mycology Subcommittee 2.

*Date:* March 4–5, 2004.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Capitol Hill Suites, 200 C Street, SE., Washington, DC 20003.

*Contact Person:* Melody Mills, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3204, MSC 7808, Bethesda, MD 20892, 301–435–0903.

*Name of Committee:* Health of the Population Integrated Review Group, Health Services Organization and Delivery Study Section.

*Date:* March 4–5, 2004.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

*Contact Person:* Charles N. Rafferty, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7816, Bethesda, MD 20892, 301–435–3562, *raffertc@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 NNB (01) Neuroendocrinology, Neuroimmunology, and Behavior.

*Date:* March 4–5, 2004.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Richard Marcus, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5168, MSC 7844, Bethesda, MD 20892, 301–435–1245, *richard.marcus@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, R15 Grant Applications Review.

*Date:* March 5, 2004.

*Time:* 8 a.m. to 3 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Four Points By Sheraton, 8400 Wisconsin Avenue, Ambassador 1, Bethesda, MD 20814.
*Contact Person:* Zakir Bengali, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5150, MSC 7842, Bethesda, MD 20892, 301–435–1742.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, ZRG1 HOP D (02)M: Member Conflict: Cancer Epidemiology.
*Date:* March 5, 2004.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
*Contact Person:* Ann Hardy, DRPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, 301–435–0695, *hardyan@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, SSPS R03, R21 and F Applications.
*Date:* March 5, 2004.
*Time:* 9 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.
*Contact Person:* Valerie Durrant, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, 301–435–3554, *durrantv@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Myocardial Electrophysiology.
*Date:* March 5, 2004.
*Time:* 9:30 a.m. to 10:30 a.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.
*Contact Person:* Joyce C. Gibson, DSC, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7814, Bethesda, MD 20892, 301–435–4522, *gibsonj@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Research on Ethical Issues.
*Date:* March 5, 2004.
*Time:* 10:30 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.
*Contact Person:* Karin F. Helmers, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7770, Bethesda, MD 20892, 301–435–1017, *helmersk@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Health Services Organization and Delivery.
*Date:* March 5, 2004.
*Time:* 2 p.m. to 6 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.
*Contact Person:* Gertrude K. McFarland, RN, FAAN, DNSC, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3156, MSC 7770, Bethesda, MD 20892, 301–435–1784, *mcfarlag@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 4, 2004.

**LaVerne Y. Stringfield,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 04–2769 Filed 2–9–04; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2003–16251]**

### Information Collection Under Review by the Office of Management and Budget (OMB): 1625–0086, The Great Lakes Pilotage

**AGENCY:** Coast Guard, DHS.

**ACTION:** Request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the Coast Guard has forwarded one Information Collection Report (ICR), The Great Lakes Pilotage Rate Methodology to the Office of Information and Regulatory Affairs (OIRA) of the OMB for review and comment. Our ICR describes the information we seek to collect from the public. Review and comment by OIRA ensures that we impose only paperwork burdens commensurate with our performance of duties.

**DATES:** Please submit comments on or before March 11, 2004.

**ADDRESSES:** To make sure that your comments and related material do not enter the docket [USCG 2003–16251] more than once, please submit them by only one of the following means:

(1)(a) By mail to the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001.

(b) By mail to OIRA, 725 17th Street NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard. *Caution:* Because of recent delays in the delivery of mail, your comments may reach the Facility more quickly if you choose one of the means described below.

(2)(a) By delivery to room PL–401 at the address given in paragraph (1)(a) above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329. (b) By delivery to OIRA, at the address given in paragraph (1)(b) above, to the attention of the Desk Officer for the Coast Guard.

(3) By fax to (a) the Facility at (202) 493–2251 and (b) OIRA at (202) 395–5806, or e-mail to OIRA at *oira_docket@omb.eop.gov attention:* Desk Officer for the Coast Guard.

(4)(a) Electronically through the Web Site for the Docket Management System at *http://dms.dot.gov.* (b) OIRA does not have a website on which you can post your comments.

The Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL–401 (Plaza level), 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

Copies of the complete ICR are available for inspection and copying in public dockets. They are available in docket USCG 2003–16251 Docket Management Facility between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays; for inspection and printing on the internet at *http://dms.dot.gov;* and for inspection from the Commandant (CG–611), U.S. Coast Guard, room 6106, 2100 Second Street SW., Washington, DC, between 10 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Bernice Parker-Jones, Office of Information Management, (202) 267–2328, for questions on this document; Andrea M. Jenkins, Program Manager, U.S. Department of Transportation, (202) 366–0271, for questions on the docket.

**SUPPLEMENTARY INFORMATION:**

#### Public Participation and Request for Comments

We encourage you to participate in this request for comment by submitting comments and related materials. We will post all comments received,

without change, to *http://dms.dot.gov,* and they will include any personal information you have provided. We have an agreement with DOT to use the Docket Management Facility. Please see the paragraph on DOT's "Privacy Act" below.

*Submitting comments:* If you submit a comment, please include your name and address, identify the docket number for this request for comment [USCG 2003–16251], indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, 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.

*Viewing comments and documents:* To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

**Regulatory History**

This request constitutes the 30-day notice required by OIRA. The Coast Guard has already published (68 FR 59192, October 14, 2003) the 60-day notice required by OIRA. That notice elicited no comments.

**Request for Comments**

The Coast Guard invites comments on the proposed collection of information to determine whether the collection is necessary for the proper performance of the functions of the Department. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collection; (2) the accuracy of the Department's estimated burden of the collection; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of the collection; and (4) ways to minimize the burden of collection on respondents, including the use of automated collection techniques or other forms of information technology.

Comments, to DMS or OIRA, must contain the OMB Control Number of the ICR addressed. Comments to DMS must contain the docket number of this request, USCG 2003–16251. Comments to OIRA are best assured of having their full effect if OIRA receives them 30 or fewer days after the publication of this request.

**Information Collection Request**

*Title:* Great Lakes Pilotage Rate Methodology.

*OMB Control Number:* 1625–0086.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Associations of Pilots on the Great Lakes.

*Form:* This collection of information does not require the public to fill out forms, but does require submitting information to the Coast Guard in written format.

*Abstract:* The Director of the Office of Great Lakes Pilotage uses the information collected to carry out financial oversight of the associations and to set rates for pilotage.

*Annual Estimated Burden Hours:* The estimated burden is 18 hours a year.

Dated: January 29, 2004.

**Nathaniel S. Heiner,**

*Acting Assistant Commandant for Command, Control, Communications, Computers, and Information Technology.*

[FR Doc. 04–2750 Filed 2–9–04; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2004–17029]**

### Chemical Transportation Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The Chemical Transportation Advisory Committee (CTAC) and its Hazardous Cargo Transportation Security Subcommittee will meet to discuss various issues relating to the marine transportation of hazardous materials in bulk. These meetings will be open to the public.

**DATES:** CTAC will meet on Thursday, March 4, 2004, from 9 a.m. to 3:30 p.m. The Subcommittee on Hazardous Cargo Transportation Security will meet on Tuesday, March 2, 2004, from 9 a.m. to 4 p.m. and Wednesday, March 3, 2004, from 9 a.m. to 4 p.m. These meetings may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before February 27, 2004. Requests to have a copy of your material distributed to each member of the Committee should reach the Coast Guard on or before February 27, 2004.

**ADDRESSES:** Both CTAC and the Subcommittee on Hazardous Cargo Transportation Security will meet at the Coast Guard Headquarters Building, 2100 2nd Street SW., Washington DC, 20593, in room 2415. Send written material and requests to make oral presentations to Commander Robert J. Hennessy, Executive Director of CTAC, Commandant (G–MSO–3), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001 or email: *CTAC@comdt.uscg.mil.* This notice is available on the Internet at *http://dms.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Commander Robert J. Hennessy, Executive Director of CTAC, or Ms. Sara Ju, Assistant to the Executive Director, telephone (202) 267–1217, fax (202) 267–4570.

**SUPPLEMENTARY INFORMATION:** Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

*Agenda of Subcommittee Meeting on March 2–3, 2004:*

(1) Introduce Subcommittee members and attendees.

(2) Discuss status of CTAC recommendations to the Coast Guard regarding bulk solid ammonium nitrate and ammonium nitrate fertilizers that are classified as oxidizers.

(3) Discuss status of Maritime Transportation Security Act (MTSA) implementation.

(4) Discuss outreach initiatives.

*Agenda of CTAC Meeting on Thursday, March 4, 2004:*

(1) Introduce Committee members and attendees.

(2) Status report from the CTAC Hazardous Cargo Transportation Security Subcommittee.

(3) Final report from the Outreach Workgroup.

(4) Presentation of the initiative to incorporate marine specific

competencies, for hazardous material incident responders, into the National Fire Protection Association (NFPA) 472 Standard.

(5) Discussion and vote to establish a new subcommittee on the NFPA 472 Initiative.

(6) Presentation by the Chemical Distribution Institute on their Responsible Care Program.

(7) Presentation by CTAC reviewing recent marine casualties.

(8) Presentation by the Coast Guard's Office of Port, Vessel, and Facility Security (G–MPS).

(9) Presentation by the Coast Guard's Office of Response on Hazardous Substance Response Plan Regulations.

(10) Update of Coast Guard Regulatory Projects.

**Procedural**

These meetings are open to the public. Please note that the meetings may close early if all business is finished. At the discretion of the Chair, members of the public may make oral presentations during the meetings. If you would like to make an oral presentation at a meeting, please notify the Executive Director and submit written material on or before February 27, 2004. If you would like a copy of your material distributed to each member of the Committee in advance of a meeting, please submit 25 copies to the Executive Director (*see* **ADDRESSES**) no later than February 27, 2004.

**Information on Services for Individuals With Disabilities**

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, telephone the Executive Director as soon as possible.

Dated: February 3, 2004.

**Joseph J. Angelo,**

*Director of Standards, Marine Safety, Security and Environmental Protection.*

[FR Doc. 04–2736 Filed 2–9–04; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

**[CBP Decision 04—07]**

### Recordation of Trade Name: "DISPALCA"

**AGENCY:** Customs and Border Protection (CBP).

**ACTION:** Notice of final action.

**SUMMARY:** This document gives notice that "DISPALCA" has been recorded with CBP as a trade name by Caribbean Imports, Inc., a Florida corporation organized under the laws of the State of Florida, P.O. Box 617308, Orlando, Florida 32861–7308.

The application for trade name recordation was properly submitted to CBP and published in the **Federal Register**. As no public comments in opposition to the recordation of this trade name were received by CBP within the 60-day comment period, the trade name has been duly recorded with CBP and will remain in force as long as this trade name is in use by this manufacturer in accordance with § 133.15 of the CBP Regulations.

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** La Verne Watkins, Paralegal Specialist, Intellectual Property Rights Branch, Office of Regulations and Rulings, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229; (202) 572–8710.

**SUPPLEMENTARY INFORMATION:** Trade names that are being used by manufacturers or traders may be recorded with Customs and Border Protection (CBP) to afford the particular business entity with increased commercial protection. CBP procedures for recording trade names are provided at § 133.11 *et seq.* of the CBP Regulations (19 CFR 133.11 *et seq.*). Pursuant to these regulatory procedures, Caribbean Imports, Inc., a Florida corporation organized under the laws of the State of Florida, P.O. Box 617308, Orlando, Florida 32861–7308, applied to CBP for protection of its manufacturer's trade name, "DISPALCA".

On Wednesday, November 19, 2003, CBP published a notice of application for the recordation of the trade name "DISPALCA" in the **Federal Register** (68 FR 65304). The notice advised that before final action would be taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing in opposition of the recordation of this trade name. The closing day for the comment period was January 20, 2004.

As of the end of the comment period, January 20, 2004, no comments were received. Accordingly, as provided by § 133.14 of the CBP Regulations, "DISPALCA" is recorded with CBP as the trade name used by the manufacturer, Dispalca, and will remain in force as long as this trade name is in use by this manufacturer in accordance with § 133.15 of the CBP Regulations.

Dated: February 3, 2004.

**Paul Pizzeck,**

*Acting Chief, Intellectual Property Rights Branch.*

[FR Doc. 04–2726 Filed 2–9–04; 8:45 am]

**BILLING CODE 4820–02–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1498–DR]**

### California; Amendment No. 5 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of California (FEMA–1498–DR), dated October 27, 2003, and related determinations.

**EFFECTIVE DATE:** February 3, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that for this disaster, the incident period is reopened as October 21, 2003, through and including March 31, 2004. During the expanded incident period, only those areas within the designated areas specifically determined by the Federal Coordinating Officer to be damaged or adversely affected as a direct result of the compromised watershed conditions and fire-generated debris caused by the wildfires will be considered eligible for assistance on a case-by-case basis.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–2787 Filed 2–9–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4909–N–02]

### Notice of Proposed Information Collection for Public Comment on the Survey of Market Absorption of New Multifamily Units

**AGENCY:** Office of Policy Development and Research, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1995. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* April 12, 2004.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control Number and should be sent to: Reports Liaison Officer, Office of Policy Devleopment and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Ronald J. Sepanik, Director, Housing and Demographic Analysis Division, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; (202) 708–1060, x5887. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Sepanik.

**SUPPLEMENTARY INFORMATION:** The Department of Housing and Urban Development will submit the proposed information collection package 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 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:* Survey of Market Absorption of New Multifamily Units.

*OMB Control Number:* 2528–0013 (Expires 10/31/04).

*Description of the need for the information and proposed use:* The Survey of Market Absorption (SOMA) provides the data necessary to measure the rate at which new rental apartments and new condominium apartments are absorbed; that is, taken off the market, usually by being rented or sold, over the course of the first twelve months following completion of a building.

The data is collected at quarterly intervals until the twelve months conclude, or until the units in a building are completely absorbed. The survey also provides estimates of certain characteristics, i.e., asking rent/price, number of units, and number of bedrooms.

The survey provides a basis for analyzing the degree to which new apartment construction is meeting the present and future needs of the public. Additionally, beginning with new construction in 2002, the survey will attempt to ascertain the number and degree of services provided by "Assisted Living" type units.

*Members of affected public:* Rental Agents/Builders.

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:*

*Estimated Number of Respondents:* 12,000 yearly (maximum).

*Estimated Time Per Response:* 20 minutes.

*Frequency of Response:* four times (maximum).

*Estimated Total Annual Burden Hours:* 4,000 (12,000 × 20 minutes).

*Estimated Total Annual Cost:* The only cost to respondents is that of their time.

**Authority:** The survey is taken under Title 12, United States Code, Section 1701Z.

Dated: January 29, 2004.

**Darlene F. Williams,**

*General Deputy Assistant Secretary for Policy Development and Research.*

[FR Doc. 04–2770 Filed 2–9–04; 8:45 am]

BILLING CODE 4210–62–M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Endangered and Threatened Species Permit Applications

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of applications.

**SUMMARY:** The following applicants have applied for permits to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*).

**DATES:** Written data or comments should be submitted to the Regional Director, U.S. Fish and Wildlife Service, Ecological Services, 1 Federal Drive, Fort Snelling, Minnesota 55111–4056, and must be received on or before March 11, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Peter Fasbender, (612) 713–5343.

**SUPPLEMENTARY INFORMATION:**

*Permit Number:* TE081995.

*Applicant:* James P. Dunn, Allendale, Michigan.

The applicant requests a permit to take (collect) the Karner blue butterfly (*Lycaedes melissa samuelis*) in Michigan. The scientific research is aimed at enhancement of survival of the species in the wild.

*Permit Number:* TE0840524–1.

*Applicant:* Lynn W. Robbins, Springfield, Missouri.

The applicant requests a permit to take (collect) the Indiana bat (*Myotis sodalis*) and gray bat (*M. grisescens*) throughout Iowa, Kansas, Ohio, and Nebraska. The scientific research is aimed at enhancement of survival of the species in the wild.

*Permit Number:* TE082167.

*Applicant:* Ozark Underground Laboratory, Protem, Missouri.

The applicant requests a permit to take (collect) the Illinois cave amphipod (*Gammarus acherondytes*) throughout Illinois. The scientific research is aimed at enhancement of survival of the species in the wild.

*Permit Number:* TE082499.

*Applicant:* Applied Science and Technology, Inc., Brighton, Michigan.

The applicant requests a permit to take (collect) Northern riffleshell mussel (*Epioblasma torulosa rangiana*) in Michigan. The scientific research is aimed at enhancement of survival of the species in the wild.

*Permit Number:* TE082500.

*Applicant:* Saint Louis Zoo, St. Louis, Missouri.

The applicant requests a permit to take (collect) the American burying beetle (*Nicrophorus americanus*) in Missouri. The scientific research is aimed at enhancement of survival of the species in the wild.

Dated: January 28, 2004.

**Lynn M. Lewis,**

*Acting Assistant Regional Director, Ecological Services, Region 3, Fort Snelling, Minnesota.*

[FR Doc. 04–2780 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Internal Law Enforcement Services Policies

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice publishes internal policies on Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements. These policies apply to all Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements.

**DATES:** These policies are effective February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Peter Maybee, Executive Officer, Bureau of Indian Affairs, Law Enforcement Services Washington, DC Liaison Office, 1849 C Street, NW., Washington, DC 20240; Telephone No. (202) 208–4844.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

This notice is published in the exercise of authority under the Indian Law Enforcement Reform Act, 25 U.S.C. 2801 *et seq.*, 5 U.S.C. 552(a), 5 U.S.C. 301, 25 U.S.C. 2 and 9, 43 U.S.C. 1457, and under the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.

To clarify the existing policies of the Bureau of Indian Affairs (BIA) Law Enforcement Services (OLES) regarding the authority and obligations of parties to Memoranda of Agreement (MOAs), Memoranda of Understanding (MOUs), Cross Deputation Agreements (CDAs), and in particular, Special Law Enforcement Commission (SLECs) Deputation Agreements, the Assistant Secretary—Indian Affairs (AS–IA) is publishing these policies. Questions regarding the current policies have been raised by Federal, tribal, and local law enforcement; therefore, the AS–IA is making these policies public so the public may have a clearer understanding of the policies which have governed all these types of agreements.

An agency may clarify its policies, procedures, and implementation of its own regulations where these clarifications do not contradict or alter the regulations. These clarified policies do not change the law enforcement regulations. Rather, these clarifications restate to outside parties what has been and continues to be the practice and understanding of the BIA regarding such agreements. This **Federal Register** notice is to advise all parties to Indian country law enforcement agreements, as well as all other interested persons and organizations, of the BIA's policies, understandings, and expectations related to these agreements, though the issues raised here may not be exhaustive.

The Federal Government has an interest in promoting strong tribal governments with the ability to protect the health and welfare of their members. Inherent in this relationship is strong and effective law enforcement in Indian country. Due to variations in state policies, paired with Indian country crime rates well above the national average, there is a public health and safety need in Indian country that must be addressed. Another issue over the years has been lack of jurisdictional clarity, making state and local officials reluctant to either arrest or prosecute in Indian country. This lack of prosecution in Indian country has compounded the problem.

Under the Indian Law Enforcement Reform Act, 25 U.S.C. 2801–2809, and the corresponding regulations at 25 CFR part 12, the Secretary of the Interior, acting through BIA, is charged with providing, or assisting in the provision of, law enforcement in Indian country. This is true nationwide—throughout Indian country and in the areas near and adjacent to Indian country. To increase the effectiveness of law enforcement in Indian country, the authority and status of law enforcement officers, relationships among and between law enforcement departments, as well as potential liability and liability coverage, must be clear. Law enforcement officers are expected to appear a certain way, use certain equipment, and drive certain vehicles both for the safety of the officers and for the safety of the public. The BIA's internal policies prescribe all of these standards and recognize that officers maintain their status when they are outside Indian country. The BIA's policy makes clear that although officers will not as a rule conduct investigations or make arrests outside Indian country, they maintain their law enforcement officers' responsibilities and certain authorities irrespective of whether they are located in Indian country.

To assist the AS–IA in fulfilling the BIA's duties to provide law enforcement in Indian country and to make clear important policies and working relationships, the BIA OLES enters into MOAs, MOUs, CDAs, and SLEC agreements (pursuant to which it grants special law enforcement commissions to tribal and local law enforcement officers). SLECs support the sovereignty of tribes by allowing tribal law enforcement officers to enforce Federal law, to investigate Federal crimes, and to protect the rights of people in Indian country, particularly against crimes perpetrated by non-Indians against tribal members. Without such commissions, tribal law enforcement in many jurisdictions is limited to restraining these perpetrators until a county, State, or Federal officer arrives. It is common for tribes to have difficulty getting local or State law enforcement to respond to crimes on the reservations. For example, it is difficult to get local law enforcement to respond to domestic violence calls and illegal disposal activities in Indian country. As a result, there is a critical void in law enforcement in Indian country that these SLECs fill.

Due to the nature of law enforcement in Indian country, SLEC officers will often have to respond to calls where it is unclear initially whether they are responding in their Federal or tribal capacity. The Federal Government has an interest in ensuring that Federal and federally commissioned officers are able to respond to calls immediately and with all of the necessary and recommended law enforcement tools. The Federal Government and the Department also have an interest in promoting strong tribal governments capable of effectively carrying out law enforcement in Indian country. The Government further has an interest in ensuring the tribes' sovereign rights to do so are respected and the boundaries of Indian country do not impede officers' travel, use of marked vehicles, emergency response, and other incidental aspects of their Indian country policing authority.

To ensure the SLEC tribal officers are fully qualified to enforce Federal law and to perform functions which would otherwise be performed by BIA officers, the BIA has established certain minimum standards and certification

requirements for potential officers. The BIA OLES conditions officer commissions on meeting these requirements. The Chief of Police of a tribe must perform an FBI criminal history check on each officer and certify the officers are both full-time employees with a law enforcement program and certified through either the State or the BIA. If an officer is not yet certified by one of the two entities, the BIA provides training before commissioning an officer. These officers must also meet other requirements such as firearms certification and maintaining a record free of any felonies. The SLECs expire after 3 years, when the Chief of Police must recertify the qualifications of the officers, and the officers must reapply for SLECs.

For SLEC officers to be used effectively to fill this void, it is important that all parties involved in Indian country law enforcement have a clear understanding of each of their roles and expectations. The BIA expects that, first, liability coverage under the Federal Tort Claims Settlement Act (FTCA) may be available to officers carrying Federal SLECs, but the Department of Justice makes all determinations on FTCA coverage on a case-by-case, factual basis, and their decisions are final. Second, because coordination is the foundation on which effective Indian country law enforcement is based, the BIA encourages full and open coordination between and among relevant tribal, local, and Federal law enforcement, and any relevant task forces or other similar organizations. Whenever possible the BIA encourages the relevant parties to enter agreements governing these cooperative relationships. The BIA will work with any parties to help accomplish this goal. There must also be coordination and communication among law enforcement entities, including local United States Attorney's offices, on Federal policing and prosecutorial practices and on particular cases and prosecutions where appropriate. Finally, the BIA expects that tribes and local law enforcement will maintain appropriate training and policies to ensure that their officers will be able to maintain the appropriate level of training and are otherwise prepared to perform their duties as SLEC officers. The BIA will also assist law enforcement organizations in developing these policies and training standards.

By clarifying the BIA's understandings and expectations of agencies participating in Indian country law enforcement, it is the AS-IA's intent to provide a strong basis on which to build and strengthen these essential relationships. With strong relationships and communication, the BIA and tribal, local, and other Federal law enforcement can better meet the law enforcement, public health, and safety needs of people in Indian country.

Dated: January 22, 2004.

**Aurene M. Martin,**

*Principal Deputy Assistant Secretary—Indian Affairs.*

[FR Doc. 04–2842 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–G6–J

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[OR–090–5882–PH–EE01; HAG 04–0081]**

### Notice of Meeting

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Meeting notice for the Engene District, Bureau of Land Management (BLM) Resources Advisory Committees under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. 106–393).

**SUMMARY:** This notice is published in accordance with Section 10(a)(2) of the Federal Advisory Committee Act. Meeting notice is hereby given for the Eugene District BLM Resources Advisory Committee pursuant to Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000, Public Law 106–393 (the Act). Topics to be discussed by the BLM Resource Advisory Committee include selection of a chairperson, public forum and proposed projects for funding in "Round 4, FY 05" under Title II of the Act.

**DATES:** The BLM Resource Advisory Committees will meet on the following dates: The Eugene Resource Advisory Committee will meet at the BLM Eugene District Office, 2890 Chad Drive, Eugene, Oregon 97440, 9 a.m. to 4:30 p.m. on May 20, 2004 and 9 a.m. to 4:30 p.m., on June 10, 2004. The public forum will be held from 12:30–1 pm on both days.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Act, five Resource Advisory Committees have been formed for western Oregon BLM districts that contain Oregon & California (U&C) Grant Lands and Coos Bay Wagon Road lands. The Act establishes a six year payment schedule to local counties in lieu of funds derived from the harvest of timber on Federal lands, which have dropped dramatically over the past 10 years.

The Act creates a new mechanism for local community collaboration with Federal land management activities in the selection of projects to be conducted on federal lands or that will benefit resources on federal lands using funds under Title II of the Act. The BLM Resource Advisory Committees consist of 15 local citizens (plus 6 alternates) representing a wide array of interests.

**FOR FURTHER INFORMATION CONTACT:** Additional information concerning the BLM Resource Advisory Committees may be obtained from Wayne Elliott, Designated Federal Official, Eugene District Office, P.O. Box 10226, Eugene, Oregon 97440, (541) 683–6600, or *wayne_elliott@or.blm.gov.*

Dated: February 3, 2004.

**Julia Dougan,**

*Eugene District Manager.*

[FR Doc. 04–2781 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–33–M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[AK–932–1410–ET; F–14838]**

### Public Land Order No. 7595; Withdrawal of Public Lands for Bethel Village Selection; Alaska

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public land order.

**SUMMARY:** This order withdraws approximately 61,139 acres of public lands located within and outside of the Yukon Delta National Wildlife Refuge from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, pursuant to section 22(j)(2) of the Alaska Native Claims Settlement Act. This action also reserves the lands for selection by the Bethel Native Corporation, the village corporation for Bethel. This withdrawal is for a period of 120 days; however, any lands selected shall remain withdrawn by the order until they are conveyed. Any lands described herein that are not selected by the corporation will remain withdrawn as part of the Yukon Delta National Wildlife Refuge, pursuant to the Alaska National Interest Lands Conservation Act, and will be subject to the terms and conditions of any other withdrawal or segregation of record.

**EFFECTIVE DATE:** February 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Robbie J. Havens, Bureau of Land Management, Alaska State Office, 222

W. 7th Avenue, No. 13, Anchorage, Alaska 99513–7599, 907–271–5477.

**Order**

By virtue of the authority vested in the Secretary of the Interior by Section 22(j)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1621 (j)(2) (2000), it is ordered as follows:

1. Subject to valid existing rights, the following described public lands located within and outside of the Yukon Delta National Wildlife Refuge are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and are hereby reserved for selection under Section 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1611 (2000), by the Bethel Native Corporation, the village corporation for Bethel:

**Seward Meridian**

T. 10 N., R. 61 W., (unsurveyed)
Secs. 5 to 8, inclusive;
Secs. 16, 17, and 18.
T. 11 N., R. 61 W., (unsurveyed)
Secs. 3 to 8, inclusive;
Secs. 17 to 20, inclusive;
Secs. 30 and 31.
T. 12 N., R. 61 W., (unsurveyed)
Secs. 27 to 34, inclusive.
T. 10 N., R. 62 W., (unsurveyed)
Secs. 1 and 2;
Secs. 7 to 18, inclusive, excepting therefrom Native Allotment application F–17230.
T. 11 N., R. 62 W., (unsurveyed)
Secs. 1 and 2;
Secs. 11 to 14, inclusive;
Secs. 23 to 26, inclusive;
Secs. 35 and 36.
T. 10 N., R. 63 W., (unsurveyed)
Secs. 9 to 16, inclusive.
T. 5 N., R. 68 W., (unsurveyed)
Secs. 1 to 36, inclusive, excepting therefrom Native Allotment Certificates 50–2000–0148, 50–2000–0045, 50–2000–0015, and 50–2000–0078.

The areas described aggregate a total of approximately 61,139 acres.

2. Prior to conveyance of any of the lands withdrawn by this order, the lands shall be subject to administration by the Secretary of the Interior under applicable laws and regulations, and his authority to make contracts and to grant leases, permits, rights-of-way, or easements shall not be impaired by this withdrawal.

3. This order constitutes final withdrawal action by the Secretary of the Interior under section 22(j)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1621(j)(2)(2000), to make lands available for selection by the Bethel Native Corporation, to fulfill the entitlement of the village for Bethel, under section 12 and section 14(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1611 and 1613 (2000).

4. This withdrawal will terminate 120 days from the effective date of this order, provided, any lands selected shall remain withdrawn pursuant to this order until conveyed. Any lands described in this order not selected by the corporation shall remain withdrawn as part of the Yukon Delta National Wildlife Refuge, pursuant to section 303 (7) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 668(dd) (2000); and will be subject to the terms and conditions of any other withdrawal or segregation of record.

5. It has been determined that this action is not expected to have any significant effect on subsistence uses and needs pursuant to section 810(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3120(c) (2000) and this action is exempted from the National Environmental Policy Act of 1969, 42 U.S.C. 4321 note (2000), by section 910 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. 1638 (2000).

Dated: January 9, 2004.

**Rebecca W. Watson,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. 04–2756 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–JA–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CA–180–1430–ES; CACA 27456]**

### Notice of Realty; Recreation and Public Purposes Classification for Lease and/or Conveyance; El Dorado County, CA

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of realty action.

**SUMMARY:** It is proposed to classify 190 acres of land for lease and/or conveyance to the Georgetown Divide Recreation District (GDRD) under the Recreation and Public Purposes (R&PP) Act, such land to be added by amendment to an existing R&PP Act lease of 35 acres, CACA 27456–01. As explained below, it is further proposed to change the use of the existing lease from a local park to a regional recreational facility.

**DATES:** The land will be segregated from all other forms of appropriation under the public land laws, including the general mining laws and leasing under the mineral leasing laws, except for leasing or conveyance under the Recreation and Public Purposes Act on February 10, 2004.

**ADDRESSES:** For a period until March 26, 2004, interested persons may submit comments regarding the proposed classification, leasing or conveyance of the land to the Field Manager, Folsom Field Office Bureau of Land Management, 63 Natoma Street, Folsom, California.

**FOR FURTHER INFORMATION CONTACT:** You may contact Karen Montgomery at (916) 985–4474.

**SUPPLEMENTARY INFORMATION:** The GDRD proposes an amendment to R&PP Lease CACA 27456–01 to add 190 acres to an existing lease of 35 acres and to change the use of the lease from a local park to a regional recreational facility with playing fields, a skate park, a disc golf course, a swimming pool, a recreation center/gymnasium, and an equestrian staging area. The following public land, located in El Dorado County, near the community of Greenwood has been examined and found suitable for lease and/or conveyance for recreational or public purposes under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 *et seq.*).

T. 12 N., R. 10 E., M.D.M.,
Sec. 6, lots 8 and 13;
Sec. 7, lots 1, 11, 20, 23, 25, 26, 31, 33, and portions of lots 28, 32, and MS 6418.

Containing 225 acres, more or less.

The land is not required for any federal purpose. The lease and/or conveyance is consistent with current Bureau planning for this area and would be in the public interest. The lease and/or patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals shall be reserved to the United States.

3. Any other valid and existing rights of record not yet identified.

**Classification Comments**

Interested parties may submit comments involving the suitability of the land for a regional park facility. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

**Application Comments**

Interested parties may submit comments regarding the specific use proposed in the application, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for a regional park.

Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective April 12, 2004. A plan of development for the regional park is on file in the Folsom Field Office.

(Authority: 43 CFR 2741.5 (h)(1)).

**D.K. Swickard,**

*Field Manager.*

[FR Doc. 04–2759 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–40–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[NV–056–1430–EU; N–77540]**

### Notice of Realty Action: Non-Competitive Sale of Reversionary Interest, Portion of Recreation and Public Purposes Patent Number 27–83–0052

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action.

**SUMMARY:** The following described land in Clark County, Nevada, has been examined and found suitable for direct sale under section 203 of the Federal Land Policy and Management Act of 1976 (Pub. L. 94–579, as amended; 43 CFR 2711.3–3).

**FOR FURTHER INFORMATION CONTACT:** Anna Wharton, Supervisory Realty Specialist, (702) 515–5095.

**SUPPLEMENTARY INFORMATION:** The following described land in Clark County, Nevada, was patented to the State of Nevada, Division of State Lands, pursuant to the Act of Congress of June 14, 1926 (44 Stat. 741, as amended; 43 U.S.C. 869), on July 20, 1983 for a prison (N–25221–02).

**Mount Diablo Meridian, Nevada,**

T. 16 S., 57 E.,
Sec. 33, lots 1 to 12, inclusive, N½.

Containing 687.09 acres, more or less.

The patent contains a reversionary interest to the United States. The State of Nevada requests the purchase of the reversionary interest at not less than the fair market value of $124,000, as determined by a BLM-approved appraisal for a portion of the patented land, on the following described land. These lands were also previously segregated from mineral entry under case file number N–61968FD, with record notation as of October 1, 1997. This segregation on the following described land will terminate upon publication of this Notice of Realty Action.

**Mount Diablo Meridian, Nevada,**

T. 16 S., R. 57 E.,
Sec. 33, W½SW¼NE¼NW¼, SE¼NW¼NW¼, N½NE¼SW¼NW¼, NW¼NW¼SE¼NW¼.

Containing 22.5 acres, more or less.

The Federal interest has been examined and found suitable for sale under the provisions of section 203 of the Federal Land Policy and Management Act of 1976 (P.L. 94–579, as amended; 43 CFR 2711.3–3).

Direct sale procedures to the State of Nevada are considered appropriate, in this case, as the land described above was patented to the State of Nevada, and transfer of the Federal interest to any other entity would not protect existing equities in the land. The direct sale is consistent with the current Bureau planning for this area and would be in the public interest. The land is not required for any Federal purpose. The patent will be subject to the provisions of the Federal Land Policy and Management Act and applicable regulations of the Secretary of the Interior and the land will continue to be subject to the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (26 Stat. 391, 43 U.S.C. 945).

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

Detailed information concerning this action, including the approved appraisal report, is available for review at the Las Vegas Field Office, Bureau of Land Management, 4701 N. Torrey Pines Dr., Las Vegas, Nevada 89130.

For a period until March 26, 2004, interested parties may submit comments to the Field Manager, Las Vegas Field Office, at the above address.

**Application Comments**

Interested parties may submit comments regarding whether the BLM followed proper administrative procedures in reaching the decision or any other factor not directly related to the suitability of the land for a direct sale. Any adverse comments will be reviewed by the State Director.

In the absence of any adverse comments, the decision will become effective April 12, 2004. The lands will not be offered for conveyance until after the decision becomes effective.

Dated: October 24, 2003.

**John C. Jamrog,**

*Acting Field Manager, Las Vegas, NV.*

[FR Doc. 04–2758 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–HC–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[OR–116–5870–EU: HAG04–0023]**

### Realty Action: Direct Sale of Public Land in Josephine County, OR 57956

**AGENCY:** Bureau of Land Management (BLM), Interior.

**ACTION:** Notice of realty action.

**SUMMARY:** The following described public land in Josephine County, Oregon, has been examined and found suitable for sale under sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713 and 1719), at not less than the appraised market value. The parcel proposed for sale is identified as suitable for disposal in the Medford District Resource Management Plan (June 1995).

The parcel proposed for sale is identified as follows:

**Willamette Meridian**

T. 34 S., R. 7 W.,
Section 3, lot 5.

The area described contains 2.46 acres, more or less, in Josephine County, Oregon. The appraised market value for this parcel has been determined to be $4,060.00.

**DATES:** On or before March 26, 2004, interested persons may submit written comments. In the absence of any objections, this proposal will become the determination of the Department of the Interior.

**ADDRESSES:** Written comments should be submitted to Lynda Boody, Glendale Resource Area Field Manager, 3040 Biddle Road, Medford, Oregon 97504. Electronic format submittal is not acceptable.

**FOR FURTHER INFORMATION CONTACT:** Detailed information concerning this land sale, including the reservations, sale procedures and conditions, and planning and environmental

documents, is available from Mathew Craddock, Realty Specialist, at the above address, phone (541) 618–2221.

**SUPPLEMENTARY INFORMATION:** This land is being considered for direct sale to Jack and Jackie Gray, the family of Mary Gray, to resolve a long-term, inadvertent, unauthorized occupancy of the public land. The encroachment involves a residence currently occupied by Mary Gray, the original historic Gray family home, outbuildings, equipment storage, a road and a well. The Gray family owns private property adjacent to the subject public land. The initial occupancy began approximately sixty years ago when the Gray family placed improvements on the public land assuming it was part of their adjacent private ownership.

The sale would assemble the BLM lands to the Gray property, protect the improvements placed on the lands by the Gray family, and resolve an inadvertent trespass. The parcel is the minimum size possible to ensure that all of the improvements are included. A cadastral survey was completed to partition the sale parcel from the larger BLM ownership.

In accordance with 43 CFR 2710.0–6(c)(3)(iii), direct sale procedures are appropriate to resolve an inadvertent unauthorized occupancy of the land and to protect existing equities in the land.

Jack and Jackie Gray will be allowed 30 days from receipt of a written offer to submit a deposit of at least 20 percent of the appraised market value of the parcel, and 180 days thereafter to submit the balance.

The following rights, reservations, and conditions will be included in the deed conveying the land:

1. A reservation to the United States for a right-of-way for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. A reservation to the United States for a right-of-way for Bureau of Land Management road #34–7–2 (OR 1902).

The deed would contain a floodplain covenant pursuant to the authority contained in section 3(d) of Executive Order 11988 of May 24, 1977, and sections 203 and 209 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2750, 43 U.S.C. 1713 and 1719. The deed is subject to a restriction which constitutes a covenant running with the land. The land may be used only for a residential homesite. No additional structures may be placed within the floodplain area without the approval of local government planning offices.

The deed would also include a notice and indemnification statement under the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9620) holding the United States harmless from any release of hazardous materials that may have occurred as a result of the unauthorized use of the property by other parties.

Acceptance of the direct sale offer constitutes an application for conveyance of the mineral interests also being offered under the authority of section 209(b) of the Federal Land Policy and Management Act of 1976. In addition to the full purchase price, a nonrefundable fee of $50 will be required from the prospective purchaser for purchase of the mineral interests to be conveyed simultaneously with the sale of the land.

The land described is segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action or 270 days from the date of publication of this notice, whichever occurs first. Protests/comments, including names, street addresses, and other contact information of respondents, will be available for public review. Individual respondents may request confidentiality.

If you wish to request that BLM consider withholding your name, street address and other contact information (such as: Internet address, FAX or phone number) from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. BLM will honor requests for confidentiality on a case-by-case basis to the extent allowed by law. BLM will make available for public inspection in their entirety all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses.

Dated: December 3, 2003.

**Lynda Boody,**

*Field Manager Glendale Resource Area, Medford District Office.*

[FR Doc. 04–2757 Filed 2–9–04; 8:45 am]

BILLING CODE 4310–33–P

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–04–002]**

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** International Trade Commission.

**TIME AND DATE:** February 17, 2004 at 11 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–1063–1068 (Preliminary) (Certain Frozen and Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before February 17, 2004; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before February 24, 2004.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: February 5, 2004.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04–2941 Filed 2–6–04; 10:34 am]

BILLING CODE 7020–02–P

## DEPARTMENT OF JUSTICE

### Antitrust Division

### *United States* v. *First Data Corporation and Concord EFS, Inc.;* Competitive Impact Statement, Proposed Final Judgment and Complaint

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. section 16(b) through (h), that a proposed Final Judgment, Amended Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *First Data Corporation and Concord EFS, Inc.*, Civil Action No. 03CV02169. On October 23, 2003, the United States filed a Complaint alleging that the proposed acquisition by First Data of Concord would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that the acquisition would reduce competition substantially in the PIN debit network services market by combining Concord's STAR PIN debit network with the NYCE PIN debit network. First Data owns a controlling 64 percent interest in NYCE. The proposed Final Judgment requires

First Data to divest all of its interests in NYCE. Copies of the Complaint, proposed Final Judgment, Amended Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC, in Room 9500, 600 E Street, NW. and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Renata Hesse, Chief, Networks and Technology Section, Antitrust Division, Department of Justice, Suite 9500, 600 E Street, NW., Washington, DC 20530, (telephone: 202–307–6200).

**J. Robert Kramer, II,**

*Director of Operations, Antitrust Division.*

**Competitive Impact Statement**

Plaintiff, the United States of America ("United States"), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. Nature and Purpose of the Proceeding**

Defendant first Data Corporation ("First Data") and Defendant Concord EFS, Inc. ("Concord") entered into an Agreement and Plan of Merger on April 1, 2003, pursuant to which First Data would acquire Concord in an all-stock transaction then valued at approximately $7 billion. On October 23, 2003, the United States and the States of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania and Texas, and the District of Columbia ("Plaintiff States") filed a civil antitrust complaint, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition would reduce competition substantially in the PIN debit network services market by combining the STAR and NYCE PIN debit networks, in violation of section 7 of the Clayton Act, 15 U.S.C. 18.

PIN debit networks provide a fast and secure payment mechanism that is used at more than one million merchant locations. The acquisition would have significantly increased the concentration levels in the already concentrated PIN debit network services market by combining the largest and third-largest PIN debit networks in the United States, STAR and NYCE, respectively. This significant increase in market concentration would likely have substantially reduced competition among PIN debit networks for merchant customers, resulting in thousands of merchants paying higher prices and receiving poorer levels of service for PIN debit network services. Merchants would have passed on at least some of these higher costs by raising the prices of their goods and services, to the detriment of tens of millions of consumers throughout the United States. Accordingly, the complaint sought: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) permanent injunctive relief that would prevent Defendants from carrying out the acquisition or otherwise combining their businesses or assets.

On December 15, 2003, the United States, the Plaintiff States and the Defendants filed a proposed Final Judgment and Hold Separate Stipulation and Order, which will eliminate the anticompetitive effects of the acquisition. Upon the filing of the proposed Final Judgment and Hold Separate Stipulation and Order, the Defendants announced that they had extended the date for closing the transaction until April 30, 2004. On January 9, 2004, the parties filed an Amended Hold Separate Stipulation and Order.[1]

The proposed Final Judgment requires First Data, within 150 calendar days after the Court's signing of the original Hold Separate Stipulation and Order, or five days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest all of its governance rights in NYCE and its entire 64 percent ownership interest in NYCE (collectively "NYCE Holdings").[2] The requirement that First Data divest NYCE is equivalent to the relief the United States would likely have obtained had it prevailed at trial.

The terms of the Amended Hold Separate Stipulation and Order require First Data to take certain steps to ensure that NYCE is operated as a competitively independent, economically viable and ongoing business concern, that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

**II. Description of the Events Giving Rise to the Alleged Violation**

*A. The Defendants and the Proposed Transaction*

First Data is a Delaware corporation headquartered in Greenwood Village, Colorado. In 2002, First Data reported total worldwide revenues of $7.6 billion. First Data owns 64 percent of NYCE, which operates the third largest PIN debit network. Citicorp, J.P. Morgan Chase & Co., FleetBoston Financial and HSBC USA Inc. own the remaining 36 percent of NYCE. First Data also owns substantial merchant and card issuing processing operations, as well as Western Union, the leading provider of consumer-to-consumer money transfer services.

Concord is a Delaware corporation headquartered in Memphis, Tennessee. Concord's revenues in 2002 totaled nearly $2 billion. Concord operates STAR, the largest PIN debit network. STAR is comprised of a number of PIN debit networks that Concord acquired over the last several years. Concord brought MAC in 1999, Cash Station in 2000, and then STAR in 2001, merging it with the MAC network. Shortly before Concord acquired STAR, STAR bought the HONOR network, which had recently acquired the MOST network. Concord also is a leading merchant processor and provides an array of services to debit card issuers and ATM owners.

First Data and Concord executed a merger agreement on April 1, 2003. Under that agreement, First Data would acquire Concord through an all-stock transaction.

[1] The original Hold Separate Stipulation and Order signed by the Court on December 15, 2003 prohibited any first Data officer, director, manager, employee, or agent from serving on the NYCE Board of Directors after December 30, 2003. This deadline would have required six First Data employees who were serving on the NYCE Board to resign. On December 30, 2003, with the consent of all parties, the Court issued an order extending First Data's deadline concerning participation on the NYCE Board until January 9, 2004. On January 9, the parties filed a consent motion requesting that the Court enter the Amended Hold Separate Stipulation and Order, which the Court signed on January 13, 2004. The Amended Hold Separate Stipulation and Order allows First Data to retain its NYCE Board seats for certain limited specifically enumerated purposes unless the United States, in its sole discretion, in consultation with the Plaintiff States, requires First Data's representatives on the NYCE Board to resign.

[2] The term "NYCE Holdings" is defined at ¶II.G of the Final Judgment.

*B. Product Market: PIN Debit Network Services*

The Complaint alleges that PIN debit network services is a line of commerce and a relevant antitrust product market within the meaning of section 7 of the Clayton Act, 15 U.S.C. § 18. During the 1970s, bank consortiums formed numerous regional electronic funds transfer ("EFT") networks to enable their customers to withdraw funds from ATMs owned by multiple banks. EFT networks were first used for PIN debit transactions in the early 1980s. It was not until the mid-1990s, however, that PIN debit transactions became a popular method of payment for consumers to purchase goods and services at retail stores. PIN debit transaction volume grew substantially over the past five years due to merchant and consumer recognition of the advantages of PIN debit as a form of payment. Today, consumers make over 500 million PIN debit transactions every month.

A PIN debit network provides the telecommunications and payments infrastructure that connects a network's participating financial institutions with merchant locations throughout the United States. A PIN debit network also performs a number of related functions necessary for the efficient operation of the network. For example, PIN debit networks: (1) Promote their brand names among consumers, merchants and financial institutions; (2) establish rules and standards to govern their networks; and (3) set fees and assessments for use of the network's products and services.

To execute a PIN debit transaction, a customer swipes a debit card at a point-of-sale terminal and enters a PIN on a numeric keypad. After the PIN is entered, the transaction and card information is sent over the PIN debit network to the card-issuing financial institution for authorization. The financial institution sends an electronic message to the PIN debit network, accepting or rejecting the transaction. The PIN debit network switches this reply back to the merchant to complete the transaction. The entire process takes place electronically in several seconds.

PIN debit networks charge both the merchant and the card-issuing financial institution a per transaction "switch" fee for the network's routing services. PIN debit networks also set an "interchange" fee. The interchange fee is paid by the merchant to the PIN debit network and then passed through to the card-issuing financial institution. Generally, the merchant's total charge from the PIN debit networks for each transaction is the switch fee plus the interchange fee.

As stated, the Complaint alleges that PIN debit network services is a relevant antitrust product market. A hypothetical monopolist could profitably impose a small but significant and nontransitory increase in the price ("SSNIP") of all PIN debit network services. Merchants would not defeat a SSNIP for PIN debit network services by requiring or encouraging their customers to switch to other payment methods, including signature debit network services. In particular, PIN debit networks offer a number of substantial advantages to consumers and merchants that distinguish them from signature debit networks. PIN debit networks are generally significantly less expensive to merchants than signature debit networks. PIN debit networks also often provide a more secure method of payment than signature debit networks because it is easier to forge a person's signature than to obtain an individual's PIN. Because of the increased security of PIN debit network services, there is no need for the charge-back procedures that allow consumers to challenge signature debit transactions, thereby saving merchants additional time and money. PIN debit transactions also generally settle more quickly than signature debit transactions. Finally, PIN debit networks often allow for faster execution at the point of sale than signature debit networks.

Merchants also would not defeat a SSNIP for PIN debit network services because significant numbers of consumers prefer to use PIN debit transactions over other forms of payment, particularly at supermarkets, mass merchandisers and drug stores. Many consumers value the security and speed of PIN debit transactions, as well as the "cash back" feature that allows them to receive cash at the register when making a purchase. Consumers cannot receive cash back when making a signature debit purchase. Today, consumers request cash back in approximately 20 percent of all PIN debit transactions. Consequently, many merchants would risk causing substantial customer backlash if they stopped offering or discouraged PIN debit transactions.

*C. Geographic Market: United States*

While certain PIN debit networks are stronger in particular areas of the country, the largest networks, including STAR and NYCE, are accepted at many merchant locations throughout the United States. Accordingly, the United States is a relevant geographic market for the provision of PIN debit network services within the meaning of section 7 of the Clayton Act, 15 U.S.C. 18.

*D. Harm to Competition in the PIN Debit Network Services Market*

The Complaint alleges the First Data's acquisition of Concord is likely to substantially reduce competition in the PIN debit network services market by combining the largest and third-largest PIN debit networks, STAR and NYCE. The loss of this significant competition would have caused higher prices and reduced levels of service to merchants and consumers. The PIN debit network services market is already very concentrated. As of March 2003, STAR routed approximately 56 percent of all PIN debit transactions, while Interlink and NYCE accounted for approximately 15 percent and 10 percent of the PIN debit market, respectively. Although recent contract losses may reduce STAR's market share (and increase Interlink's), under the most conservative estimates, STAR will remain the largest PIN debit network in the United States, with at least a 35 percent market share. Thus, if the transaction were completed, the combined STAR/NYCE network would be the largest PIN debit network, with at least a 45 percent market share. Together, the combined STAR/NYCE network and Interlink would form a near duopoly, accounting for more than 80 percent of all PIN debit transactions.

This highly concentrated market structure would have enabled PIN debit networks to increase prices and reduce levels of service to merchant customers. PIN debit networks compete for merchants' business by convincing merchants to accept their networks and to route debit transactions to their networks when there is a choice of routing options. PIN debit networks also compete for merchants by improving their networks' transmission speed, limiting network down-time and reducing the number of improperly rejected transactions. Merchants' ability to choose which PIN debit networks to accept at their stores, and to control the routing of some PIN debit transactions, constrains the prices that merchants pay for PIN debit network services and helps to ensure high quality levels of service.

1. Merchant Threats To Drop PIN Debit Networks

The Complaint alleges that combining STAR and NYCE would have harmed competition in the PIN debit network services market by reducing merchants' ability to drop either network. The PIN debit networks take merchants' threats to drop their networks seriously. The loss merchant customers can significantly reduce a PIN debit

network's profits. In addition to the lost switch fees from merchants, the loss of merchant business can make a PIN debit network less attractive to its financial institution customers. PIN debit networks compete for financial institution members based in part on the number of merchants that accept their networks.

Merchant have prevented or reduced some large price increased from STAR, NYCE and interlink by credibly threatening to discontinue acceptance of the networks. During the past two years, STAR, NYCE and Interlink each reduced planned price increases by more than one third because of concerns that merchants would drop their networks. This reduction in the amount of the three leading networks' planned price increases resulted in more than $100 million in annual savings to merchant customers.

Merchants' ability to drop a PIN debit network, or to credibly threaten to do so, depends on several factors, including: (1) A network's market share; and (2) the number of the network's PIN debit transactions that are routed over "single-bugged" debit cards. Generally, it is riskier for a merchant to drop a PIN debit network with a larger market share because of the increased likelihood of rejected transactions, delays at check-out lines, customer confusion and embarrassment, lost sales, and customers' use of more costly forms of payment for merchants. Dropping a PIN debit network with a large market share is particularly risky if many of the debit cards that can connect to that network are "single-bugged" with only that network. A single-bugged debit card can connect to only one PIN debit network. For example, some debit cards are single-bugged only with STAR. If a merchant does not accept STAR, then card holders with debit cards that are single-bugged only with STAR cannot execute a PIN debit transaction at that merchant. In contrast, if a debit card is bugged with STAR and other PIN debit networks, then a merchant's decision to drop STAR may not prevent the card holder from making PIN debit transactions at the merchant if the merchant accepts at least one of the other PIN debit networks on the debit card.

Combining STAR and NYCE would have made it substantially more difficult for merchants to drop, or credibly threaten to drop STAR or NYCE, to prevent future price increases. The merged networks would have had a large combined market share of at least 45%, a significant increase over each network's current market share. In addition, combining STAR and NYCE would have increased substantially the number of STAR and NYCE PIN debit transactions executed with debit cards that were single-bugged.

2. Reduced Least-Cost Routing Opportunities

The Complaint also alleges that combining STAR and NYCE would have reduced competition in the PIN debit network services market for merchant customers by limiting merchants' opportunities to route PIN debit transactions to the least expensive network ("least-cost routing"). Some large merchants, either directly or through their processors, always route PIN debit transactions to the least expensive PIN debit network when a debit card is bugged with multiple PIN debit networks. Other merchants and processors least-cost route when there are conflicts in the networks' routing rules. Conflicts occur when two networks both claim "priority" status for a particular debit card. For example, both STAR and NYCE may require merchants (or their processors) to route PIN debit transactions executed with a particular debit card over their networks. In such instances, some merchants (and processors) will route to the less expensive network.

Least-cost routing opportunities constrain PIN debit networks from increasing prices to merchants, or reducing levels of service, because they permit merchants, in some circumstances, to route around more expensive networks, or networks that offer poorer levels of service. In recent years, major supermarkets and mass merchandisers have obtained superior prices and levels of service by routing, or threatening to route, transactions away from one PIN debit network to another network.

Merchants currently have a substantial number of opportunities to least-cost route PIN debit transactions between STAR and NYCE. A large number of debit cards can connect to both STAR and NYCE. Further, STAR and NYCE's routing rules often conflict. The merger would have prevented merchants from obtaining lower prices and improved levels of service from STAR and NYCE by leveraging their ability to route PIN debit transactions away from STAR to NYCE, and vice versa.

*E. Timely and Sufficient Entry Is Unlikely*

The Complaint alleges that, in the near future, entry or expansion into the PIN debit network services market is unlikely to defeat the anticompetitive price increases that the combination of STAR and NYCE would have caused. There has been virtually no new entry in the PIN debit network services market for more than five years. Entry and expansion are difficult because the market is characterized by substantial "network effects." A network must attract a substantial number of financial institutions as members, while at the same time convince a large number of merchants to accept the network. Coordinated development of both financial institution members and merchant acceptance is critical because the utility of a particular PIN debit network to consumers, banks and merchants depends heavily on the breadth of its acceptance and use.

In addition, most PIN debit networks have adopted rules and policies that increase the cost of expansion by a small network or entry by a new market participant. Most significantly, network routing rules that specify the routing of transactions executed with multi-bugged cards sometimes can slow the degree to which a new PIN debit network can expand. Companies (such as First Data and Concord) that own both merchant processing operations and PIN debit networks also can make entry or expansion by PIN debit networks more difficult. When a PIN debit transaction is executed with a multi-bugged card, in some circumstances, merchant processors can determine which of the multiple PIN debit networks receives the transaction. Accordingly, companies that own both merchant processing operations and PIN debit networks may have some opportunities and incentives to favor their own PIN debit networks.

**III. Explanation of the Proposed Final Judgment**

The proposed Final Judgment's requirement that First Data divest its NYCE Holdings will eliminate the anticompetitive effects in the PIN debit network services market that the transaction would have produced. First Data's divestiture of its NYCE Holdings will prevent the combination of STAR and NYCE, the combination of First Data and Concord's assets that would have violated section 7 of the Clayton Act. By preventing the combination of STAR and NYCE, the proposed Final Judgment will ensure that merchants retain their current ability to obtain competitive prices and levels of service from the two networks, either by: (1) Dropping, or credibly threatening to drop, STAR and/or NYCE; or (2) taking advantage of least-cost routing opportunities between the two networks.

The proposed Final Judgment requires First Data, within 150 calendar days after the Court's signing of the original Hold Separate Stipulation and Order,[3] or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest all of its NYCE Holdings. Final Judgment ¶ IV.A. Again, the NYCE Holdings consist of all of First Data's governance rights in NYCE, and First Data's entire 64 percent ownership interest in NYCE, including all tangible assets. Final Judgment ¶ II.G. The United States agreed to allow First Data 150 days to divest its NYCE holdings, rather than the 120-day time period typically required for divestitures to remedy Section 7 violations, because NYCE's minority shareholders, by contract, have 30 days to match any third-party offer to purchase First Data's interests in NYCE. Had the United States not agreed to the additional 30-day divestiture period, First Data effectively would have had only 90 days to find a buyer for its NYCE holdings.

In addition to divesting its NYCE Holdings, the proposed Final Judgment requires First Data to provide certain guarantees to the buyer of the NYCE holdings, including warranting that: (1) Each asset therein that was operational as of the date of filing of the Complaint will be operational on the date of the divestiture; and (2) there are no material defects in the environmental, zoning or other permits pertaining to the operation of NYCE. Final Judgment ¶¶ IV.E and G.

The United States, in its sole discretion, after consultation with the Plaintiff States, may agree to one or more extensions of this time period, not to exceed in total 90 calendar days. Final Judgment ¶ IV.A. The NYCE Holdings must be divest in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that NYCE can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Final Judgment ¶¶ IV.A and H. First Data must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective acquirers.

If First Data does not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will appoint, a trustee to assume sole power and authority to complete the divestiture. Final Judgment ¶ V.A. If a trustee is appointed, the proposed Final Judgment provides that First Data will pay all costs and expenses of the trustee. Final Judgment ¶¶ V.B and D. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, the United States and the Plaintiff States, setting forth his or her efforts to accomplish the divestiture. Final Judgment ¶ V.F. If First Data has not divested its NYCE Holdings at the end of six months, the United States and the Plaintiff States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment. Final Judgment ¶ V.G. Defendants must cooperate fully with the trustee's efforts to divest First Data's NYCE Holdings to an acquirer acceptable to the United States. Final Judgment ¶ V.E.

The proposed Final Judgment filed in this case is meant to ensure the prompt divestiture by First Data of its NYCE Holdings. The purpose of the divestiture is to ensure the maintenance of a viable PIN debit network competitor capable of competing effectively to provide PIN debit network services and to remedy the anticompetitive effects that the United States and the Plaintiff States allege would otherwise result from First Data's acquisition of Concord. *See* Final Judgment ¶ V.H.

The Amendment Hold Separate Stipulation and Order will ensure that NYCE is maintained and operated as an independent competing PIN debit network until First Data divests all of its NYCE Holdings. The Order, except when necessary to carry out First Data's obligations under the Order, bars First Data from: (1) Serving as an officer, manager, or employee, or in a comparable position with or for NYCE; (2) exercising any authority through its representatives on the NYCE Board of Directors, except for limited specifically enumerated actions; (3) participating in, attending, or receiving any notes, minutes, or agendas of, information from, or any documents distributed in connection with, any nonpublic meeting of NYCE's Board of Directors or any committee thereof; and (4) voting or permitting to be voted First Data's NYCE shares. Amended Hold Separate Stipulation and Order ¶¶ V.1 through V.3. In addition, the Order prevents First Data from communicating to or receiving from any officer, director, manager, employee, or agent of NYCE any nonpublic information regarding any aspect of NYCE's business. Amended Hold Separate Stipulation and Order ¶ V.4. The Order also allows the United States, in its sole discretion, in consultation with the Plaintiff States, to require all of First Data's representatives on the NYCE board to resign. If the United States exercises its discretion to require First Data's NYCE directors to resign, First Data may only nominate individuals to fill the vacant NYCE Board seats who are officers or managers of NYCE or a minority shareholder of NYCE. Amended Hold Separate Stipulation and Order ¶ V.1.

## IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the Defendants.

## V. Procedures Available for Modification of the Proposed Final Judgment

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered in the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest. 15 U.S.C. 16(e).

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. 15 U.S.C. 16(b&d). Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register.** The United States will evaluate and respond to the comments. All comments will be give due consideration by the United States which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the

[3] The Court signed the original Hold Separate Stipulation and Order on December 15, 2003.

Court and published in the **Federal Register.**

Written comments should be submitted to: Renata B. Hesse, Chief, Networks & Technology Section, Antitrust Division, United States Department of Justice, 600 E Street, NW., Suite 9500, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

**VI. Alternatives to the Proposed Final Judgment**

The United States considered as an alternative to the proposed Final Judgment a full trial on the merits against the Defendants. The United States could have continued the litigation and sought permanent injunctive relief against First Data's acquisition of Concord. The United States is satisfied, however, that the divestiture of all of First Data's interests in NYCE to an independent third party will achieve all of the relief the United States would have obtained through litigation and will preserve competition for the provision of PIN debit network services in the United States.

**VII. Standard of Review Under the APPA for the Proposed Final Judgment**

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e). In making the determination, the Court may consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other consideration bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

*Id.* The United States Court of Appeals for the District of Columbia Circuit has held that the statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney.)[4] Rather:

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States* v. *Mid-America Dairymen, Inc.*, 1977 WL 4532, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see* also Microsoft, 56 F.3d at 1460–62. Rather, the case law requires that:

[t]he balancing act of competing social and political interests by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[5]

The proposed Final Judgment, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting Gillette, 406 F. Supp. at 716), aff'd sub nom., *Maryland* v. *United States*, 460 U.S. 1001 (1983). *See also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459–60.

**VIII. Determinative Documents**

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January__, 2004

Respectfully submitted,

For Plaintiff United States:

Joshua H. Soven, Esq.,

*Antitrust Division, U.S. Department of Justice, 600 E Street, NW., Suite 9500, Washington, DC 20530.*

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[4] *See also United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93–1463, 93rd Cong., 2d Sess. 8–9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

[5] Cf. BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree)"; Gillette, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See* generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

**Final Judgment**

*Whereas*, plaintiff United States of America ("United States"), the District of Columbia, and the States of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania, and Texas ("plaintiff states"), filed their Complaint on October 23, 2003, and the United States, plaintiff states, and defendants, First Data Corporation and Concord EFS, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial:

*And whereas*, this Final Judgment does not constitute any evidence against or admission by any party, regarding any issue of fact or law;

*And whereas*, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

*And whereas*, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by First Data to assure that competition is not substantially lessened;

*And whereas*, the United States and plaintiff states require First Data to make a certain divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

*And whereas*, defendants have represented to the United States and plaintiff states that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

*Now therefore*, without trial and upon consent of the parties, it is *ordered, adjudged and decreed:*

**I. Jurisdiction**

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

**II. Definitions**

As used in this Final Judgment:

A. "Acquirer" means the entity or entities to whom defendant First Data divests NYCE Holdings.

B. "Concord" means Concord EFS, Inc., a Delaware corporation headquartered in Memphis, Tennessee, and its successors and assigns, its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "EFT network services" means the provision to financial institutions and retailers of shared electronic fund transfer network services for automatic teller machine (ATM) transactions, online and offline debit point-of-sale (POS) transactions, electronic benefits transfer, and point-of-banking transactions.

D. "EFT processing services" means the provision to financial institutions of real-time processing services that support ATM driving and fully-automated monitoring services, gateway access, and debit card issuance and authorization solutions.

E. "First Data" means First Data Corporation, a Delaware corporation headquartered in Greenwood Village, Colorado, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures (excluding those entities not controlled by First Data), and their directors, officers, managers, agents, and employees.

F. "NYCE" means NYCE Corporation, a Delaware corporation headquartered in Montvale, New Jersey, and its successors and assigns, its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures (excluding those entities not controlled by NYCE), and their directors, officers, managers, agents, and employees. NYCE includes its EFT network service business (the NYCE Network) and its EFT processing services business.

G. "NYCE Holdings" means, unless otherwise noted, all of First Data's governance rights in NYCE, and First Data's entire 64 percent ownership interest in NYCE, including all of NYCE's rights, titles, and interests in the following:

1. all tangible assets of NYCE, including facilities and real property; data centers; assets used for research, development, engineering or other support to NYCE, and any real property associated with those assets; manufacturing and sales assets relating to NYCE, including captial equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-site warehouses or storage facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by any governmental organization relating to NYCE; all contracts, joint ventures, agreements, leases, commitments, and understandings pertaining to the operation of NYCE; supply agreements; all customer lists, accounts, and credit records; and other records maintained by NYCE in connection with its operations; and

2. the intangible assets of NYCE, including all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, computer software and related documentation, trade names, service marks, "bugs," services names, technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, data and results concerning historical and current research and development, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information NYCE provides to its employees, customers, suppliers, agents or licensees in connection with the NYCE's operations.

H. "Online debit" means PIN debit.

I. "PIN" means a Personal Identification Number.

J. "PIN debit" means a method of electronic card payment by which consumers purchase goods and services form merchants by swiping a bank card at a point-of-sale terminal and entering a PIN on a numeric keypad, upon which the purchase amount is debited from the customer's bank account and transferred to the retailer's bank.

K. "PIN debit network" Means a telecommunications and payment infrastructure that enables PIN debit transactions by providing the switch that connects merchants to consumers' demand deposit accounts at banks.

L. "PIN debit network services" means the PIN debit network and its performance of those related functions necessary for the efficient operation of the network, including promotion of brand names among consumers, merchants, and banks; establishment of rules and standards to govern the networks; and the setting of fees.

**III. Applicability**

A. This Final Judgment applies to First Data and Concord, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets or of lesser business units that include NYCE, that the purchaser agrees to be bound by the provision of this Final Judgment.

**IV. Divestiture**

A. Defendant First Data is ordered and directed, within one hundred fifty (150) calendar days after the Court's signing of the Hold Separate Stipulation and Order in this matter, or five (5) days after notice of the entry of this Final

Judgment by the Court, whichever is later, to divest NYCE Holdings in a manner consistent with this Final Judgment to an Acquireer acceptable to the United States in its sole discretion, after consultation with plaintiff states. The United States, in its sole discretion, after consultation with plaintiff states, may agree to one or more extensions of this time period, not to exceed in total ninety (90) calendar days, and shall notify the Court in each such circumstance. Defendant First Data agrees to use its best efforts to divest NYCE Holdings as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendant First Data promptly shall make known, by usual and customary means, the availability of NYCE Holdings. Defendants shall inform any person making inquiry regarding a possible purchase of NYCE Holdings that it will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant First Data shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to NYCE customarily provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Defendant First Data shall make available such information to the United States and plaintiff states at the same time that such information is made available to any other person.

C. Defendant First Data shall provide perspective Acquirers of NYCE Holdings, the United States, and plaintiff states information relating to the personnel involved in the production, operation, research, development, and sales at NYCE to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any of NYCE's employees whose responsibilities includes the production, operation, development, or sale of the products and services of NYCE.

D. Defendant First Data shall permit prospective Acquirers of NYCE Holdings to have reasonable access to personnel and to make inspections of the physical facilities of NYCE; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendant First Data shall warrant to the Acquirer of NYCE Holdings that each asset therein that was operational as of the date of filing to the Complaint in this matter will be operational on the date of divestiture.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of NYCE or NYCE Holdings.

G. Defendant First Data shall warrant to the Acquirer of NYCE Holdings that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of NYCE, and following the sale of NYCE Holdings, defendants shall not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of NYCE.

H. Unless the United States otherwise consents in writing, after consultation with plaintiff states, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire NYCE Holdings as defined in Section II(G) and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with plaintiff states, that NYCE can and will be used by the Acquirer as part of a viable, ongoing business engaged in the provision of EFT network services, including PIN debit network services, and EFT processing services. Divestiture of NYCE Holdings may be made to an Acquirer, provided that it is demonstrated to the sole satisfaction of the United States, in its sole judgment, after consultation with plaintiff states, that the divested asset will remain viable and that the divestiture will remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United States' sole judgment, after consultation with plaintiff states, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effective in the provision of EFT network services, including PIN debit network services, and EFT processing services in the United States; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with plaintiff states, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise NYCE's costs, to lower NYCE's efficiency, or otherwise to interfere in the ability of NYCE to compete effectively.

**V. Appointment of Trustee to Effect Divestiture**

A. If defendant First Data has not divested NYCE Holdings within the time period specified in section IV(A), it shall notify the United States and plaintiff states of that fact in writing. Upon application of the United States, in its sole discretion, after consultation with plaintiff states, the Court shall appoint a trustee selected by the United States, and approved by the Court to effect the divestiture of NYCE Holdings.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell NYCE Holdings. The trustee shall have the power and authority to accomplish the divestiture of NYCE Holdings to an Acquirer acceptable to the United States, in its sole judgment after consultation with plaintiff states, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendant First Data nay investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States, plaintiff states, and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendant First Data, on such terms and conditions as the NYCE approves, and shall account for all monies derived from the sale of NYCE Holdings and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant First Data and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the asset to be divested and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States, plaintiff states, and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, NYCE Holdings and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest NYCE Holdings.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States and plaintiff states, and the United States and plaintiff states shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

**VI. Notice of Proposed Divestiture**

A. Within two (2) business days following execution of a definitive divestiture agreement, defendant First Data or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States and plaintiff states of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in NYCE Holdings, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States and plaintiff states of such notice, the United States and plaintiff states may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States and plaintiff states have been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States, in its sole discretion, after consultation with plaintiff states, shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under section V(C) of the Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

**VII. Financing**

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

**VIII. Hold Separate**

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

**IX. Affidavits**

A. Within twenty (20) calendar days of the Court's signing of the Hold Separate Stipulation and Order in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States and plaintiff states an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in NYCE Holdings and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the asset to be divested, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States, in its sole discretion, after consultation with plaintiff states, to information provided by defendants, including limitations on the information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the Court's signing of the Hold Separate Stipulation and Order in this matter, defendants shall deliver to the United States and plaintiff states an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States and plaintiff states an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest NYCE Holdings until one year after such divestiture has been completed.

**X. Compliance Inspection**

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants be permitted:

1. access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**XI. No Reacquisition**

Defendants may not reacquire any ownership interest in NYCE during the term of this Final Judgment.

**XII. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry to or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**XIII. Expiration of Final Judgment**

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

**XIV. Public Interest Determination**

Entry of this Final Judgment is in the public interest.

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

United States District Judge

Case Number 1:03CV02169
*Judge:* Rosemary M. Collyer.
*Deck Type:* Antitrust.
*Date Stamp:* 10/23/2003.

United States of America, United States Department of Justice, Antitrust Division, 600 E Street, NW., Suite 9500, Washington, DC 20530,

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and

District of Columbia, Office of the Corporation Counsel, 441 4th Street, NW., Suite 450–N, Washington, DC 20001,
*Plaintiffs,*

v.

First Data Corporation, 6200 South Quebec Street, Greenwood Village, CO 80111,

and

Concord EFS, Inc., 2525 Horizon Lake Drive, Memphis, TN 38133, *Defendants.*

**Verified Complaint**

The United States of America, acting under the direction of the Attorney General of the United States, and the states of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, and Texas and the District of Columbia ("Plaintiff States"), acting under the direction of their respective Attorneys General, or other authorized officials, bring this civil action to enjoin the proposed merger of First Data Corporation ("First Data") and Concord EFS, Inc. ("Concord"), and allege as follows:

1. First Data's acquisition of Concord would combine the largest and third-largest point-of-sale ("POS") PIN debit networks in the United States. POS PIN debit networks are the telecommunications and payment infrastructure that connects merchants to consumers' demand deposit accounts at banks. These networks enable consumers to purchase goods and services from merchants through PIN debit transactions by swiping their bank card at a merchant's terminal and entering a Personal Identification Number, or PIN. Within seconds, the purchase amount is debited from the customer's bank account and transferred to the retailer's bank.

2. PIN debit networks provide an increasingly important method of payment for consumers and retailers because PIN debit is the least expensive, most efficient, and most secure form of card payment. In 2002, customers purchased more than $150 billion in goods and services using PIN debit networks. PIN debit transaction volume has grown by more than 20 percent annually over the past 5 years. Today, merchants accept PIN debit transactions at more than one million retail locations in the United States.

3. Concord operates STAR, the nation's largest PIN debit network. STAR currently handles approximately half of all PIN debit transactions in the United States. First Data owns a controlling interest in NYCE, the nation's third-largest PIN debit network.

4. PIN debit networks compete for merchants to accept and route purchases over their networks. A significant number of banks that issue debit cards participate in more than one PIN debit network. In some cases, this allows merchants to choose the network over which to route a transaction; merchants made this choice based on a variety of factors, including price and network performance. Large merchants

usually accept the debit cards of many PIN debit networks.

5. First Data's acquisition of Concord would substantially reduce competition among the PIN debit networks for retail transactions in violation of section 7 of the Clayton Act, 15 U.S.C. 18. The merger would make prices for PIN debit network services to merchants less competitive. Merchants will pass on at least some of the higher costs of PIN debit transactions by raising the prices of their goods and services, to the detriment of tens of millions of consumers throughout the United States. The United States and Plaintiff States therefore seek an order permanently enjoining the merger.

## I. Jurisdiction and Venue

6. This action is filed by the United States under section 15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain the Defendants from violating section 7 of the Clayton Act, 15 U.S.C. 18.

7. The Plaintiff States bring this action under section 16 of the Clayton Act, 15 U.S.C. 26, to prevent and restrain the Defendants from violation section 7 of the Clayton Act, 15 U.S.C. 18. The Plaintiff States, by and through their respective Attorneys General, or other authorized officials, bring this action in their sovereign capacities and as parens patriae on behalf of the citizens, general welfare, and economy of each of their states.

8. First Data and Concord are engaged in interstate commerce and in activities substantially affecting interstate commerce. First Data and Concord provide PIN debit network services throughout the United States. First Data's and Concord's PIN debit networks are engaged in a regular, continuous, and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce as well as commerce in each of the Plaintiff States. The Court has jurisdiction over this action pursuant to sections 12 and 15 of the Clayton Act, 15 U.S.C. 22, 25, and 28 U.S.C. 1331, 1337.

9. First Data and Concord transact business and are found in the District of Columbia, Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

## II. The Defendants and the Transaction

10. First Data is a corporation organized and existing under the laws of Delaware. In 2002, First Data reported total worldwide revenues of $7.6 billion. First Data is organized into four business groups: merchant services, payment services, card issuer services, and emerging payments. First Data's card issuing business offers a comprehensive set of services to banks that issue debit and credit cards. First Data's payment services group includes Western Union, the leading provider of consumer-to-consumer money transfer services.

11. First Data's merchant services segment, which primarily consists of NYCE and the merchant processing and acquiring business, was responsible for $2.8 billion of the company's revenues in 2002. First Data owns 64 percent of NYCE Corporation, which operates the NYCE PIN debit and ATM network. Four large banks own the remaining 36 percent of NYCE Corporation. In addition, First Data is the nation's leading merchant processor. A merchant processor connects merchants to the various payment networks, ensuring that each transaction is sent to the appropriate network. First Data also acts as a merchant acquirer; merchant acquirers sponsor merchants into the PIN debit networks, facilitate settlement, and assume financial responsibility for the transactions. First Data provides merchant processing and acquiring services independently and through a series of alliances and partnerships with major financial institutions.

12. Concord is a corporation organized and existing under the laws of the state of Delaware. Concord's revenues in 2002 totaled nearly $2 billion. Concord operates STAR, the largest PIN debit and ATM network. The STAR network is the result of a series of acquisitions of other large networks over the past several years. Concord bought MAC in 1999 and Cash Station in 2000. Concord then acquired STAR in 2001; STAR itself had acquired the Honor network, which in turn had acquired MOST. Concord is also a leading merchant processor and acquirer and provides an array of services to debit card issuers and ATM owners.

13. On April 1, 2003, First Data and Concord entered into an Agreement and Plan of Merger, pursuant to which First Data will acquire Concord in an all-stock transaction valued at approximately $7 billion.

## III. The Relevant Market

### *A. Description of the Product*

14. In the late 1970s, bank consortiums formed numerous regional electronic funds transfer ("EFT") networks to enable their customers to withdraw funds from ATMs owned by a variety of different banks. The EFT networks were first used to handle PIN debit purchases at retailers in the early 1980s. It was not until the mid-1990s, however, that PIN debit became a popular method of payment for consumers to purchase goods and services at retail stores. PIN debit transaction volume has grown substantially over the past five years due to merchant and consumer recognition of the advantages of PIN debit as a form of payment. Today, over 500 million PIN debit transactions are made every month. Nearly three-quarters of all PIN debit purchases occur at thirty large retail chains.

15. Many EFT networks, including those operated by First Data and Concord, route both ATM and PIN debit transactions. Some companies, however, operate separate ATM and PIN debit networks. For example, while Interlink is Visa's PIN debit network, Visa operates a separate ATM network called Plus.

16. A PIN debit network serves as the critical electronic switch connecting a network's participating financial institutions with merchants that accept the network. PIN debit networks provide one of the primary means for consumers to access the money in their checking accounts. A PIN debit network also performs a number of related functions necessary for the efficient operation of the network. For example, PIN debit networks: Promote their brand names among consumers, merchants, and banks; establish rules and standards to govern their networks; and set fees and assessments for use of the network's products and services. Collectively, these products and services are "PIN debit network services."

17. To execute a PIN debit transaction, a customer swipes a debit card at a POS terminal and enters a PIN on a numeric keypad. After the PIN is entered, the POS terminal transmits the transaction and bank card information to a "merchant processor," which acts as a conduit between the merchant and the various PIN debit networks. The merchant processor sends the information to the appropriate PIN debit network, which switches the transaction to the issuing bank's "card processor." The card processor accesses the bank's account database to verify the PIN and ensure that the customer has sufficient funds to pay for the purchase. The card processor sends an electronic message to the PIN debit network accepting or rejecting the transaction. The PIN debit network switches this reply back to the merchant through the merchant processor to complete the transaction. The entire authorization process takes place electronically in just seconds. At the same time, the merchant acquirer

"purchases" the transaction from the merchant, guaranteeing payment and facilitating settlement of the transaction.

18. A transaction can only be routed over a particular PIN debit network if the customer's bank issues a debit card that participates in that network. This participation is signified by placing the network's logo, or "bug," on the card. To provide their customers with seamless access to the widest array of merchants, a significant number of banks place the bug of more than one PIN debit network on their cards. Many networks, including NYCE, have a "priority routing" rule that allows the card issuer to designate which PIN debit network will serve as the primary network for PIN debit transactions when the bank bugs its cards with two or more networks. STAR, by contrast, imposes a network routing rule, requiring most transactions on cards bearing the STAR bug to be routed over the STAR network, regardless of whether there are other bugs on the card.

19. PIN debit networks charge both the merchant and the card-issuing bank a "switch" fee for the network switching services provided by the network. This fee typically ranges from 2 cents to 4 cents per transaction. The PIN debit networks also set an "interchange" fee, which is a fee paid by the merchant to the PIN debit network. The PIN debit network then passes through the interchange fee to the card-issuing bank as compensation for permitting access to the consumer's bank account. The interchange fee is normally at least 4–5 times as large as the switch fee, ranging from as low as 10 cents to as high as 45 cents, depending on the network, the merchant, and the size of the transaction. Consequently, the merchant's total charge for each PIN debit transaction is the interchange fee plus the switch fee.

20. At some networks, such as NYCE and Interlink, an advisory board representing the network's bank members has substantial authority over setting the network's interchange rates and determining the network's rules, including rules concerning the routing of PIN debit transactions.

21. The PIN debit network services market is characterized by significant network effects. Financial institutions are more likely to join networks that are accepted by many merchants. Conversely, merchants are more likely to accept networks that have many large financial institutions as members because the value of a particular PIN debit network depends in great measure on the breadth of its acceptance and use.

22. Many debit cards can also execute "signature" debit transactions, in addition to PIN debit transactions. Signature debit transactions are authenticated like credit card transactions, with the customer signing for identification rather than entering a PIN. Visa and MasterCard developed the only two signature debit networks from their existing credit card infrastructure. In contrast to a PIN debit transaction, in which the funds are immediately transferred from the customer's account, a signature debit transaction generally takes twenty-four to forty-eight hours to settle.

23. PIN debit networks offer a number of substantial advantages to consumers and merchants that distinguish them from signature debit networks. PIN debit networks are generally considerably less expensive to merchants than signature debit networks, due to significantly lower interchange rates. PIN debit networks also provide a more secure method of payment than signature debit because it is much easier to forge a person's signature than to obtain an individual's PIN; consequently, fraud rates for PIN debit are substantially lower than for signature debit. Because of the increased security of PIN debit, there is no need for the complicated and expensive charge-back procedures that allow consumers to challenge signature debit transactions, thereby saving merchants additional time and money. PIN debit transactions also settle instantaneously, guaranteeing the merchant ready access to its receipts, whereas signature debit transactions usually take a day or two to settle. Finally, PIN debit networks allow for faster execution than signature debit networks. With a PIN debit transactions, customers can enter their PIN as soon as the first product is scanned. By contrast, customers cannot sign for signature debit transactions until after the entire order is totaled, prolonging the checkout process.

24. PIN debit networks also allow individuals to receive cash back at the register when making a purchase, a popular feature with many consumers. Customers cannot receive cash back when making a signature debit purchase. Today, customers request cash back in approximately 20 percent of all PIN debit transactions. Customers also value the additional security provided by PIN verification as opposed to signature.

*B. Relevant Product Market*

25. The relevant product market affected by this transaction is the provision of PIN debit network services. A hypothetical monopolist could profitably impose a small but significant and nontransitory increase in the price of all PIN debit network services.

26. Signature debit networks are not in the same product market as PIN debit networks because signature debit networks are substantially more expensive and have inferior functionality and features. PIN debit networks would remain substantially less expensive than signature debit or credit care networks even after a small but significant nontransitory increase in price. Merchants would continue to purchase and promote the use of PIN debit network services because of the low fraud rate, corresponding lack of charge-backs, speed of execution at the register, and the cash back feature that many customers demand. As the President of First Data Merchant Services testified, PIN debit "is still the lowest-cost, most efficient, mest secure transaction there is out there in electronic transactions."

27. Merchants would not defeat a small but significant and nontransitory increase in the price of PIN debit network services by requiring or encouraging their customers to switch from PIN debit to signature debit or other payment methods.

28. The provision of PIN debit network services is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act, 15 U.S.C. 18.

*D. Relevant Geographic Market*

29. First Data and Concord compete with each other throughout the United States. Merchants in the United States could not switch to providers of PIN debit network services located outside of the United States in the event of a small but significant nontransitory increase in the price by PIN debit networks in the United States. While certain networks are stronger in particular areas of the country, the largest networks essentially operate on a national scale. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

**IV. Market Concentration**

30. The relevant market is highly concentrated and would become significantly more concentrated as a result of the proposed transaction. As of March 2003, the most recent period for which data is available, Concord accounted for approximately 56 percent of PIN debit transactions, while First Data had approximately a 10 percent share. The top four networks—STAR, Visa's Interlink, NYCE, and Pulse—routed over 90 percent of all PIN debit transactions. Using a standard measure

of market concentration called the "HHI" (defined and explained in Appendix A), the market is highly concentrated, with a pre-merger HHI of approximately 3590. First Data's acquisition of Concord would increase the HHI by approximately 1120, resulting in a post-merger HHI of approximately 4710. While STAR has recently lost some significant bank contracts to Interlink and NYCE, under even the most conservative estimate of future market shares the combined firm would have approximately a 45 percent post-merger share. Taking into account these lost contracts, the PIN debit network services market remains highly concentrated and would become substantially more concentrated as a result of the merger, with a post-merger HHI greater than 3000.

**V. Anticompetitive Effects**

*A. The Proposed Transaction Will Likely Substantially Reduce Competition Among PIN Debit Networks*

31. First Data's acquisition of Concord will combine the largest and third-largest PIN debit networks and enable the resulting network to raise prices and to reduce levels of services to merchants.

32. PIN debit networks compete for merchant business by attempting to convince merchants to accept their networks and to route to their networks when there is a choice of routing options. PIN debit networks also compete for merchants by improving their networks' transmission speed, limiting network down-time, and reducing the number of improperly rejected transactions. Merchants' ability to choose which networks to accept at their stores and their control over the routing of some transactions acts as a constraint on the price of PIN debit network services to merchants.

33. While most large merchants generally accept all of the PIN debit networks, retailers can and have used the threat of dropping a network to obtain lower prices. For example, in 2001 Visa announced a substantial rate increase for its PIN debit network, Interlink; STAR, and later NYCE, followed by announcing comparable price increases. A number of large retailers responded by stating that if Interlink implemented the planned price increase, they would no longer accept Interlink. In response, Interlink delayed and substantially scaled back its proposed price increase. Then STAR delayed and reduced its planned price increase to remain competitive. Similarly, NYCE concluded in an internal document that its "previously announced pricing [was] now out of balance with new market realities" and followed suit.

34. Combining STAR and NYCE will make it substantially more difficult for merchants to use the possibility of dropping a network to prevent price increases. The larger the network, the more risky it is for a merchant to drop that network because of the increased likelihood of rejected transactions, delays at check-out lines, customer confusion and backlash, lost sales, and customer use of other forms of payment that are more costly to the merchant.

35. The PIN debit networks take into account the merchants' competitive reactions when they make decisions about pricing. Earlier this year, NYCE was considering raising interchange rates to attract financial institutions to the network. NYCE's internal analysis of the market recognized, however, that "[t]aking a leadership role in POS interchange does not come without risk to the transaction growth engine of the NYCE Network and its current revenue stream * * * "[P]recedent has been set via major retailers in the past dropping or threatening to drop a payment card network due to pricing. * * * [T]he risks are material that certain retailers or segments may decide to 'send a message' and simply stop taking NYCE-branded cards for purchases." (emphasis added)

36. First Data's acquisition of Concord will also reduce competition in the PIN debit market by limiting merchants' ability to route transactions to the least-cost network. Major supermarkets and mass merchandisers have obtained superior prices and levels of service by routing, or threatening to route, transactions away from NYCE to STAR and vice versa. After the merger, merchants will no longer be able to seek lower prices and improved service from the combined firm by playing off NYCE and STAR against each other in this manner.

37. An internal merger planning document acknowledged the likely effect of First Data's acquisition of Concord on pricing in the PIN debit network services market: The "[c]ombination of NYCE and STAR allows FDC [First Data Corp.] more leeway to set market pricing."

38. Interchange fees have risen dramatically in the past several years as the PIN debit network services market has become more highly concentrated. First Data's acquisition of Concord will likely exacerbate this trend toward higher pricing by further reducing competition in the market. Merchants will be forced to pass on a significant portion of the higher fees to tens of millions of consumers, in the form of higher prices for all goods and services. Merchants do not typically pass through increase costs for particular forms of payment on a per-transaction basis.

39. Any efforts the combined First Data/Concord might make to expand PIN debit usage after the merger would not prevent the company from raising prices to merchants that already accept PIN debit. PIN debit networks are able to charge different prices to merchants based on the value of the network to the particular company or type of merchant. For example, First Data and Concord have both recently offered substantial discounts to quick-service restaurants to encourage them to deploy PIN pads at all of their locations. At the same time, First Data and Concord have dramatically raised their merchant fees to the market as a whole. This ability to engage in price discrimination will facilitate First Data's exercise of market power post-merger by allowing it to simultaneously raise prices to merchants that already accept PIN pads and cut special deals to attract new market segments to the network.

*B. Lack of Countervailing Factors*

40. It is unlikely that entry or expansion in the PIN debit network services market will occur in a timely manner or on a scale sufficient to undo the competitive harm that the merger will produce. Entry and expansion are difficult because they require large, sunk investments to attract bank members, and, to a lesser degree, participating merchants. Coordinate development of both bank members and merchant acceptance is critical because the utility of a particular PIN debit network to customers, banks, and merchants depends not only on the cost and features of the card, but also on the breadth of its acceptance and use. These network effects that characterize the PIN debit network services market make it difficult for small networks to significantly expand their market share.

41. Banks would have little incentive to join a new or small network that was attempting to expand market share by offering lower interchange rates to merchants. To the contrary, a bank would only have an incentive to join a network if it offered higher interchange rates. Without such bank participation, a network's attempts to expand would prove fruitless. Moreover, financial institutions benefit from a market structure characterized by a limited number of significant PIN debit networks and face fewer competitive constraints to setting higher prices to merchants.

42. The PIN debit networks have adopted rules and policies that further increase the cost for a network to expand by developing bank and merchant participation. For example, the networks' priority routing rules make entry more difficult and less likely. Even if a network succeeds in convincing banks to add its bug to the banks' debit cards, the network is unlikely to see many transactions because of the priority routing rules. In addition, STAR requires its member banks to use STAR for both ATM and PIN debit network services; this all-or-nothing requirement makes it more difficult for competing networks to convince banks to participate in their network. Finally, banks that want to act as acquirers for STAR ATM and PIN debit transactions must issue cards that participate in the STAR network. Because a significant number of banks have substantial ATM or merchant acquiring businesses, the STAR rule further inhibits potential expansion by competing PIN debit networks. After the merger, the application of any or all of these rules to First Data/Concord's combined network would inhibit entry or expansion by other PIN debit networks.

43. Finally, the combination of First Data's and Concord's merchant processing businesses with their PIN debit networks will raise barriers to entry. The combined First Data/Concord will process more than half of all PIN debit transactions. As the merchant processor, the merged firm will have significant control over which network routes a transaction on a double-bugged card. As the owner of the dominant PIN debit network, First Data will have a significant incentive to exercise this control after it acquires Concord, inhibiting other PIN debit networks from expanding their presence in the market.

## VI. Violation Alleged

44. The United states and the Plaintiff States hereby incorporate paragraphs 1 through 43.

45. First Data's acquisition of Concord would likely substantially lessen competition in the provision of PIN debit network services, in violation of section 7 of the Clayton Act, 15 U.S.C. 18. The transaction would likely have the following effects, among others:

(a) competition between First Data and Concord in the provision of PIN debit network services would be eliminated;

(b) competition generally in the provision of PIN debit network services would be eliminated or substantially lessened;

(c) prices of PIN debit network services to merchants that currently use them would likely increase to levels above those that would prevail absent the merger, forcing merchants to pass on these increased costs in the form of higher prices for all goods and services to tens of millions of consumers; and

(d) quality in the provision of PIN debit network services would likely decrease to levels below those that would prevail absent the merger.

## Request for Relief

46. The United States and the Plaintiff States request:

(a) that the proposed acquisition be adjudged to violate section 7 of the Clayton Act, 15 U.S.C. 18;

(b) that the Defendants be permanently enjoined and restrained from carrying out the Agreement and Plan of Merger dated April 1, 2003, or from entering into or carrying out any agreement, understanding, or plan by which First Data would merge with or acquire Concord, its capital stock, or any of its assets;

(c) that the United States and the Plaintiff States be awarded costs of this action;

(d) that as the Court may deem appropriate, the Plaintiff States be awarded reasonable attorneys fees and costs as permitted by law; and

(e) that the United States and the Plaintiff States have such other relief as the Court may deem just and proper.

Dated: October 23, 2003.

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Respectfully submitted,

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October 20, 2003.

Louisiana's Signature Page for the FDC/Concord merger opposition case

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Office of the Attorney General

Jay L. Himes,
*Chief, Antitrust Bureau, N.Y., Attorney No., 1236934*

Richard E. Grimm,
*Assistant Attorney General, N.Y. Attorney No. 1337138.*

Antitrust Bureau,
Office of the Attorney General, 120 Broadway Room 26C62, New York, New York 10271–0332, Tel: (212) 416–8282, (212) 416–8280, Fax: (212) 416–6015.

*United States of America, et al. (State of Ohio)* v. *First Data Corporation and Concord EFS, Inc.*

For Plaintiff State of Ohio.

Jim Petro,
*Attorney General, State of Ohio.*

Mitchell L. Gentile,
*OH Bar Number 0022274, Principal Attorney, Antitrust Section, Ohio Attorney General's Office, 150 E. Gay Street, Columbus, OH 43215–3031, Tel: 614–466–4328, Fax: 614–995–0266.*

For Plaintiff State of Texas.

Greg Abbott,

*Attorney General of Texas.*

Barry R. McBee,
*First Assistant Attorney General.*

Edward D. Burbach,
*Deputy Attorney General for Litigation.*

Mark Tobey,
*Assistant Attorney General,*
*Chief, Antitrust Division.*

Rebecca Fisher,
*Assistant Attorney General,*
*State Bar No. 07057800.*

Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711–2548, 512/463–2185, 512/320–0975 (Facsimile).

Signature by the State of Texas of Complaint in *United States of America, et al,* v. *First Data Corporation and Concord EFS, Inc.*

Robert J. Spagnoletti,
*Corporation Counsel, DC.*

Charlotte W. Parker (Bar #186205),
*Deputy Corporation Counsel,*
*Civil Division.*

Bennett Rushkoff (Bar #386925),
*Senior Counsel,*
*Don Allen Resnikoff (Bar #386688),*
*Assistant Corporation Counsel,*
*Anika Sanders Cooper (Bar #458863),*
*Assistant Corporation Counsel.*

Office of the Corporation Counsel, 441 4th Street, NW., Suite 450–N, Washington, DC 20001 (202) 727–4170.

Attorneys for the District of Columbia.

## Appendix A

**Herfindahl-Hirschman Index**

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30%, 30%, 20%, and 20%, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). (Note: Throughout the Compliant, market share percentages have been rounded to the nearest whole number, but HHIs have been estimated using unrounded percentages in order to accurately reflect the concentration of the various markets.) The HHI takes into account the relative size distribution of the firms in a market and approaches zero when a market consists of a large number of small firms. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. *See* Horizontal Merger Guidelines ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the guidelines issued by the U.S. Department of Justice and Federal Trade Commission. *See id.*

[FR Doc. 04–2688 Filed 2–9–04; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF LABOR

### Employment And Training Administration

**[TA-W–53,875]**

### Cascada De Mexico, Inc., a Division of Cascade West Sportswear, Inc., Puyallup, Washington; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 23, 2003 in response to a petition filed by a company official on behalf of workers of Cascada de Mexico, Inc., a division of Cascade West Sportswear, Inc., Puyallup, Washington.

The investigation revealed that the subject firm can be certified upon an amendment to a previous certification (TA–W–53,873). The workers at the subject firm were in support of the production facility previously certified under (TA–W–53,873). Consequently the investigation has been terminated.

Signed at Washington, DC, this 12th day of January, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4–240 Filed 2–9–04; 8:45 am]

BILLING CODE 4510–13–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–53,874]**

### Cascade West Sportswear, Inc., Puyallup, Washington; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 23, 2003 in response to a petition filed by a company official on behalf of workers of Cascade West Sportswear, Inc., Puyallup, Washington.

The investigation revealed that the subject firm can be certified upon an amendment to a previous certification (TA–W–53,873). The workers at the subject firm were in support of the production facility previously certified under (TA–W–53,873). Consequently the investigation has been terminated.

Signed at Washington, DC, this 12th day of January, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4–242 Filed 2–9–04; 8:45 am]

BILLING CODE 4510–13–P

## DEPARTMENT OF LABOR

### Employment And Training Administration

**[TA–W–53,042]**

### Solon Manufacturing Co., Rhinelander, Wisconsin; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 22, 2003, applicable to workers of Solon Manufacturing Company, Rhinelander, Wisconsin. The notice was published in the **Federal Register** on November 28, 2003 (68 FR 66879).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of ice cream sticks and are not separately identifiable by product line.

New findings show that there was a previous certification, TA–W–39,153, issued on May 8, 2001, for workers of Solon Manufacturing, Rhinelander, Wisconsin, who were engaged in employment related to the production of ice cream sticks. That certification expired May 8, 2003. To avoid an overlap in worker group coverage, the certification is being amended to change the impact date from September 24, 2002, to May 9, 2003, for workers of the subject firm.

The amended notice applicable to TA–W–53,042 is hereby issued as follows:

"All workers of Solon Manufacturing Company, Rhinelander, Wisconsin, who became totally or partially separated from employment on or after May 9, 2003, through October 22, 2005, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974 and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974."

Signed at Washington, DC, this 22nd day of January, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4–245 Filed 2–9–04; 8:45 am]

BILLING CODE 4510–13–P

## DEPARTMENT OF LABOR

### Employment And Training Administration

**[TA–W–52,774]**

### Weyerhaeuser Company, North Bend, Oregon; Notice of Negative Determination on Reconsideration

On November 19, 2003, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The notice was published in the **Federal Register** on January 2, 2004 (69 FR 117).

The Department denied Trade Adjustment Assistance (TAA) to workers of the subject firm because imports did not "contribute importantly" and a shift of production relating to the eligibility requirements of section 222(3) of the Trade Act of 1974, as amended, were not met. The workers produced corrugated medium. The investigation revealed neither significant increased imports of corrugated medium nor a shift of production abroad.

The petitioner requested reconsideration of the negative determination regarding both TAA and Alternative Trade Adjustment Assistance (ATAA). In the request for reconsideration, the petitioner alleges that workers' separations were caused by the increased imports of corrugated boxes and containerboard, the shift of production abroad, and the decreased need for packaging and shipping material due to the general shift of production of goods abroad. Workers at the subject firm as already indicated produced corrugated medium.

The petitioner alleges that increased imports of corrugated boxes and containerboard have reduced the need for corrugated medium. Corrugated boxes and containerboard are not "like or directly competitive" with the articles produced by the subject firm (corrugated medium). Corrugated medium is a component of containerboard and corrugated boxes. Corrugated medium is a fluted paper product used to make containerboard. Containerboard consists of a sheet of corrugated medium pressed between two sheets of flat paper. Pieces of containerboard are cut and assembled into corrugated boxes. Therefore, the imports of corrugated boxes and containerboard are not relevant in meeting the eligibility requirement of section 222 of the Trade Act of 1974, as amended.

Following the issuance of the Affirmative Determination Regarding Application for Reconsideration, the Department contacted the company to determine whether the subject company had increased import purchases of corrugated medium or shifted production abroad. The investigation revealed that the amount of corrugated medium imported was minimal and that the corrugated medium at issue was actually part of corrugated boxes that were used to ship other products.

The investigation also revealed that while the subject company has facilities outside the United States, the subject company did not shift production of corrugated medium abroad, but did shift production domestically in August 2003.

The alleged decreased need for packaging and shipping materials caused by decreased domestic production of goods due to overall shifts of production of goods abroad was not investigated because the decreased production of corrugated medium was not related to either increased imports of the same or like and directly competitive product or a shift of production abroad.

While the petitioner requested reconsideration regarding ATAA, the Department did not investigate whether the workers are eligible for this benefit since they are not eligible for TAA.

### Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Weyerhaeuser Company, North Bend, Oregon.

Signed at Washington, DC, this 30th day of January, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4–241 Filed 2–9–04; 8:45 am]

**BILLING CODE 4510–13–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Revised Schedule of Remuneration for the UCX Program

Under section 8521(a)(2) of Title 5 of the United States Code, the Secretary of Labor is required to issue a Schedule of Remuneration specifying the pay and allowances for each pay grade of members of the military services. The schedules are used to calculate the base period wages and benefits payable under the program of Unemployment Compensation for Ex-servicemembers (UCX Program).

The revised schedule published with this Notice reflects increases in military pay and allowances, which are effective in January 2004.

Accordingly, the following new Schedule of Remuneration, issued pursuant to 20 CFR 614.12(c), applies to "first claims" for UCX, which are effective beginning with the first day of the first week that begins on or after January 4, 2004.

| Pay grade | Monthly wage rate |
|---|---|
| (1) Commissioned Officers: | |
| 0–10 | $15,084 |
| 0–9 | 14,670 |
| 0–8 | 13,539 |
| 0–7 | 12,283 |
| 0–6 | 10,576 |
| 0–5 | 8,911 |
| 0–4 | 7,561 |
| 0–3 | 5,966 |
| 0–2 | 4,717 |
| 0–1 | 3,575 |
| (2) Commissioned Officers With Over 4 Years Active Duty As An Enlisted Member Or Warrant Officer: | |
| 0–3E | $6,877 |
| 0–2E | 5,627 |
| 0–1E | 4,788 |
| (3) Warrant Officers: | |
| W–5 | $7,838 |
| W–4 | 6,963 |
| W–3 | 5,883 |
| W–2 | 5,110 |
| W–1 | 4,249 |
| (4) Enlisted Personnel: | |
| E–9 | $6,706 |
| E–8 | 5,577 |
| E–7 | 4,904 |
| E–6 | 4,238 |
| E–5 | 3,502 |
| E–4 | 2,888 |
| E–3 | 2,577 |
| E–2 | 2,429 |
| E–1 | 2,180 |

The publication of this new Schedule of Remuneration does not revoke any prior schedule or change the period of time any prior schedule was in effect.

Signed at Washington, DC, on February 4, 2004.

**Emily Stover DeRocco,**

*Assistant Secretary of Labor.*

[FR Doc. 04–2827 Filed 2–9–04; 8:45 am]

**BILLING CODE 4510–30–P**

## DEPARTMENT OF LABOR

### Employment Standards Administration

### Proposed Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721) and Notice of Law Enforcement Officer's Death (CA–722). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before April 12, 2004.

**ADDRESSES:** Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418, fax (202) 693–1451, *e-mail bell.hazel@dol.gov*. Please use only one method of transmission for comments (mail, fax, or e-mail).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Office of Workers' Compensation Programs (OWCP) administers the Federal Employees' Compensation Act (FECA). The Act provides that non-Federal law enforcement officers and/or their survivors injured or killed under certain circumstances are entitled to benefits of the Act to the same extent asemployees in the Federal government. The Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721) and the Notice of Law Enforcement Officer's Death (CA–722) are the forms used by non-Federal law enforcement officers and their survivors to claim compensation under FECA. This information collection is currently approved for use through August 31, 2004.

**II. Review Focus**

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

**III. Current Actions**

The Department of Labor seeks the extension of approval to collect this information to determine eligibility for benefits.

*Type of Review:* Extension.

*Agency:* Employment Standards Administration.

*Title:* Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721), Notice of Law Enforcement Officer's Death (CA–722).

*OMB Number:* 1215–0116.

*Agency Number:* CA–721 and CA–722.

*Affected Public:* Individuals or Households; Business or other for-profit; State, Local or Tribal Government.

*Total Respondents:* 23.

*Total Annual Responses:* 23.

*Average Time per Response:* 60 minutes.

*Estimated Total Burden Hours:* 31.

*Frequency:* On occasion.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $220.00.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 4, 2004.

**Bruce Bohanon,**

*Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.*

[FR Doc. 04–2828 Filed 2–9–04; 8:45 am]

**BILLING CODE 4510–30–P**

## NUCLEAR REGULATORY COMMISSION

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Nuclear Regulatory Commission.

**DATES:** Weeks of February 9, 16, 23, March 1, 8, 15, 2004.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**MATTERS TO BE CONSIDERED:**

**Week of February 9, 2004**

There are no meetings scheduled for the Week of February 9, 2004.

**Week of February 16, 2004—Tentative**

*Wednesday, February 18, 2004*

9:30 a.m. Briefing on Status of Office of Chief Financial Officer Programs, Performance, and Plans (Public Meeting) (Contact: Edward L. New, 301–415–5646).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

**Week of February 23, 2004—Tentative**

*Wednesday, February 25, 2004*

9 a.m. Discussion of Security Issues (Closed—Ex. 1).

*Thursday, February 26, 2004*

9:30 a.m. Meeting with UK Regulators to Discuss Security Issues (Closed—Ex. 1).

1:30 p.m. Status of Davis Besse Lessons Learned Task Force Issues (Public Meeting) (Contact: Brendan Moroney, 301–415–3974).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

**Week of March 1, 2004—Tentative**

*Tuesday, March 2, 2004*

9:30 a.m. Meeting with Advisory Committee on the Medical Uses of Isotopes (ACMUI) & NRC Staff (Public Meeting) (Contact: Angela Williamson, 301–415–5030).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

*Wednesday, March 3, 2004*

9:30 a.m. 25th Anniversary Three Mile Island (TMI) Unit 2 Accident Presentation (Public Meeting) (Contact: Sam Walker, 301–415–1965).

This meeting will be webcast live at the Web address—*www.nrc.gov.*

2:45 p.m. Discussion of Security Issues (Closed—Ex. 1).

*Thursday, March 4, 2004*

1:30 p.m. Briefing on Status of Office of Nuclear Material Safety and Safeguards (NMSS) Programs, Performance, and Plans—Waste Safety (Public Meeting) (Contact: Claudia Seelig, 301–415–7243).

This meeting will be webcast live at the Web address—*www.nrc.gov.*

**Week of March 8, 2004—Tentative**

*Tuesday, March 9, 2004*

9:30 a.m. Briefing on Status of Office of Nuclear Material Safety and Safeguards (NMSS) Programs, Performance, and Plans—Material Safety (Public Meeting) (Contact: Claudia Seelig, 301–415–7243).

This meeting will be webcast live at the Web address—*www.nrc.gov.*

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1).

**Week of March 15, 2004—Tentative**

There are no meetings scheduled for the Week of March 15, 2004.

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Timothy J. Frye, (301) 415–1651.

* * * * *

**ADDITIONAL INFORMATION:** By a vote of 3–0 on January 29, the Commission determined pursuant to U.S.C. 552b(e) and section 9.107(a) of the Commission's rules that "Affirmation of COMSECY–04–0004 (Draft Notice and Order for Louisiana Energy Services)" be held on January 30, and on less than one week's notice to the public.

By a vote of 3–0 on February 4, the Commission determined pursuant to U.S.C. 552b(e) and section 9.107(a) of the Commission's rules that "Affirmation of SECY–04–0015 (Private Fuel Storage Independent Spent Fuel Storage Installation)" be held on February 5, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at *www.nrc.gov/what-we-do/policy-making/schedule.html.*

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: February 5, 2004.

**Timothy J. Frye,**

*Technical Coordinator, Office of the Secretary.*

[FR Doc. 04–2932 Filed 2–6–04; 9:21 am]

**BILLING CODE 7590–01–M**

## OFFICE OF PERSONNEL MANAGEMENT

### Submission for OMB Review; Comment Request for Review of a Revised Information Collection: SF 3112

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) submitted to the Office of Management and Budget a request for review of a revised information collection. Standard Form 3112, CSRS/FERS Documentation in Support of Disability Retirement Application, collects information from applicants for disability retirement so that OPM can determine whether to approve a disability retirement. The applicant will only complete Standard Forms 3112A and 3112C. Standards Forms: 3112B, 3112D, and 3112E will be completed by the immediate supervisor and the employing agency of the applicant.

Approximately 12,100 applicants for disability retirement complete Standard Forms 3112A and 3112C annually. This is a combined figure including 9,000 CSRS and 3,100 FERS applications. The SF 3112C requires approximately 60 minutes to complete. A burden of 12,100 hours is estimated for SF 3112C. SF 3112A is used each year by approximately 1,350 persons who are not Federal employees. This is a combined figure including 1,000 CSRS and 350 FERS applications. SF 3112A requires approximately 30 minutes to complete and a burden of 675 hours is estimated for SF 3112A. The total annual burden for SF 3112 is 12,775 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, Fax (202) 418–3251 or via E-mail to *mbtoomey@opm.gov.* Please include a mailing address with your request.

**DATES:** Comments on this proposal should be received on or before March 11, 2004.

**ADDRESSES:** Send or deliver comments to—Ronald W. Melton, Chief, Operation Support Group, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street NW., Room 3349A, Washington, DC 20415–3540; and Joseph F. Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

**FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION CONTACT:** Cyrus S. Benson, Team Leader, Publications Team, Support Group, (202) 606–0623.

**Kay Coles James,**

*Director, U.S. Office of Personnel Management.*

[FR Doc. 04–2733 Filed 2–9–04; 8:45 am]

**BILLING CODE 6325–50–P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 30e–2; SEC File No. 270–437; OMB Control No. 3235–0494.

Notice is hereby given that, under the Paperwork Reduction Act of 1995 (44 U.S.C. 350l-3520), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 30(e) of the Investment Company Act of 1940 [15 U.S.C. 80a-29(e)] (the "Investment Company Act" or "Act") and rule 30e-2[1] thereunder [17

[1] Rule 30e–2 was originally adopted as rule 30d–2, but was redesignated as rule 30e–2 effective February 15, 2001. See Role of Independent Directors of Investment Companies, Securities Act

CFR 270.30e-2] require registered unit investment trusts ("UITs") that invest substantially all of their assets in securities of a management investment company [2] ("fund") to send to shareholders at least semi-annually a report containing certain financial statements and other information. Specifically, rule 30e–2 requires that the report contain the financial statements and other information that rule 30e–1 under the Act [17 CFR 270.30e–1] requires to be included in the report of the underlying fund for the same fiscal period. Rule 30e–1 requires that the underlying fund's report contain, among other things, the financial statements and other information that is required to be included in such report by the fund's registration form. Preparing and sending the above-described reports under rule 30e–2 are collections of information under the Paperwork Reduction Act.

Rule 30e–2, however, permits, under certain conditions, delivery of a single shareholder report to investors who share an address ("householding"). The purpose of the householding provisions of the rule is to reduce the amount of duplicative reports delivered to investors sharing the same address. Specifically, rule 30e–2 permits householding of annual and semi-annual reports by UITs to satisfy the delivery requirements of rule 30e–2 if, in addition to the other conditions set forth in the rule, the UIT has obtained from each applicable investor written or implied consent to the householding of shareholder reports at such address. The rule requires UITs that wish to household shareholder reports with implied consent to send a notice to each applicable investor stating that the investors in the household will receive one report in the future unless the investors provide contrary instructions. In addition, at least once a year, UITs relying on the rule for householding must explain to investors who have provided written or implied consent how they can revoke their consent. Preparing and sending the initial notice and the annual explanation of the right to revoke consent are collections of information under the Paperwork Reduction Act.

The purpose of the requirement that UITs that invest substantially all of their assets in securities of a fund transmit to shareholders at least semi-annually reports containing financial statements and certain other information is to apprise current shareholders of the operational and financial condition of the UIT. Absent the requirement to disclose all material information in reports, investors would be unable to obtain accurate information upon which to base investment decisions and consumer confidence in the securities industry might be adversely affected. Requiring the submission of these reports to the Commission permits us to verify compliance with securities law requirements.

The purpose of the notice and annual explanation requirements associated with the householding provisions of the rule is to ensure that investors who wish to receive individual copies of shareholder reports are able to do so.

The Commission estimates that as of April 2003, approximately 733 UITs were subject to the provisions of rule 30e–2. The Commission further estimates that the annual burden associated with rule 30e–2 is 121 hours for each UIT, including an estimated 20 hours associated with the notice requirement for householding and an estimated 1 hour associated with the explanation of the right to revoke consent to householding, for a total of 88,693 burden hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

In addition to the burden hours, the Commission estimates that the cost of contracting for outside services associated with complying with rule 30e–2 is $12,000 per respondent (80 hours times $150 per hour for independent auditor services), for a total of $8,796,000 ($12,000 per respondent times 733 respondents).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days after this notice.

Dated: February 2, 2004.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2761 Filed 2–9–04; 8:45 am]

BILLING CODE 8010–01–P

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Rel. No. 7932; Exchange Act Rel. No. 43786; Investment Company Act Rel. No. 24816 (Jan. 2, 2001) [66 FR 3734 (Jan. 16, 2001)].

[2] Management investment companies are defined in section 4(3) of the Investment Company Act as any investment company other than a face-amount certificate company or a unit investment trust, as those terms are defined in sections 4(1) and 4(2) of the Investment Company Act. *See* 15 U.S.C. 80a–4.

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 26346; 812–12610]**

## FFTW Funds, Inc. et al.; Notice of Application

February 4, 2004.

**AGECNCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under section 12(d)(1)(J) of the Investment Company Act of 1940 ("Act") for an exemption from section 12(d)(1)(G)(i)(II) of the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit funds of funds relying on section 12(d)(1)(G) of the Act to invest in securities and other financial instruments.

**APPLICANTS:** FFTW Funds, Inc. (the "Fund") and Fischer Francis Trees & Watts, Inc. (the "Manager").

**FILING DATES:** The application was filed on August 15, 2001, and amended on February 3, 2004.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 1, 2004, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 5th Street, NW., Washington, DC 20549–0609; Applicants, c/o Robin Meister, Chief Risk and Legal Officer, Fischer Francis Trees & Watts, Inc., 200 Park Ave., New York, NY 10166.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Mann, Senior Counsel, at (202) 942–0582, or Mary Kay Frech, Branch

Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 5th Street, NW., Washington, DC 20549–0102 (telephone (202) 942–8090).

**Applicants' Representations**

1. The Fund is registered under the Act as an open-end management investment company and is organized as a Maryland corporation. The Fund consists of the following nine active portfolios ("Portfolios"): U.S. Short-Term Portfolio, Limited Duration Portfolio, Mortgage-Backed Portfolio, Worldwide Portfolio, Worldwide Core Portfolio, International Portfolio, Emerging Markets Portfolio, U.S. Inflation-Indexed Portfolio, and Global Inflation-Indexed Hedged Portfolio. It is expected that Worldwide Portfolio, Worldwide Core Portfolio, International Portfolio and Limited Duration Portfolio (the "Acquiring Portfolios") would each acquire shares of one or more of the following Portfolios: U.S. Short-Term Portfolio, Emerging Markets Portfolio, Mortgage-Backed Portfolio, U.S. Inflation-Indexed Portfolio and Global Inflation-Indexed Hedged Portfolio (the "Underlying Funds"). The Acquiring Portfolios would also invest in certain debt and equity securities or other financial instruments ("Other Securities").[1]

2. The Manager is registered as an investment adviser under the Investment Advisers Act of 1940, and is a wholly-owned subsidiary of Charter Atlantic Corporation. The Manager serves as investment adviser for each Portfolio. Applicants request that each registered open-end management investment company, or series thereof, that, currently or in the future, is part of the same "group of investment companies" as the Fund, as defined in section 12(d)(1)(G)(ii) of the Act, and is advised by the Manager or any entity controlling, controlled by or under common control with the Manager, be permitted to rely on the order (included in the terms "Acquiring Portfolios" and "Underlying Funds").

3. Applicants believe that the proposed structure will provide a more efficient way for each Acquiring Portfolio to allocate investment risk of portions of a particular index by investing a portion of its assets in an Underlying Fund that focuses on that asset class.[2]

**Applicants' Legal Analysis**

1. Section 12(d)(1)(A) of the Act provides that no registered investment company ("acquiring company") may acquire securities of another investment company ("acquired company") if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) the acquiring company and the acquired company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Securities Exchange Act of 1934 or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G). Applicants state that the proposed arrangement would comply with the provisions of section 12(d)(1)(G), but for the fact that each Acquiring Portfolio may invest a portion of its assets directly in securities other than those specified in section 12(d)(1)(G)(i)(II).

3. Section 12(d)(1)(J) of the Act provides that the Commission may exempt persons or transactions from any provision of section 12(d)(1) if, and to the extent that, the exemption is consistent with the public interest and the protection of investors. Applicants request an order under section 12(d)(1)(J) exempting them from section 12(d)(1)(G)(i)(II). Applicants assert that permitting the Acquiring Portfolios to invest in Other Securities as described in the application would not raise any of the concerns that the requirements of section 12(d)(1)(G) were designed to address.

**Applicants' Conditions**

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. Before approving any advisory contract under section 15 of the Act, the board of directors of the Fund, with respect to an Acquiring Portfolio, including a majority of the directors who are not "interested persons" as defined in section 2(a)(19) of the Act, will find that advisory fees, if any, charged under the contract to the Acquiring Portfolio are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to any Underlying Fund's advisory contract. Such finding, and the basis upon which it was made, will be recorded fully in the minute books of the Acquiring Portfolio.

2. Applicants will comply with all provisions of section 12(d)(1)(G), except for section 12(d)(1)(G)(i)(II) to the extent that it restricts any Acquiring Portfolio from investing in Other Securities as described in the application.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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[1] These investments will not include shares of any registered investment companies that are not in the same group of investment companies as the Acquiring Portfolios.

[2] Applicants state that in the event an Underlying Fund is organized in a master-feeder structure, the Acquiring Portfolio would not invest in shares of the feeder fund, but in shares of the master portfolio. In all such cases, the master portfolio would be part of the same group of investment companies as the Acquiring Portfolio. Such master portfolio is included in the term Underlying Fund. All existing entities that currently intend to rely on the order are named as applicants. Any Acquiring Portfolio and any Underlying Fund that may rely on the order in the future will do so only in accordance with the terms and conditions of the application.

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49136; File No. SR–Amex–2003–99]**

## Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by American Stock Exchange LLC Relating to Trust Certificates Linked to a Basket of Investment Grade Fixed Income Securities

January 28, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to approve for listing and trading under section 107A of the Amex Company Guide ("Company Guide"), trust certificates linked to a basket of investment grade fixed income debt instruments.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Under section 107A of the Amex Company Guide, the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds debentures, or warrants. [3] The Amex proposes to list for trading under section 107A of the Company Guide, the ABS Securities. The Exchange proposed to list and trade under section 107A of the Company guide, asset-backed securities ("ABS Securities") representing ownership interests in the Select Notes Trust 2004–01[4] ("Trust"), a special purpose trust to be formed by Structured Obligations Corporation ("SOC"),[5] and the trustee of the Trust pursuant to a trust agreement, which will be entered into on the date that the ABS Securities are issued. The assets of the Trust will consist primarily of a basket or portfolio of up to approximately twenty-five (25) investment-grade fixed-income securities ("Underlying Corporate Bonds") and United States Department of Treasury STRIPS or securities issued by the United States Department of the Treasury ("Treasury Securities") or government sponsored entity securities ("GSE Securities"). In the aggregate, the component securities of the basket or portfolio will be referred to as the "Underlying Securities."

The ABS Securities will conform to the initial listing guidelines under section 107A [6] and continued listing guidelines under sections 1001–1003[7] of the Company Guide. At the time of issuance, the ABS Securities will receive an investment grade rating from a nationally recognized securities rating organization ("NRSRO"). The issuance of the ABS Securities will be a repackaging of the Underlying Corporate Bonds together with the addition of either Treasury Securities or GSE Securities,[8] with the obligation of the Trust to make distributions to holders of the ABS Securities depending on the amount of distributions received by the Trust on the Underlying Securities.

However, due to the pass-through and passive nature of the ABS Securities, the Exchange intends to rely on the assets and stockholder equity of the issuers of the Underlying Corporate Bonds as well as GSE Securities, rather than the Trust to meet the requirement in section 107A of the Company Guide. The corporate issuers of the Underlying Corporate Bonds and GSE Securities will meet or exceed the requirements of section 107A of the Company Guide. The distribution and principal amount/aggregate market value requirements found in sections 107A(b) and (c), respectively, will otherwise be met by the Trust as issuer of the ABS Securities. In addition, the Exchange for purposes of including Treasury Securities will rely on the fact that the issuer is the United States government rather than the asset and stockholder tests found in section 107A.

The basket of Underlying Securities will not be managed and will generally remain static over the term of the ABS Securities. Each of the Underlying Securities provide for the payment of interest on a semi-annual basis, but the ABS Securities will provide for monthly or quarterly distributions of interest. Neither the Treasury Securities or GSE Securities will make periodic payments of interest.[9] The Exchange represents

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8624 (March 8, 199) (order approving File No. SR–Amex–89–29).

[4] Telephone conference between Jeffrey P. Burns, Associate General Counsel, Amex, and Florence E. Harmon, Senior Special Counsel, Division of Market Regulation, Commission (January 5, 2004).

[5] SOC is a wholly-owned special purpose entity of J.P. Morgan Securities Holdings Inc. and the registrant under the Form S–3 Registration Statement (No. 333–67188) under which the securities will be issued.

[6] The initial listing standards for the ABS Securities require: (1) A minimum public distribution of one million units; (2) a minimum of 400 shareholders; (3) a market value of at least $4 million; and (4) a term of at least one year. However, if traded in thousand dollar denominations, then there is no minimum holder requirement. In addition, the listing guidelines provide that the issuer have assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in Section 101 of the Company Guide, the Exchange pursuant to section 107A of the Company Guide will require the issuer to have the following: (1) Assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[7] The Exchange's continued listing guidelines are set forth in sections 1001 through 1003 of part 10 to the Exchange's Company Guide. Section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the ABS Securities, the Exchange will rely on the guidelines for bonds in section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.

[8] A GSE Security is a security that is issued by a government-sponsored entity such as Federal National Mortgage Association ("Fannie Mae"), Federal Home Loan Mortgage Corporation ("Freddie Mac"), Student Loan Marketing Association ("Sallie Mae"), the Federal Home Loan Banks and the Federal Farm Credit Banks. All GSE debt is sponsored but not guaranteed by the Federal government, whereas government agencies such as Government National Mortgage Association ("Ginnie Mae") are divisions of the United States government whose securities are backed by the full faith and credit of the United States.

[9] A stripped fixed income security, such as a Treasury Security or GSE Security, is a security that

Continued

that, to alleviate this cash flow timing issue, the Trust will enter into an interest distribution agreement ("Interest Distribution Agreement") as described in the prospectus supplement related to the ABS Securities ("Prospectus Supplement").[10] Principal distributions on the ABS Securities are expected to be made on dates that correspond to the maturity dates of the Underlying Securities, (*i.e.*, the Underlying Corporate Bonds and Treasury Securities or GSE Securities). However, some of the Underlying Securities may have redemption provisions and in the event of an early redemption or other liquidation (*e.g.*, upon an event of default) of the Underlying Securities, the proceeds from such redemption (including any make-whole premium associated with such redemption) or liquidation will be distributed pro rata to the holders of the ABS Securities. Each Underlying Corporate Bond will be issued by a corporate issuer and purchased in the secondary market.

In the case of Treasury Securities, the Trust will either purchase the securities directly from primary dealers or in the secondary market, which consists of primary dealers, non-primary dealers, customers, financial institutions, non-financial institutions and individuals. Similarly, in the case of GSE Securities, the trust will either purchase the securities directly from the issuer or in the secondary market.

Holders of the ABS Securities generally will receive interest on the face value in an amount to be determined at the time of issuance of the ABS Securities and disclosed to investors. The rate of interest payments will be based upon prevailing interest rates at the time of issuance and made to the extent that coupon payments are received from the Underlying Securities. Distributions of interest will be made monthly or quarterly. Investors will also be entitled to be repaid the principal of their ABS Securities from the proceeds of the principal payments on the Underlying Securities.[11] The payout or return to investors on the ABS Securities will not be leveraged.

The ABS Securities will mature on the latest maturity date of the Underlying Securities. Holders of the ABS Securities will have no direct ability to exercise any of the rights of a holder of an Underlying Corporate Bond; however, holders of the ABS Securities as a group will have the right to direct the Trust in its exercise of its rights as holder of the Underlying Securities.

The proposed ABS Securities are virtually identical to Select Notes Trust 2003–02, 2003–03, 2003–04 and 2003–05 previously approved by the Commission.[12] The only difference being the actual Underlying Securities in the basket of investment grade fixed-income securities. Accordingly, the Exchange proposes to provide for the listing and trading of the ABS Securities where the Underlying Securities meet the Exchange's Bond and Debenture Listing Standards set forth in section 104 of the Amex Company Guide. The Exchange represents that all of the Underlying Securities in the proposed basket will meet or exceed these listing standards.

The Exchange's Bond and Debenture Listing Standards in Section 104 of the Company Guide provide for the listing of individual bond or debenture issuances provided the issue has an aggregate market value or principal amount of at least $5 million and any of: (1) The issuer of the debt security has equity securities listed on the Exchange (or on the New York Stock Exchange ("NYSE") or on the Nasdaq National Market ("Nasdaq")); (2) an issuer of equity securities listed on the Exchange (or on the NYSE or on the Nasdaq) directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security; (3) an issuer of equity securities listed on the Exchange (or on the NYSE or on the Nasdaq) has guaranteed the debt security; (4) an NRSRO has assigned a current rating to the debt security that is no lower than an S&P Corporation ("S&P") "B" rating or equivalent rating by another NRSRO; or (5) or if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned (i) an investment grade rating to an immediately senior issue or (ii) a rating that is no lower than a S&P "B" rating or an equivalent rating by another NRSRO to a pari passu or junior issue.

In addition to the Exchange's Bond and Debenture Listing Standards, an Underlying Security must also be of investment grade quality as rated by an NRSRO and at least 75% of the underlying basket is required to contain Underlying Securities from issuances of $100 million or more. The maturity of each Underlying Security is expected to match the payment of principal of the ABS Securities with the maturity date of the ABS Securities being the latest maturity date of the Underlying Securities. Amortization of the ABS Securities will be based on (1) the respective maturities of the Underlying Securities, including Treasury Securities or GSE Securities, (2) principal payout amounts reflecting the pro-rata principal amount of maturing Underlying Securities, and (3) any early redemption or liquidation of the Underlying Securities, including Treasury Securities or GSE Securities.

Investors will be able to obtain the prices for the Underlying Securities through Bloomberg L.P. ("Bloomberg") or other market vendors, including the broker-dealer through whom the investor purchased the ABS Securities.[13] In addition, the Bond Market Association ("TBMA") provides links to price and other bond information sources on its investor Web site at www.investinginbonds.com. Transaction prices and volume data for the most actively traded bonds on the exchanges are also published daily in newspapers and on a variety of financial Web sites. The National Association of Securities Dealers, Inc. ("NASD") Trade Reporting and Compliance Engine ("TRACE") will also help investors obtain transaction information for the most active corporate debt securities, such as investment grade corporate bonds.[14] For a fee, investors can have access to intra-day bellwether quotes.[15]

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is separated into its periodic interest payments and principal repayment. The separate strips are then sold individually as zero coupon securities providing investors with a wide choice of alternative maturities.

[10] Pursuant to the Interest Distribution Agreement, shortfalls in the amounts available to pay monthly or quarterly interest to holders of the ABS Securities due to the Underlying Securities paying interest semi-annually will be made to the Trust by JP Morgan Chase Bank or one of its affiliates and will be repaid out of future cash flow received by the Trust from the Underlying Securities.

[11] The Underlying Securities may drop out of the basket upon maturity or upon payment default or acceleration of the maturity date for any default other than payment default. *See* Prospectus for a schedule of the distribution of interest and of the principal upon maturity of each Underlying Security and for a description of payment default and acceleration of the maturity date.

[12] *See* Securities Exchange Act Release Nos. 48791 (November 17, 2003), 68 FR 65750 (November 21, 2003) (File No. SR–Amex–2003–92); 48312 (August 8, 2003), 68 FR 48970 (August 15, 2003) (File No. SR–Amex–2003–69); 47884 (May 16, 2003), 68 FR 28305 (May 23, 2003) (File No. SR–Amex–2003–37); 47730 (April 24, 2003), 68 FR 23340 (May 1, 2003) (File No. SR–Amex–2003–25); 46923 (November 27, 2002), 67 FR 72247 (December 4, 2002) (File No. SR–Amex–2002–92); and 46835 (November 14, 2002), 67 FR 70271 (November 21, 2002) (File No. SR–Amex–2002–70).

[13] The prices of Underlying Securities generally will be determined by one or more market makers in accordance with applicable law and Exchange's rules.

[14] *See* Securities Exchange Act Release No. 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001) (File No. SR–NASD–99–65). Investors are able to access TRACE information at *http://www.nasdbondinfo.com/*.

[15] Corporate prices are available at 20-minute intervals from Capital Management Services at *http://www.bondvu.com/*.

Price and transaction information for Treasury Securities and GSE Securities may also be obtained at *http://publicdebt.treas.gov* and *http://www.govpx.com*, respectively. Price quotes are also available to investors via proprietary systems such as Bloomberg, Reuters and Dow Jones Telerate. Valuation prices [16] and analytical data may be obtained through vendors such as Bridge Information Systems, Muller Data, Capital Management Sciences, Interactive Data Corporation and Barra.

The ABS Securities will be listed in $1,000 denominations with the Exchange's existing debt floor trading rules applying to trading. First, pursuant to Amex Rule 411, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the ABS Securities.[17] Second, the ABS Securities will be subject to the debt margin rules of the Exchange.[18] Third, the Exchange will, prior to trading the ABS Securities, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the ABS Securities and highlighting the special risks and characteristics of the ABS Securities. With respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the ABS Securities: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the ABS Securities. Specifically, the Amex will rely on its existing surveillance procedures governing debt, which have been deemed adequate under the Act. In addition, the Exchange also has a general policy, which prohibits the distribution of material, non-public information by its employees.

[16] "Valuation Prices" refer to an estimated price that has been determined based on an analytical evaluation of a bond in relation to similar bonds that have traded. Valuation prices are based on bond characteristics, market performance, changes in the level of interest rates, market expectations and other factors that influence a bond's value.

[17] Amex Rule 411 requires that every member, member firm or member corporation use due diligence to learn the essential facts, relative to every customer and to every order or account accepted.

[18] *See* Amex Rule 462.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6 of the Act [19] in general and furthers the objectives of section 6(b)(5) [20] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange did not receive any written comments on the proposed rule change.

**III. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2003–99. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR–Amex–2003–99 and should be submitted by March 2, 2004.

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

**IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change**

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of section 6(b)(5) of the Act.[21] The Commission finds that this proposal is similar to several approved equity-linked instruments currently listed and traded on the Amex.[22] Accordingly, the Commission finds that the listing and trading of the ABS Securities is consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, protect investors and the public interest consistent with section 6(b)(5) of the Act.[23]

As described more fully above, the ABS Securities are asset-backed securities and represent a repackaging of the Underlying Corporate Bonds together with the addition of either Treasury Securities or GSE Securities, subject to certain distribution of interest obligations of the Trust. The ABS Securities are not leveraged instruments. The ABS Securities are debt instruments whose price will still be derived and based upon the value of the Underlying Securities. The Exchange represents that the value of the Underlying Securities will be determined by one or more market makers, in accordance with Exchange rules. Investors are guaranteed at least the principal amount that they paid for the Underlying Securities. In addition, each of the Underlying Corporate Bonds will pay interest on a semi-annual basis while the ABS securities themselves will pay interest on a monthly or quarterly basis, pursuant to the Interest Distribution Agreement. Neither the Treasury Securities or GSE Securities will make periodic payments of interest.[24] In addition, the ABS

[21] *Id.*

[22] *See supra* note 12.

[23] 15 U.S.C. 78f(b)(5). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[24] *See supra* note 9.

securities will mature on the latest maturity date of the Underlying Securities. However, due to the pass-through nature of the ABS Securities, the level of risk involved in the purchase or sale of the ABS Securities is similar to the risk involved in the purchase or sale of traditional common stock.

The Commission notes that the Exchange's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the ABS Securities. In particular, by imposing the hybrid listing standards, suitability, disclosure, and compliance requirements noted above, the Commission believes the Exchange has addressed adequately the potential problems that could arise from the hybrid nature of the ABS Securities. Moreover, the Commission notes that the Exchange will distribute a circular to its membership calling attention to the specific risks associated with the ABS Securities.

The Commission notes that the ABS Securities are dependent upon the individual credit of the issuers of the Underlying Securities. To some extent this credit risk is minimized by the Exchange's listing standards in section 107A of the Company Guide which provide that only issuers satisfying asset and equity requirements may issue securities such as the ABS Securities. In addition, the Exchange's "Other Securities" listing standards further provide that there is no minimum holder requirement if the securities are traded in thousand dollar denominations.[25] The Commission notes that the Exchange has represented that the ABS Securities will be listed in $1000 denominations with its existing debt floor trading rules applying to the trading. In any event, financial information regarding the issuers of the Underlying Securities will be publicly available.[26]

Due to the pass-through and passive nature of the ABS Securities, the Commission does not object to the Exchange's reliance on the assets and stockholder equity of the Underlying Securities rather than the Trust to meet the requirement in section 107A of the Company Guide. The Commission notes that the distribution and principal amount/aggregate market value requirements found in sections 107A(b) and (c), respectively, will otherwise be met by the Trust as issuer of the ABS Securities. Thus, the ABS Securities will conform to the initial listing guidelines under section 107A and continued listing guidelines under sections 1001–1003 of the Company Guide, except for the assets and stockholder equity characteristics of the Trust. At the time of issuance, the Commission also notes that the ABS Securities will receive an investment grade rating from an NRSRO.

The Commission also believes that the listing and trading of the ABS Securities should not unduly impact the market for the Underlying Securities or raise manipulative concerns. As discussed more fully above, the Exchange represents that, in addition to requiring the issuers of the Underlying Securities meet the Exchange's section 107A listing requirements (in the case of Treasury securities, the Exchange will rely on the fact that the issuer is the United States Government rather than the asset and stockholder tests found in section 107A), the Underlying Securities will be required to meet or exceed the Exchange's Bond and Debenture Listing Standards pursuant to section 104 of the Amex's Company Guide, which among other things, requires that underlying debt instrument receive at least an investment grade rating of "B" or equivalent from an NRSRO. Furthermore, at least 75% of the basket is required to contain Underlying Securities from issuances of $100 million or more. The Amex also represents that the basket of Underlying Securities will not be managed and will remain static over the term of the ABS securities. In addition, the Amex's surveillance procedures will serve to deter as well as detect any potential manipulation.

The Commission notes that the investors may obtain price information on the Underlying Securities through market venders such Bloomberg, or though Web sites such as *http://www.investinginbonds.com* (for Underlying Corporate Bonds) and *http://publicdebt.treas.gov* and *http://www.govpx.com* (for Treasury Securities and GSE Securities, respectively).

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Amex has requested accelerated approval because these products are virtually identical to Select Notes Trust currently listed and traded on the Amex.[27] The Commission believes that the ABS Securities will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the ABS Securities promptly. Additionally, the ABS Securities will be listed pursuant to Amex's existing hybrid security listing standards as described above. Based on the above, the Commission believes that there is good cause, consistent with sections 6(b)(5) and 19(b)(2) of the Act [28] to approve the proposal on an accelerated basis.

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,[29] that the proposed rule change (SR–Amex–2003–99) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[30]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2826 Filed 2–9–04; 8:45 am]

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[25] *See* Company Guide section 107A.

[26] The ABS Securities will be registered under section 12 of the Act.

[27] *See supra* note 12.

[28] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[29] 15 U.S.C. 78o–3(b)(6) and 78s(b)(2).

[30] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49180; File No. SR–BSE–2004–02]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to Complex Orders

February 3, 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 January 28, 2004 the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rule regarding Complex Orders. The text of the proposed rule change is available at the Exchange and at the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

**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 the proposed rule change is to amend Chapter V, Section 27 of the Rules of the Boston Options Exchange (the "BOX Rules") relating to the trading of Complex Orders. The Exchange is proposing to amend Section 27 by adding new paragraph (c) specifying the process by which Boston Options Exchange ("BOX") Options Participants ("BOX Participants") must notify BOX of a proposed Complex Order strategy. The Exchange is also setting forth, in the same paragraph, that an advisory message regarding a Complex Order strategy would be sent by BOX to all BOX Participants at its creation and prior to the start of its trading.

Each Complex Order strategy would be treated as a separate trading instrument on the Complex Order Book. During the trading day BOX would maintain a listing, accessible to all BOX Participants through the BOX system, of all Complex Order strategies available on BOX. This list would not show any orders or prices. A BOX Participant who wishes to propose trading in a Complex Order strategy, that is not already listed as available on the BOX Complex Order Book, must either send an electronic Complex Order strategy request to BOX through the BOX trading system or make a telephone request with the BOX Market Operations Center. Along with this request, the BOX Participant may also place a Complex Order in the proposed strategy. BOX would check each strategy request to validate that the option components of the strategy are listed on BOX and that the Complex Order type is available on BOX.

After validation, an "advisory" message regarding the Complex Order strategy would be sent by BOX to all BOX Participants, stating the terms of the strategy created and the time when Complex Orders on the new strategy will begin to trade. Trading would not begin until at least five minutes has elapsed from the time the advisory message was sent from BOX to all BOX Participants. Any Complex Orders on the newly-created strategy that are received prior to the start of trading would be placed in the Complex Order Book. Complex Orders on the Complex Order Book are not disseminated to the Options Price Reporting Authority ("OPRA"), but are separately disseminated by BOX through a broadcast to all BOX Participants, showing the five best limits for each strategy. Trading in the newly-created strategy would commence at the time announced in the advisory message.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[3] in general, and Section 6(b)(5) of the Act,[4] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest by granting the Exchange greater authority to regulate the trading of Complex Orders.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act[5] and Rule 19b-4(f)(6)[6] thereunder because it 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; and the Exchange has given the Commission written notice of its intention to file the proposed rule change. 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.

Under Rule 19b–4(f)(6)(iii) of the Act,[7] the proposed rule change does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange has requested that the Commission accelerate the thirty-day operative date of the proposal and waive the requirement that the Exchange submit the pre-filing period written notice of its intent to file the proposed rule change at least five business days prior to the filing date, so that the Exchange may remain competitive with other exchanges that currently have similar rules in effect and may begin the trading of Complex Orders in options on the Exchange. The Commission, consistent with the protection of investors and the public interest, has determined to waive the requirements that notice be filed at least five business days prior to the filing and to accelerate the 30-day operative date to February 3, 2004,[8] and, therefore, the proposal is effective and operative on that date.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–BSE–2004–02. 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

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6).

[7] 17 CFR 240.19b–4(f)(6)(iii).

[8] For purposes only of accelerating the 30-day operative period for this proposal, the commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–BSE–2004–02 and should be submitted by March 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2760 Filed 2–9–04; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49171; File No. SR–BSE–2004–03]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to Its Boston Options Exchange Trading Rules

February 2, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 29, 2004, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange.[3] The BSE has submitted the proposed rule change under Section 19(b)(3)(A) of the Act[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The BSE proposes to add new paragraph (f), relating to anticipatory hedging, to Chapter III, "Business Conduct," Section 4, "Prevention of the Misuse of Material Nonpublic Information," of the Boston Options Exchange trading rules ("BOX Rules"). Proposed new language is *italicized.*

* * * * *

Chapter III Business Conduct

Sec. 4 Prevention of the Misuse of Material NonPublic Information

(a)–(e) no change

*(f) It may be considered conduct inconsistent with just and equitable principles of trade for any Participant or person associated with a Participant who has knowledge of all material terms and conditions of:*

*(i) an order and a solicited order,*

*(ii) an order being facilitated or submitted to the Price Improvement Period, or*

*(iii) orders being crossed;*

*the execution of which are imminent, to enter, based on such knowledge, an order to buy or sell an option for the same underlying security as any option that is the subject of the order, or an order to buy or sell the security underlying such class, or an order to buy or sell any related instrument until (a) the terms and conditions of the order and any changes in the terms and conditions of the order of which the Participant or person associated with the Participant has knowledge are disclosed to the trading crowd, or (b) the trade can no longer reasonably be considered imminent in view of the passage of time since the order was received. The terms of an order are "disclosed" to the trading crowd on BOX when the order is entered into the BOX Book or the Price Improvement Period, as defined in Chapter V, Section 18 of these Rules. For purposes of this Paragraph (f), an order to buy or sell a "related instrument" means, in reference to an index option, an order to buy or sell securities comprising 10% or more of the component securities in the index or an order to buy or sell a futures contract on an economically equivalent index.*

* * * * *

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 the proposed rule change is to add new paragraph (f), relating to anticipatory hedging, to Chapter III, "Business Conduct," Section 4, "Prevention of the Misuse of Material Nonpublic Information," of the BOX Rules. Currently, Chapter III, Section 4 of the BOX Rules contains policies and procedural requirements, as well as definitional language, regarding the obligations of Boston Options Exchange participants ("BOX Participants") to prevent the misuse of material nonpublic information. To remain consistent with similar rules of other options exchanges, the BSE is proposing to adopt new paragraph (f) regarding anticipatory hedging. The rest of Chapter III, Section 4, will remain unchanged.

Paragraph (f) would expressly prohibit any BOX Participant or person associated with a BOX Participant who has knowledge of the material terms and conditions of a solicited order, an order being facilitated or submitted to the Price Improvement Period ("PIP"),[6] or orders being crossed, the execution of which are imminent, from entering, based on such knowledge, an order to buy or sell an option for the same underlying security; an order to buy or sell the security underlying such class; or an order to buy or sell any related instrument. The prohibition would remain in effect until the terms and conditions of such solicited, facilitated, PIP or crossed order are disclosed to the trading crowd, or until the trade can no longer reasonably be considered imminent in view of the passage of time since the order was received.

To allow BOX Participants to know what constitutes a "related instrument"

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] File No. SR–BSE–2004–03 replaces and supersedes File No. SR-BSE–2003–24. *See* letter from John Boese, Vice President, Legal and Compliance, BSE, dated January 23, 2004.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

[6] *See* BOX Rules Chapter V, Section 18.

in reference to an index option, paragraph (f) clarifies that an order to buy or sell a related instrument means, in reference to an index option, an order to buy or sell securities comprising 10% or more of the component securities in the index or an order to buy or sell a futures contract on an economically equivalent index.

Under the proposal, a violation of paragraph (f) may be considered conduct inconsistent with just and equitable principles of trade.[7] The purpose of the proposed rule is to expressly prohibit anticipatory hedging that is based on inside information. The Exchange believes that a codified prohibition, and the proposed language stating that a violation of the rule may be considered conduct inconsistent with just and equitable principles of trade, should function as a deterrent to possible manipulative practices based on inside information.[8]

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[9] in general, and Section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest by granting the Exchange greater authority to regulate anticipatory hedging.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The BSE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The BSE has neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The BSE has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [11] and subparagraph (f)(6) of Rule 19b–4 thereunder.[12] Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty 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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. The BSE provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.[13] The BSE has requested that the Commission waive the 30-day operative delay to allow the BSE to remain competitive with other options exchanges that currently have similar rules in effect. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration will allow the BSE to institute its anticipatory hedging rules immediately. For these reasons, the Commission, consistent with the protection of investors and the public interest has determined to make the proposed rule change operative as of January 29, 2004.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–BSE–2004–03. 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 BSE. All submissions should refer to File No. SR–BSE–2004–03 and should be submitted by March 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2806 Filed 2–9–04; 8:45 am]

**BILLING CODE 8010–01–U**

[7] *See* BSE Rules of the Board of Governors Chapter II, Section 14, stating that a member, member organization, or person associated with or employed by a member or member organization shall not engage in conduct inconsistent with just and equitable principles of trade. Other BOX Rules expressly reference just and equitable principles of trade. *See, e.g.*, BOX Rules Chapter V, Section 18(f) and (i), Section 27.01 and Chapter VII, Section 1(d). The lack of express reference in other BSE rules should not be construed as waiving the ability to make a violation of Chapter II, Section 14 of the BSE Rules of the Board of Governors, co-exist with any other violation, depending on the facts and circumstances of the case. The Exchange believes that a violation of the existing crossing, facilitation and solicitation provisions of the BOX Rules could be a violation of just and equitable principles of trade and could be subject to disciplinary action as such. In addition, a violation of paragraph (f) of Chapter III, Section 4 of the BOX Rules, for instance, could be in and of itself a stand-alone violation.

[8] Depending on the facts and circumstances surrounding individual cases, anticipatory hedging activity may be a violation of other BSE Rules or rules under the Act.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49184; File No. SR–CBOE–2003–55]**

## Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. To Amend Provisions of its Constitution and Rules Pertaining to the Governance of the Exchange

February 4, 2004.

### I. Introduction

On November 19, 2003, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend provisions of CBOE's Constitution and rules pertaining to the governance of the Exchange. On December 11, 2003, CBOE submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on December 29, 2003.[3] No comments were received on the proposed rule change. This order approves the proposed rule change, as amended.

### II. Description of the Amended Proposal

*Terms of Office of Directors and Vice Chairman*

The proposed rule change will amend CBOE Constitution Sections 6.1(b), 6.4, and 8.1 to specify that Directors and the Vice Chairman take office on January 1. Currently, the term of office of Directors starts at the first regular meeting of the Board held after January 1 following the annual election, while the Vice Chairman's term starts on the 3rd Friday in December of each year. The proposal also amends CBOE Constitution Section 6.3(b) to provide the later of 45 days or until the next regular Board meeting for a Director who fails to maintain qualifications for a designated category to requalify. During any period in which a Director fails to maintain qualifications for a designated category, the Director shall be deemed not to hold office and the seat formerly held by the Director shall be deemed vacant for all purposes.

*CBOE's Nominating Committee*

The proposal amends CBOE Constitution Section 4.1(b) to allow a member of the Nominating Committee who was elected to a term of less than three years as a result of a vacancy to stand for reelection. The proposal also deletes from CBOE Constitution Section 4.3 the requirements that the Nominating Committee hold three meetings in October, and that it announce its slate of candidates no later than October 10th or the first business day thereafter if October 10th is not a business day. In addition, the proposal adopts new CBOE Constitution Section 4.8 to require that members of the Nominating Committee continuously meet the eligibility criteria for the category to which they were elected. New Constitution Section 4.8 also specifies that the Board of Directors alone determines whether a Nominating Committee member satisfies the qualification criteria for the category to which he or she was elected and that a member of the Nominating Committee who fails to maintain the applicable qualifications has 45 days from the date the Board determines the member is not qualified to requalify. During any period in which a member of the Nominating Committee fails to maintain the applicable qualifications, the member shall be deemed not to hold office and the seat formerly held by the member shall be deemed to be vacant for all purposes. The proposal also adopts new CBOE Constitution Section 4.9, which specifies that the Board may remove a Nominating Committee member in the event of the refusal, failure, neglect, or inability to discharge his or her duties, or for any cause affecting the best interests of the Exchange.

*Election and Voting Procedures*

The proposal adopts CBOE Constitution Section 3.8 to authorize the Board to set a "record date" to determine which members are entitled to receive notice and to vote in any Exchange election or vote. The record date will be the day preceding the date on which notice of the vote is given, if an alternate record date is not fixed by the Board. The proposal also amends CBOE Constitution Section 5.2 to provide that the Exchange may allow voting members to electronically submit ballots and proxies and to provide for a confidential electronic or online voting process in the future, if the Board determines to do so. The proposal also amends CBOE Constitution Section 10.1 to allow the Exchange to give notice to members and associated persons by messenger, courier service, facsimile or electronic mail, as well as in person or by mail or telephone as is currently provided in Section 10.1 while deleting wireless, telegraph, and cable as available communication methods. In addition, the proposal amends Constitution Section 10.2 to allow for the waiver of notice by the same means as notice may be given.

*Provisions for Notice to CBOE Members*

The proposal adopts new CBOE Constitution Section 10.1(b) which limits the types of notices that may be given via e-mail to those notices provided in the *Exchange Bulletin* and *Regulatory Bulletin* and any other types of notices designated by the Board. CBOE Constitution Section 10.1(b) will specifically provide that the Exchange may provide the *Exchange Bulletin* and the *Regulatory Bulletin* (including the notices contained therein) by e-mail. In addition, Section 10.1(b) will allow the Exchange to permit members and associated persons to request delivery of the *Bulletins* (or such other notices as the Board may designate) by other means, in a form and manner prescribed by the Exchange.

*Securities Transaction Policy*

The proposal deletes CBOE Constitution Section 11.4, which generally prohibited officers and employees of the Exchange from trading any CBOE-listed option and required them to report to the Exchange every purchase or sale of any security underlying a CBOE-listed option. CBOE has represented that the securities transaction policy will now be included in the Exchange Employee Handbook, instead of in the Exchange's Constitution. The proposal also deletes from CBOE Rule 9.17 the requirement that a member organization must obtain authorization from the CBOE before executing securities transactions for officers or employees of any national securities exchange that is a participant of The Options Clearing Corporation.

CBOE has represented that it plans to liberalize the securities transaction policies to allow employees (with certain restrictions applicable to Regulatory Services Division employees) to trade CBOE-listed products and to require employees to report transactions in CBOE listed products to the Exchange. In addition, CBOE Rule 9.17 will continue to require member organizations to obtain authorization from the CBOE before executing securities transactions for CBOE officers and employees.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48950 (December 18, 2003), 68 FR 74991 ("Notice of Proposed Rule Change").

*Composition of the MTS Committee*

CBOE is amending Rule 8.82 to modify the composition of the MTS Committee. Under the proposed rule change, the nine elected members of the MTS Committee will include: three persons whose primary business is as a Market-Maker, three persons whose primary business is as a Market-Maker or as a Designated Primary Market Maker ("DPM") Designee, and three persons whose primary business is as a Floor Broker, at least two of whom represent public customer business in the course of their activities as a Floor Broker. The proposal removes a provision requiring that no more than two members of the MTS Committee be associated with a DPM. The Vice Chairman of the Exchange and the Chairman of the Market Performance Committee will continue to serve on the MTS Committee.

The amendments to CBOE Rule 8.82 also provide that one of the nine elected positions on the MTS Committee may instead be filled by a lessor whose primary business is not as a Market-Maker, DPM Designee, or Floor Broker, and whose primary residence is located within 80 miles of the Exchange's trading floor. In addition, the amendments to Rule 8.82 provide that the sole judge of whether a candidate satisfies the applicable qualifications for election to the MTS Committee in a designated category shall be the Nominating Committee, in the case of candidates nominated by the Nominating Committee, or the Executive Committee, in the case of candidates nominated by petition, and the decision of the respective committee shall be final. The proposal further amends CBOE Rule 8.82 to provide that: (i) no elected member of the MTS Committee may be affiliated with any other elected member of the MTS Committee; (ii) the term of office of elected MTS Committee members will commence at the time of the first regular Board meeting of the calendar year; (iii) the Board of Directors is the sole judge of whether or not an MTS Committee member no longer qualifies to serve on the Committee; (iv) the Board may remove MTS Committee members for cause; and (v) the Vice Chairman, with the approval of the Board, may fill vacancies on the MTS Committee until the first regular Board meeting of the calendar year following the next annual election. The MTS Committee monitors and implements the Exchange's DPM program.

*Terms of Office for Committee Members*

The proposed rule change also amends CBOE Rule 2.1 to provide that the term of office for committee members appointed pursuant to that Rule will continue until the first regular Board meeting of the next calendar year and until their successors are appointed or until death, resignation or removal. In addition, amended Rule 2.1 provides that any action taken by majority of the committee members voting, as opposed to present, at a meeting shall be the act of the committee.

*Other Business Activities of the President of the Exchange*

The Exchange also is amending CBOE Constitution Section 8.6 to allow the Board of Directors to exempt the President from the prohibition against engaging in any business other than as President of the Exchange, in the same manner that the Board may exempt the Chairman of the Board pursuant to Constitution Section 8.2. The Commission notes that the Pacific Exchange, Inc. ("PCX") has a similar provision in its Constitution.[4] In addition, the Commission notes that under CBOE Rule 8.1(d), the President cannot be affiliated with a CBOE member.

In addition to the changes described above, the Exchange is adopting changes to several provisions of its Constitution and rules that are intended to update those provisions to reflect current practice. Those changes are described in the Notice of Proposed Rule Change.

**III. Discussion**

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission finds that the proposal is consistent with the requirements of Sections 6(b)(3)[6] and 6(b)(5)[7] of the Act. Section 6(b)(3) requires, among other things, that the CBOE's rules assure a fair representation of its members in the administration of its affairs. Section 6(b)(5) requires, among other things, that CBOE's rules be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and, in general, protect investors and the public interest.

The Commission believes that the proposed rule change should clarify CBOE's Constitution with respect to the terms of office of its Directors and committee members, as well as the composition of its Nominating Committee and thereby should increase the efficiency of CBOE's governance. In addition, the Commission believes that the amendments to the composition of CBOE's MTS Committee are consistent with its obligation to ensure its members are fairly represented in the administration of its affairs, and should permit CBOE to include representatives of diversified broker-dealers on the Committee without permitting the Committee to become dominated by any one type of member constituency. Further, the Commission believes that the proposed rule change should update CBOE's election and voting procedures, as well as the methods by which CBOE may provide notice to its members.

**IV. Conclusion**

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change, as amended, (SR-CBOE–2003–55) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2824 Filed 2–9–04; 8:45 am]

BILLING CODE 8010–01–P

[4] *See* PCX Constitution Section 2(a).

[5] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(3).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49188; File No. SR–CHX–2003–17]**

## Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Incorporated Relating to Automatic Quotations

February 4, 2004.

On June 16, 2003, the Chicago Stock Exchange, Incorporated ("CHX" 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 delete an interpretation of CHX Article XX, Rule 7 that prohibits specialists from disseminating automatically-generated quotations that are more than $.10 away from the Intermarket Trading System best bid or offer. On November 26, 2003, CHX filed Amendment No. 1 to the proposed rule change.[3] The **Federal Register** published the proposed rule change, as amended, for comment on December 31, 2003.[4] 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.[5] In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires, among other things, that an exchange's rules be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The CHX has represented that, following the securities industry's transition to decimal pricing, the consolidated quotations in the national securities markets flicker significantly throughout the trading day. Consequently, the quotations generated by CHX's auto-quote functionality flicker significantly during the trading day, resulting in significant, costly quotation traffic. Given that the Consolidated Quotation Association is now charging participants based on their capacity requirements, CHX wants to eliminate any unnecessary use of capacity. The Commission notes that, since automatic executions are required to be executed at the national best bid or offer in effect at the time the order is received or better, the proposed change should not have any negative effect on execution prices.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change, as amended, (SR–CHX–2003–17) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2807 Filed 2–9–04; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Kathleen M. Boege, Associate General Counsel, CHX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 25, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange expanded its discussion regarding the consequences of the proposed rule change, and also clarified that the proposed rule change was filed pursuant to Section 19(b)(2) of the Act. 15 U.S.C. 78s(b)(2).

[4] *See* Securities Exchange Act Release No. 48982 (December 23, 2003), 68 FR 75674.

[5] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49183; File No. SR–NYSE–2002–32]**

## Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 To Incorporate Interpretive Material to Several NYSE Rules

February 4, 2004.

### I. Introduction

On August 12, 2002, the New York Stock Exchange ("NYSE" 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 to incorporate interpretive material to several existing NYSE Rules. On March 11, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[3] On May 21, 2003, the Exchange filed Amendment No. 2 to the proposed rule change.[4]

On June 9, 2003, the proposed rule change, as amended by Amendment Nos. 1 and 2, was published for comment in the **Federal Register**.[5] The Commission received no comments on the proposed rule change, as amended. On June 11, 2003, the NYSE filed Amendment No. 3 to the proposed rule change.[6] On January 29, 2004, the NYSE filed Amendment No. 4 to the proposed rule change.[7] This order approves the proposed rule change, as amended.

### II. Description of the Proposed Rule Change

The NYSE filed the proposed rule change to codify long-standing interpretive material to several NYSE rules and to respond to recommendations made by an independent consultant retained by the NYSE.[8]

*A. NYSE Rule 72*

NYSE Rule 72 delineates the basic rule governing the priority and precedence of bids and offers at the same price on the Exchange. NYSE Rule 72(b) provides that certain types of agency cross transactions at a given price receive priority over pre-existing bids or offers at that price. The Exchange proposes to add a sentence to NYSE Rule 72(b) to clarify that a broker whose cross is broken up because another member has provided price improvement must follow the crossing procedures of NYSE Rule 76 before completing the balance of the cross.

The Exchange is also proposing to add an example to NYSE Rule 72(b) to illustrate its interpretation that a sale "clears the floor," meaning all bids and offers not satisfied in a given transaction are deemed to be simultaneously re-entered and on parity with each other.

*B. NYSE Rule 75*

The Exchange is proposing to codify formally in NYSE Rule 75 its long-standing practice that Floor disputes involving $10,000 or more, or questioned trades, can be referred for resolution to a panel of three Floor Governors, Senior Floor Officials, or

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated March 10, 2003 ("Amendment No. 1").

[4] See letter from Darla C. Stuckey, Corporate Secretary, NYSE to Nancy J. Sanow, Assistant Director, Division, Commission, dated May 20, 2003 ("Amendment No. 2").

[5] *See* Securities Exchange Act Release No. 47961 (June 2, 2003), 68 FR 34453.

[6] *See* letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated June 10, 2003 ("Amendment No. 3"). In Amendment No. 3, the Exchange added the phrase "or rejected" to a sentence within NYSE Rule 91.10 to clarify that transactions that are not rejected are deemed to be accepted for the purposes of NYSE Rule 91.10. This sentence now reads that "[t]ransactions which are not then confirmed or rejected in accordance with the procedures above are deemed to have been accepted." This is a technical amendment and is not subject to notice and comment.

[7] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated January 29, 2004 ("Amendment No. 4"). In Amendment No. 4, the Exchange provided the Commission with examples of different scenarios for confirming principal transactions under NYSE Rule 91.10. This is a technical amendment and is not subject to notice and comment.

[8] *See In the Matter of New York Stock Exchange, Inc.*, 70 S.E.C. Docket 106, Securities Exchange Act Release No. 41574 (June 29, 1999), Administrative Proceeding File No. 3–9925.

Executive Floor Officials, or any combination thereof if the parties to the dispute so agree. The proposed rule change further provides that members may, as an alternative, resolve such disputes through the arbitration procedures established under the Exchange's Constitution and Rules.

*C. NYSE Rule 91*

NYSE Rule 91.10 addresses the procedures a member follows to confirm a transaction involving another member who has elected to take or supply for his own account the securities named in an order entrusted to him. The Exchange is proposing to amend NYSE Rule 91.10 to make clear in the rule that only a member may confirm a transaction in the situations covered by the rule. The Exchange is also proposing to add a sentence to the Rule to clarify that transactions that are not confirmed or rejected are deemed to have been accepted.[9] In addition, the Exchange proposes to amend NYSE Rule 91.10 to provide that a member receiving a report of execution of a transaction where another member acted as principal triggers the member's unconditional right to reject the trade as soon as practicable, given the prevailing circumstances. Furthermore, the Exchange is amending NYSE Rule 91.10 to clarify that disputes as to whether there was sufficient time to reject the trade would be resolved under NYSE Rule 75.

The Exchange provided several examples of situations involving confirmation of a principal trade by a specialist [10] and whether the member took timely action. Under Rule 91.10, three different scenarios can occur in situations involving confirmation of a principal trade by a specialist. First, the broker can determine to take no action, in which case the transaction with the specialist would be deemed confirmed/accepted under NYSE Rule 91.10 since "transactions which are not then confirmed or rejected * * * are deemed to have been accepted." Second, the broker could determine to go to the specialist's post as soon as practicable under the prevailing circumstances to confirm the transaction by initialing the memorandum record of the specialist which shows the details of the trade and to return it to the specialist. Third, the broker could determine to go to the specialist's post as soon as practicable under the prevailing circumstances to reject the trade.

What is reasonable for a floor broker in taking timely action under NYSE Rule 91.10 depends on his location on the trading floor in relation to where the specialist's post is located, how busy he is, how timely the customer was in relaying his instructions to confirm/reject/do nothing, as well as prevailing market conditions. Any disagreement about whether a member or member organization took timely action in rejecting a trade or about whether a transaction was properly deemed to have been accepted under NYSE Rule 91.10 would be resolved in accordance with NYSE Rule 75, which gives the final determination to a Floor Official. If called upon to resolve such a dispute, a Floor Official would be expected to weigh the factors noted above. Any resolution of the dispute would, of necessity, depend on the unique facts of each particular situation. A Floor broker who received a report of execution within one minute of a trade, was located in close proximity to the trading post, and who took no action upon receiving the execution report, might, in the judgment of a Floor Official, be precluded from rejecting a trade after a period that could be as brief as several minutes, if the Floor Official concluded that the broker had not acted as soon as practicable under the circumstances. Conversely, a broker who did not receive an execution report until 10 or 15 minutes after the trade, and was actively executing orders in another trading room, might be deemed to have acted as soon as practicable in rejecting a trade after a period of a half hour or more, depending on the Floor Official's assessment of the reasonableness of the broker's actions.

The Exchange is also proposing to amend NYSE Rule 91.20 to replace the term "should" with "must," to reflect the mandatory nature of the procedures outlined, pertaining to principal transactions effected against orders in a specialist's possession.

The Exchange proposes to add NYSE Rule 91.50 regarding the rejection of specialist's principal transactions. The proposed rule states that if there is a continued pattern of rejections of a specialist's principal transactions, a Floor Official may be called upon to require the broker to review his actions. If a customer gives a continued pattern of rejection instructions to a Floor broker to reject any trade where the specialist acted as principal, a Floor Official would be able to review the appropriateness of the continued pattern of rejections by the broker, to make sure he is representing his customer as fiduciary and not giving the specialist, in effect, a kind of conditional order that is not recognized under Exchange rules. If a continued pattern of rejections does occur because the customer will not accept executions with the specialist as contra party, the Floor broker should represent the order himself or herself to ensure appropriate representation of the order in accordance with the broker's fiduciary responsibility to the customer. The proposed NYSE Rule 91.50 clarifies, however, that neither the Floor Official's review of a broker's actions, nor the characterization of an order as a conditional order compromises the unconditional right of a broker to reject any trade where the specialist trades as principal. The proposed rule further provides that a broker's exercise of his right to reject a trade will not trigger a disciplinary action against the broker.

*D. NYSE Rule 95*

The Exchange is proposing to add material to NYSE Rule 95(a) making clear that members may not create an order or a material term of an order, but must receive an order from off the Floor which includes all the material terms of an order, regardless of how familiar they are with a customer's strategy.

*E. NYSE Rule 115A*

NYSE Rule 115A provides, among other matters, procedures for members to confirm transactions on openings. The Exchange is proposing to add to NYSE Rule 115A an intra-rule cross-reference to make clear that while a broker should confirm a transaction as promptly as possible, the specialist is not responsible for losses 30 minutes after the opening.

*F. NYSE Rule 116*

The Exchange is proposing three changes to NYSE Rule 116. First, the Exchange proposes to amend NYSE Rule 116.20 to state directly a prohibition against a Floor broker "stopping" stock. Second, the Exchange is proposing to amend NYSE Rule 116.30(3)(a) to make clear that a specialist should "stop" an order in a minimum variation market only when there is an imbalance in the quotation suggesting the likelihood of price improvement for the "stopped" order. And third, the Exchange is proposing to add to NYSE Rule 116.40 a cross-reference to NYSE Rule 123C, which codifies the Exchange's procedures regarding execution of market-on-close and limit-on-close orders.

[9] *See* Amendment No. 3, *supra* note 6.

[10] *See* Amendment No. 4, *supra* note 7. The Exchange also confirmed that the scenarios provided by the Exchange regarding principal trades by a specialist would also apply to members involved in a principal transaction with any Exchange member. Telephone conversation between Donald Siemer, Director of Rule Development, Market Surveillance Division, NYSE, and Terri Evans, Assistant Director, Division, Commission on February 3, 2004.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[11] Specifically, the Commission believes the proposed rule change, as amended, is consistent with section 6(b)(5) of the Act,[12] which requires among other things, that the rules of the Exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and in general to protect investors and the public interest.

The Commission believes that the proposed rule change codifies current practices on the Exchange and existing interpretations of NYSE rules and is responsive to recommendations made by an independent consultant retained by the Exchange.[13] The Commission also believes that the proposed rule change should clarify Exchange members' rights and obligations under certain rules such as a broker having to recross a clean agency cross when there has been price improvement, a member's ability to resolve certain disputes involving a monetary difference of $10,000 or more by a panel or through arbitration, a member's requirement to receive all material terms of an order from the member's customer off the floor of the Exchange, a specialist's responsibility for losses incurred by other members because of an opening transaction, and the conditions for stopping stock.

Moreover, the Commission believes the proposed rule change will clarify the process by which a member can confirm or reject a transaction involving another member who has elected to take or supply for his own account the security named in an order entrusted to him.[14] The Commission notes that several of the changes to NYSE Rule 91 codify the NYSE's prior interpretation of this rule. As a result, the Commission believes that codification of these interpretations will add greater transparency to the NYSE's rules. Further, the Commission notes that the proposed changes to NYSE Rule 91 aim to maintain a degree of flexibility in the rule to accommodate various situations occurring during the trading day.

With respect to the changes proposed for NYSE Rule 91.50, the Commission notes that a Floor Official's review of a broker's continued pattern of rejections of a specialist's principal transactions in no way compromises the unconditional right of a broker to reject any trade where the specialist trades as principal. Furthermore, the Commission notes that the proposed rule provides that no disciplinary process would be triggered by the broker exercising his or her right to reject a trade.

### IV. Conclusion

*It is therefore ordered,* pursuant to section 19(b)(2) of the Act,[15] that the proposed rule change (SR–NYSE–2002–32), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2825 Filed 2–9–04; 8:45 am]

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[11] The Commission has considered the proposed rules' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra* note 8.

[14] The Commission notes that Exchange members should assure that any agency issues are addressed by their respective customer agreements.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49176; File No. SR–PCX–2003–59]**

## Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Amend Its Rules Governing Market-Maker Obligations on the Archipelago Exchange

February 3, 2004.

On October 21, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its wholly-owned subsidiary PCX Equities, Inc. ("PCXE"), 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 to amend its rules governing Market Maker obligations on the Archipelago Exchange ("ArcaEx"), the equities trading facility of PCXE. The PCX filed Amendment No. 1 to the proposal on December 2, 2003.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on December 29, 2003.[4] The Commission received no comment letters on the proposal. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[5] and, in particular, the requirements of Section 6 of the Act[6] and the rules and regulations thereunder. Specifically, the Commission believes that the proposed rule change is consistent with Section 6(b),[7] which, among other things, requires that the PCX's rules be designed 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. The Commission notes that the PCX's restrictions on Market Makers requiring them to become odd-lot dealers and to maintain cleanup orders in the securities in which they maintain a market currently impose a competitive barrier vis-à-vis other market centers in attracting Market Maker participation on ArcaEx because competing market centers do not impose such requirements.[8] The Commission notes that the Exchange believes that eliminating the aforementioned requirements will facilitate additional Market Maker participation on ArcaEx and will further enhance order interaction, provide greater depth in liquidity, and foster price competition. Moreover, the Exchange believes that the elimination of such requirements will place ArcaEx on a level playing field with other market centers and allow ArcaEx to fairly compete for Market Maker,[9] and that the impact on the system from removing these requirements for Market Makers would be minimal on the ArcaEx.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaces the originally filed Form 19b–4 in its entirety.

[4] *See* Securities Exchange Act Release No. 48928 (December 16, 2003), 68 Fr 75010 (December 29, 2003).

[5] In approving this proposed rule change, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b).

[8] *See e.g.,* NASD Rules 4611 and 4612.

[9] *See* note 4, supra.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change and Amendment No. 1 thereto (File No. SR–PCX–2003–59) are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2811 Filed 2–9–04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49170; File No. SR–Phlx–2004–05]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Payment for Order Flow Fees for the Top 120 Options

February 2, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4 thereunder,[2] notice is hereby given that on January 22, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which the Phlx has prepared. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to establish its equity options payment for order flow fees imposed on the transactions of Phlx Registered Options Traders ("ROTs") for the period from February 2004 through April 2004 for the top 120 equity options based on volume statistics from October, November and December 2003,[3] as set forth on the ROT Equity Option Payment for Order Flow Charges Schedule[4] and subject to certain exceptions listed below. The Phlx intends to implement the payment for order flow fees for trades settling on or after February 1, 2004 through April 30, 2004. The rate levels would not change: the top-ranked equity option would be charged a fee of $1.00 per contract; the next 49 equity options would be charged a fee of $.40 per contract; and no fee would be imposed for the remaining equity options in the top 120.[5] The Exchange's ROT Equity Option Payment for Order Flow Charges Schedule is available at the Phlx and at the Commission.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item 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*

The Phlx has reinstated its payment for order flow program.[6] Under the program, the Phlx charges ROTs a per-contract fee with respect to their transactions in the top 120 most actively traded equity options issues, subject to certain exceptions.[7] The fees are set forth on the Phlx's ROT Equity Option Payment for Order Flow Charges Schedule.

1. Purpose

The purpose of the proposed rule change is to establish the payment for order flow fees for the top 120 equity options for trades settling on or after February 1, 2004 through April 30, 2004. The Phlx will file with the Commission a proposed rule change to address changes to the fee schedule for subsequent time periods. The Phlx is not making any other changes to its payment for order flow program at this time.

2. Statutory Basis

The Exchange believes that this proposal to amend its schedule of dues, fees and charges would be an equitable allocation of reasonable fees among Phlx members, and that the proposal is consistent with Section 6(b) of the Act[8] and furthers the objectives of Section 6(b)(4) of the Act.[9]

*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*

The Phlx neither solicited nor received written comments on this proposal.

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[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange's payment for order flow fee is imposed on transactions in the top 120 most actively traded equity options in terms of the total number of contracts that are traded nationally, based on volume statistics provided by the Options Clearing Corporation. The measuring period for the top 120 equity options encompasses three months and the Exchange files a separate proposed rule change for each three-month trading period. With respect to the payment for order flow fees imposed on trades settling on or after November 1, 2003 through January 31, 2004, for example, the measuring period for the top 120 equity options was based on volume statistics from July, August and September 2003. *See* Securities Exchange Act Release No. 48688 (October 24, 2003), 68 FR 61845 (October 30, 2003) (SR–Phlx–2003–70). For the payment for order flow fees imposed on trades settling on or after February 1, 2004 through April 30, 2004, as set forth in this proposal, the measuring period for the top 120 equity options is based on volume statistics from October, November, and December 2003.

[4] To avoid confusion, the ROT Equity Option Payment for Order Flow Charges Schedule reflects only those options being charged more than $0.00.

[5] Under the Exchange's payment for order flow program, a 500 contract cap per individual cleared side of a transaction is imposed. Thus, the applicable payment for order flow fee would be imposed only on the first 500 contracts per individual cleared side of a transaction. For example, if a transaction consists of 750 contracts by one ROT, the applicable payment for order flow fee would be applied to, and capped at, 500 contracts for that transaction. Also, if a transaction consists of 600 contracts, but is divided equally among three ROTs, the 500 contract cap would not apply to any such ROT and each ROT would be assessed the applicable payment for order flow fee on 200 contracts, as the payment for order flow fee is assessed on a per ROT, per transaction basis. *See* Securities Exchange Act Release No. 47958 (May 30, 2003), 68 FR 34026 (June 6, 2003) (proposing SR–Phlx–2002–87) and Securities Exchange Act Release No. 48166 (July 11, 2003), 68 FR 42540 (July 17, 2003) (approving SR–Phlx–2002–87).

[6] *See* Securities Exchange Act Release No. 47090 (December 23, 2002), 68 FR 141 (January 2, 2003) (SR-Phlx-2002–75).

[7] The payment for order flow fee does not apply to specialist transactions or to transactions between: (1) A ROT and a specialist; (2) a ROT and a ROT; (3) a ROT and a firm; and (4) a ROT and a broker-dealer. According to the Phlx, the fee is not imposed with respect to the above-specified transactions because the primary focus of the program is to attract order flow from customers. The payment for order flow fee also does not apply to index or foreign currency options.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and Rule 19b–4(f)(2) [11] thereunder. Accordingly, the proposal has taken effect upon filing with the Commission. At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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. 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–2004–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail, but not by both methods. Copies of 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–2004–05 and should be submitted by March 2, 2004.

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2809 Filed 2–9–04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49173; File No. SR–Phlx–2004–07]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Extension of Its Pilot Program To Implement Its Existing Fee Schedule for Electronic Communications Networks

February 2, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 28, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the Exchange's current pilot program for an additional one-year period (until January 31, 2005), in order to continue to impose a $2,500 monthly fee for Electronic Communications Networks ("ECNs") that are member organizations and send order flow to the Exchange's equity trading floor.[3] The current pilot program is scheduled to expire on January 31, 2004.[4] The $2,500 fee would continue to apply to ECN trades where the ECN is not acting as a specialist or a floor broker, but rather an order flow provider. This fee is in lieu of the equity transaction value charge that would normally apply to (non-specialist) equity trades.

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 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 the proposed rule change is to extend the Exchange's current ECN pilot program that imposes a $2,500 monthly fee for ECNs that are member organizations and send order flow to the Exchange's equity trading floor for an additional one-year period, until January 31, 2005. The continuation of the $2,500 fee is intended to attract equity order flow from ECNs to the Exchange by continuing to substitute a fixed monthly fee, in light of the potential for high volumes of order flow from ECNs.[5]

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As stated on the Phlx fee schedule, ECNs shall mean any electronic system that widely disseminates to third parties orders entered therein by an Exchange market maker or over-the-counter ("OTC") market maker, and permits such orders to be executed against in whole or in part; except that the term ECN shall not include: any system that crosses multiple orders at one or more specified times at a single price set by the ECN (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or, any system operated by, or on behalf of, an OTC market-maker or exchange market-maker that executes customer orders primarily against the account of such market maker as principal, other than riskless principal. *See* SEC Rule 11Ac1–1(a)(8). The Exchange is herein proposing minor changes to this definition, which appears on the fee schedule, to correct inconsistencies between the text of the SEC Rule 11Ac1–1(a)(8) and the text that appears on the Exchange's fee schedule.

[4] *See* Securities Exchange Act Release No. 47120 (January 3, 2003), 68 FR 1498 (January 10, 2003) (Notice of Filing and Immediate Effectiveness of SR–Phlx–2002–83, extending the ECN fee pilot program until January 31, 2004). *See also* Securities Exchange Act Release Nos. 44155 (April 5, 2001), 66 FR 19274 (April 13, 2001) (Notice of Filing and Immediate Effectiveness of SR–Phlx–2001–09, adopting the ECN fee program on a pilot basis); and 45456 (February 19, 2002), 67 FR 8831 (February 26, 2002) (Notice of Filing and Immediate Effectiveness of SR–Phlx–2002–08, extending the ECN fee pilot program until January 31, 2003).

[5] To recoup costs due from the Exchange to the Commission pursuant to Section 31(b) of the Act,

The monthly fee will continue to apply to ECN order flow to the Exchange's equity trading floor, including from ECNs that either became members or began sending order flow after the commencement of the initial program. The $2,500 fee would continue to apply to ECNs that are not acting as a Phlx specialist or floor broker.[6]

Currently, no ECN operates from the Exchange's equity trading floor as a floor broker or specialist unit. If, however, an ECN did operate from the equity trading floor, it could be subject to various floor-related fees respecting its floor operation.[7] In addition, an ECN's transactions as a floor broker would be subject to the equity transaction charge and its specialists would be subject to other charges. [8] Even if the ECN was acting as a floor broker or specialist with respect to some trades, those trades for which it was not acting as a floor broker or specialist, but rather an ECN, would be subject only to the flat monthly fee and not other transaction charges. An ECN that only operates as a specialist or floor broker would not have to pay the monthly fee, because it would, instead, be paying the normal transaction charges applicable to floor brokers and specialists.

An ECN would also continue to be subject to, if applicable, the following membership-related fees: Foreign Currency User Fees, Application Fee, Initiation Fee, Transfer Fee for Foreign Currency Options Participations, Phlx CCH Guide Fee, Examinations Fee, Review/Process Subordinated Loans Fee, Registered Representative Registration fees, Trading Floor Personnel Registration Fee, Off-Floor Trader Initial Registration Fee and Annual Fee, and Remote Specialist fees.[9]

Because the $2,500 fee is a flat monthly fee as opposed to a per-transaction fee, it is intended to encourage ECN volume. Currently, the equity transaction charge (that would otherwise apply to an ECN's equity trades) ranges, based on share volumes, with a $50 maximum fee per trade side, and various other applicable discounts. Thus, many variables determine whether the proposed monthly $2,500 fee is generally more favorable than the equity transaction charge, depending upon the number of trades, size of the trade and type (*i.e.*, PACE). As a general matter, the Exchange believes that $2,500 would be more favorable to the ECN because it is a fixed amount.

The Exchange believes that the monthly ECN fee provides competitive fees with appropriate incentives, thus providing a reasonable method to attract large order flow providers such as ECNs to the Exchange. Additional order flow should enhance liquidity, and improve the Exchange's competitive position in equity trading. The Exchange believes that structuring this fee for ECNs is appropriate, as ECNs are unique in their role as order flow providers to the Exchange. Specifically, ECNs operate a unique electronic agency business, similar to a securities exchange, as opposed to directly executing orders for their own customers as principal or agent.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(4) of the Act,[11] in particular, by providing for the equitable allocation of reasonable dues, fees and other charges among its members due to the unique character of ECNs, and because the fixed monthly fee is a reasonable method of attracting a new form of order flow to the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any 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 rule change establishes or changes a due, fee, or charge imposed by the Exchange and, therefore, has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act [12] and Rule 19b–4(f)(2) thereunder.[13] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments should be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Phlx–2004–07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements

the Exchange intends to continue to apply such fee to ECNs, as the current fee schedule reflects.

[6] An ECN would also continue to incur certain license fees and other fees as specified on the Exchange's schedule of dues, fees and charges. In addition, an ECN would continue to incur specialist or equity floor brokerage transaction fees if it acts as a Phlx specialist or floor broker.

[7] According to the Exchange, these include the Trading Post/Booth Fee, Trading Post w/Kiosk Fee, Kiosk Construction Fee (when requested by specialist), Controller Space Fee, Floor Facility Fee, Shelf Space on Equity Option Trading Floor Fee, Computer Equipment Services, Repairs or Replacements Fee and Computer Relocation Requests Fee. Certain communications fees could also apply, such as the Direct Wire to the Floor Fee, Telephone System Line Extensions, Wireless Telephone System, Tether Initial Connectivity Fee, Tether Monthly Service Fee, Execution Services/Communication Charge, Stock Execution Machine Registration Fee (Equity Floor), Equity, Option, or FCO Transmission Charge, FCO Pricing Tape, Option Report Service Fee, Quotron Equipment Fee, Instinet, Reuters Equipment Pass-Through Fee and the Option Mailgram Service Fee.

[8] For example, certain license fees may apply to specialists, and the Equity Floor Brokerage Assessment and Equity Floor Brokerage Transaction Fee apply to floor brokerage activity.

[9] In a separate proposed rule change, the Exchange states that it amended its schedule of dues, fees, and charges to adopt permit fees in connection with the Exchange's recent demutualization and to make other related post-demutualization fee changes. Pursuant to that proposal, permit fees were adopted and certain fees were deleted from the Exchange's fee schedule. For example, fees that were deleted included membership dues, charges relating to Equity Trading Permits, Foreign Currency Options Participation fee, Technology Fee for Exchange members and for Foreign Currency Options Participants who do not hold legal title to a Phlx membership. References to the capital funding fee and monthly credit were also deleted and the Foreign Currency User Fee was increased. *See* Securities Exchange Act Release No. 49157 (January 30, 2004) (Notice of Filing and Immediate Effectiveness of SR–Phlx–2004–02). This proposal became effective for new members and participants upon the issuance of permits when the Exchange's demutualization became effective (January 20, 2004). Pre-demutualization membership-related fees will remain in effect for then current members, participants, and member and participant organizations for the month of January 2004.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78(s)(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

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 refer to File No. SR–Phlx–2004–07 and should be submitted by March 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2810 Filed 2–9–04; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49178; File No. SR–Phlx–2004–10]**

## Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating To a Pilot Program To Deploy the Options Floor Broker Management System

February 3, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4[2] thereunder, notice is hereby given that on February 2, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approval the proposal, on an accelerated basis.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend its pilot program pertaining to the Options Floor Broker Management System (the "System") from February 6, 2004 until August 2, 2004.[3] The System is a new component of the Exchange's Automated Options Market (AUTOM) and Automatic Execution (AUTO–X) System.[4]

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III 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 extend the effectiveness of the rules governing the System through August 2, 2004, in order to continue to have rules in place concerning the System and to ensure that Floor Brokers using the System during the continuing deployment would not be in violation of current Exchange rules regarding ticket marking requirements. The rules had previously been effective through August 29, 2003, extended through September 12, 2003, November 14, 2003, and February 6, 2004.[5]

The System is designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. Floor Brokers or their employees access the System through an electronic Exchange-provided handheld device on which they would have the ability to enter the required information as set forth in Phlx Rule 1063(e), either from their respective posts on the options trading floor or in the trading crowd. The System will eventually replace the Exchange's current Floor Broker Order Entry System ("FBOE"),[6] as part of a roll-out of the new System floor-wide.

All of the rules pertaining to the System effective February 6, 2004 are proposed to be extended until August 2, 2004, including: Rules 1014(g), 1015, 1051, 1063, 1064, and 1080.06, as well as Option Floor Procedure Advices ("Advice") A–11, B–6, B–8, C–2, C–3, F–1, F–2, and F–4.

The Exchange believes that the System will enable Floor Brokers to handle orders they represent more efficiently, and will further enable the Exchange to comply with the audit trail requirement for non-electronic orders required under the Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Sanctions.[7]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[8] in general, and

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On July 31, 2003, the Exchange filed a proposed rule change to implement a pilot program to deploy the Exchange's new System. The proposed rule change was noticed, and accelerated approval was granted thereto, on July 31, 2003. The pilot was scheduled to expire on August 29, 2003. *See* Securities Exchange Act Release No. 48266 (July 31, 2003), 68 FR 152 (August 7, 2003) (SR–Phlx–2003–56). On August 29, the Commission extended the pilot to September 12, 2003. *See* Securities Exchange Act Release No. 48425 (August 29, 2003), 68 FR 53210 (September 9, 2003) (SR–Phlx–2003–60). On September 12, 2003, the Commission extended the pilot again until November 14, 2003. *See* Securities Exchange Act Release No. 48490 (September 12, 2003), 68 FR 54926 (September 19, 2003). On December 18, 2003, the Commission extended the pilot until February 6, 2004. *See* Securities Exchange Act Release No. 48947 (December 18, 2003), 68 FR 75012 (December 29, 2003). In order to avoid a lapse in the effectiveness of this pilot, the Commission now is approving the Exchange's proposal to extend the rule from February 6, 2004 until August 2, 2004. The Exchange has also filed for permanent approval of the proposed rules. *See* Securities Exchange Act Release No. 48265 (July 31, 2003), 68 FR 47137 (August 7, 2003) (SR–Phlx–2003–40). The Exchange acknowledges that SR–Phlx–2003–40 and Amendment No. 1 thereto are subject to public comment, which may result in amendments to the proposed rules.

[4] AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution feature, AUTO–X. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor. *See* Exchange Rule 1080.

[5] *See* note 3, *supra*.

[6] *See* Securities Exchange Act Release No. 41524 (June 14, 1999), 64 FR 33127 (June 21, 1999) (SR–Phlx–99–11). The FBOE, a component of AUTOM, currently provides a means for (but does not require) Floor Brokers to route eligible orders to the specialist's post, consistent with the order delivery criteria of the AUTOM System set forth in Exchange Rule 1080(b). The new System would include the same functionality as the FBOE, in addition to providing an electronic audit trail for non-electronic orders received by Floor Brokers by way of the entry of the required information in proposed Rule 1063(e).

[7] *See* Securities Exchange Act Release No. 43268 (September 11, 2000) and Administrative Proceeding File 3–10282 (the "Order").

[8] 15 U.S.C. 78f(b).

furthers the objectives of Section 6(b)(5) of the Act[9] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and to protect investors and the public interest, by providing a System that enables Floor Brokers to handle orders they represent more efficiently, while enabling the Exchange to comply with the requirement in the Order to provide an electronic audit trail for non-electronic orders entered on the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any 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. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Phlx–2004–10. 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 Exchange. All submissions should be submitted by March 2, 2004.

**IV. 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.[10] In particular the Commission finds that the proposed rule is consistent with Section 6(b)(5) of the Act, which requires that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national securities System, and protect investors and the public interest.[11]

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of the publication of notice thereof in the **Federal Register**. The Commission believes that granting accelerated approval to the proposed rule change on a pilot basis will allow the Exchange to have enforceable rules governing use of the Exchange's new System in effect prior to permanent approval of the rules, and will help ensure that members are properly trained and familiar with the rules. In addition, that Commission is granting accelerated approval in order to prevent a lapse in the effectiveness of the Exchange's rules governing operation of the System to ensure continuity of the pilot.

**V. Conclusion**

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–Phlx–2004–10) is approved on an accelerated basis on a pilot basis until August 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

**Margaret H. McFarland,**

*Deputy Secretary.*

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[9] 15 U.S.C. 78f(b)(5).

[10] In approving this proposed rule change, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(2).

[13] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–49181; File No. SR–Phlx–2004–06]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Member Organizations' Security Requirements

February 3, 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 January 23, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which the Exchange has prepared. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Phlx proposes to amend Phlx Rules 909 and 972. The amendment to Phlx Rule 909 would create an additional method for member organizations to provide security to the Exchange for the payment of any claims owed to the Exchange, Stock Clearing Corporation of Philadelphia ("SCCP"), and other Exchange members or member organizations (the "Security Requirement"). The amendments to Phlx Rule 972 would extend the time available to member organizations to meet the Security Requirement following the transition of the Exchange from a non-stock to a stock corporation (the "Demutualization").[3] The amendments to Phlx Rule 972 would also correct two cross-references contained in that rule.

The text of the proposed rule change is below. Proposed new language is *italicized*; deletions are in brackets.

* * * * *

**Rule 909. Security for Exchange Fees and Other Claims**

(a) Each member organization, and all applicants for registration as such shall, except as provided below, be required to provide (and maintain) security to the Exchange for the payment of any claims

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73).

owed to the Exchange, Stock Clearing Corporation of Philadelphia (*"SCCP"*), and to Exchange members and/or other member organizations. If the member organization maintains excess net capital of at least the amount established by the Exchange and published by the Exchange from time to time (the "Excess Net Capital Test"), then no guaranty or deposit shall be required; provided that, if at the end of any calendar month a member organization has less than such amount of excess net capital, then it shall within 30 calendar days of the end of such month deliver to the Exchange security as provided in Rule 909(a)(i) or (ii); provided, further, that any member organization relying upon the Excess Net Capital Test shall deliver to the Membership Services Department of the Exchange each quarter a FOCUS report, and shall promptly advise the Membership Services Department if such member organization's excess net capital at any time falls below such minimum established by the Exchange. If the member organization does not satisfy the Excess Net Capital Test, then the member organization shall provide security to the Exchange in one of the following forms:

(i) An acceptable guaranty by a clearing member organization acceptable to the Exchange guaranteeing the payment by such member organization of any claims, *or if acceptable to the Exchange, a security agreement among the Exchange, SCCP and the member organization, in form and substance satisfactory to the Exchange, duly executed and delivered by the member organization, whereby the member organization shall create in favor of the Exchange, to secure payment of any claims owed by the member organization to the Exchange, SCCP, and to Exchange members and/or other member organizations, a valid first priority perfected lien on and continuing security interest in so much of the funds and other property of the member organization (including without limitation all securities, security entitlements, financial assets, investment property and other property and assets) held from time to time in the margin account of the member organization maintained with SCCP as shall then exceed the required margin amount (as such term is used in the Margin Account Agreement then in effect between SCCP and the member organization)*; or

(ii) A deposit with the Exchange in an amount not to exceed $50,000, as established by the Exchange with prior notice, to be held, together with all other such deposits made pursuant to this rule, in a segregated account, the proceeds of which may be applied by the Exchange in the same manner as proceeds from transfers of participations under Section 15–3 of the By-Laws (as if references in such Section 15–3 to "foreign currency options participant" were to "member organization"). Such deposit may be invested by the Exchange in United States government obligations or any other investments which provide safety and liquidity of the principal invested, interest or income on which deposit shall be paid periodically by the Exchange to such member organization.

(b) No change.

* * * * *

**Rule 972. Continuation of Status After the Merger**

Each member (including, without limitation, each holder of an equity trading permit), inactive nominee and member organization holding such status immediately prior to the effective time of the Merger and that, at such time, is not subject to any suspension of such status shall, from and after the Merger, maintain such status as a member, inactive nominee or member organization and in the case of members, shall be permit holders and issued a permit, provided that such member, inactive nominee and member organization shall provide to the Admissions Committee and the Exchange: *(x)* not later than 15 days following the Merger,[: The security required by Rule 909 (unless the member organization has obtained an exemption under Rule 909(c));] the form to be filed by the member organization's qualifying permit holder pursuant to Rule 921(a)[;] and the designation of the member organization's Member Organization Representative pursuant to Rule 921(b) in the form prescribed by the Exchange*; and (y) not later than 45 days following the Merger, the security required by Rule 909 (unless the member organization has obtained an exemption under Rule 909).*

The consequences of a failure to furnish within such period:

(a) The security required by Rule 909 (unless the member organization has obtained an exemption under Rule 909[(c)]) and/or the form to be filed by the member organization's qualifying permit holder pursuant to Rule 921(a) shall be the immediate suspension of the member organization's status as such; and

(b) The designation of the member organization's Member Organization Representative pursuant to Rule 921(b) shall be as provided in Rule 921(c) (as if the [30 day] period specified therein shall have elapsed).

Any member or member organization of the Exchange prior to the Merger that, as of the effective date of the Merger, has been suspended shall not be issued a permit or shall not be deemed a member organization, as the case may be, automatically upon the Merger. If the member or member organization shall cure any delinquency within 30 days of the Merger, then the foregoing provisions of this Rule 972 shall apply (but as if the dates specified therein run from the date of the cure of any delinquency, rather than the date of the Merger); otherwise, such prior members and member organizations must reapply for a permit, or registration as a member organization, as the case may be, as if they were new applicants for admission or registration.

For the avoidance of doubt, foreign currency options participants and participant organizations, as well as approved lessors of foreign currency options participations holding such status prior to the Merger will continue to hold such status following the Merger.

* * * * *

**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 had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to facilitate the administration of new Phlx Rules 909 and 972, which were recently adopted as part of the Exchange's Demutualization. The Exchange believes that the minor changes proposed in this filing make it easier for the Exchange to administer the new rules because they allow more time to comply, in the case of Phlx Rule 972, and because they add an additional method of compliance in the case of Phlx Rule 909. The purpose of the proposed amendment to Phlx Rule 909

is to provide Phlx member organizations with an additional method by which they may satisfy the Security Requirement, which was omitted from the original draft. Phlx Rule 909 provides that the Security Requirement may be satisfied by a member organization in one of three ways: (1) By maintaining excess net capital in an amount specified by the Exchange; (2) by providing an acceptable guaranty by a clearing member organization guaranteeing the payment of any claims against the member organization; or (3) by maintaining a deposit with the Exchange in an amount not to exceed $50,000.

The current proposal would add a fourth method by which a member organization may satisfy the Security Requirement. Specifically, the proposed amendment to Phlx Rule 909 would allow a member organization to satisfy the Security Requirement by entering into an acceptable agreement among the Exchange, SCCP [4] and the member organization (a "Security Agreement"), which would establish and assign to the Exchange a first priority perfected lien on and continuing security interest in the excess margin funds held in such member organization's SCCP margin account.[5] Should a member organization elect to provide security to the Exchange in the form of a Security Agreement, any outstanding claims by the Exchange, SCCP or other Exchange members or member organizations would be satisfied against the excess margin funds in the Phlx member organization's SCCP margin account. The Exchange had intended to capture this form of security when drafting the provision in Phlx Rule 909 covering an acceptable guaranty by a clearing member organization, but omitted to capture SCCP specifically.[6] Accordingly, this new method of meeting the Security Requirement is a variation of an existing method, particularly because many member organizations doing business on the equity floor do not have a relationship with a "clearing member organization;" their "clearing" relationship is instead with SCCP.

The purpose of the proposed amendments to Phlx Rule 972 is to extend the time member organizations have to satisfy the Security Requirement following the closing of Demutualization and to correct two cross-references contained in Phlx Rule 972. Phlx Rule 972 requires member organizations to satisfy the Security Requirement within 15 days following the closing of Demutualization in order for member organizations to avoid suspension. The Exchange is proposing to extend the 15-day time period to 45 days. The Exchange believes that the extension of time will provide member organizations with sufficient time to process and complete the tasks necessary to meet the Security Requirement and avoid suspension.

Finally, Phlx Rule 972 contains two cross-references that are incorrect. First, Phlx Rule 909(c) is referred to in Phlx Rule 972(a). The cross-reference should simply be to Phlx Rule 909. Second, Phlx Rule 972(b) refers to a 30-day period from Phlx Rule 921(c). That 30-day reference is incorrect (it is a 60-day period in Phlx Rule 921(c)). The reference should simply refer to the "period" in Phlx Rule 921(c).

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act [7] in general, and furthers the objectives of section 6(b)(5) of the Act [8] in particular, in that it promotes just and equitable principles of trade, removes impediments to and perfects the mechanisms of a free and open market, and in general, protects investors and the public interest by offering member organizations another method to satisfy the Security Requirement, by allowing member organizations more time to comply with the Security Requirement and by correcting cross-references in Phlx Rule 972.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Phlx neither solicited nor received written comments with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become immediately effective pursuant to section 19(b)(3)(A)(iii) [9] of the Act and Rule 19b–4(f)(6) [10] under the Act because it effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

The Exchange has requested that the Commission waive the thirty day pre-operative waiting period and the five business day pre-filing period, in order to facilitate member organization compliance with new Phlx Rule 909.

The Commission believes that it is consistent with the protection of investors and the public interest to accelerate the operative date of the proposal and waive the pre-filing requirement.[11] The Commission believes that such acceleration and waiver would provide member organizations with a somewhat greater period of time to satisfy the Security Requirement and help facilitate compliance with new Phlx Rule 909. For this reason, the Commission designates that the proposal become operative immediately and that the five business day pre-filing period be waived. At any time within sixty days after the filing of the proposed rule change, the Commission may summarily abrogate this rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2004–06. This file number should be included on the subject line

[4] SCCP, a subsidiary of Phlx, is a registered clearing agency.

[5] *See* SCCP, Phlx Rule 9.

[6] Although SCCP is a corporate member, under Phlx By-Law Article XII, Sections 12–2 and 12–4, it is neither a member organization nor even a broker-dealer, and thus technically does not comply with the existing language of Phlx Rule 909(a)(i).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. Section 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] For purposes of accelerating the operative date of the proposed rule and waiving the five-day pre-filing period, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to file number SR–Phlx–2004–06 and should be submitted by March 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–2813 Filed 2–9–04; 8:45 am]

BILLING CODE 8010–01–P

## DEPARTMENT OF STATE

**[Public Notice 4620]**

### 30-Day Notice of Proposed Information Collection: Forms DS–2053, DS–3024, DS–3025 and DS–3026; Medical Examination for Immigrant or Refugee Applicant; OMB Control Number 1405–0113

**AGENCY:** Department of State.

**ACTION:** Notice.

**SUMMARY:** The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995. Comments should be submitted to OMB within 30 days of the publication of this notice.

The following summarizes the information collection proposal submitted to OMB:

*Type of Request:* Extension of currently approved collection.

*Originating Office:* Bureau of Consular Affairs, Department of State (CA/VO).

*Title of Information Collection:* Medical Examination for Immigrant or Refugee Applicant.

*Frequency:* On occasion. Once per respondent.

*Form Number:* DS–2053, DS–3024, DS–3025 and DS–3026.

*Respondents:* Immigrant visa and refugee applicants.

*Estimated Number of Respondents:* 630,000 per year.

*Average Hours Per Response:* 1 hour.

*Total Estimated Burden:* 630,000 hours per year.

Public comments are being solicited to permit the agency to:

- Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including through the use of automated collection techniques or other forms of technology.

**FOR FURTHER INFORMATION CONTACT:** Copies of the proposed information collection and supporting documents may be obtained from Brendan Mullarkey of the Office of Visa Services, U.S. Department of State, 2401 E St. NW, RM L–703, Washington, DC 20520, who may be reached on (202) 663–1166. Public comments and questions should be directed to the State Department Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20530, who may be reached on (202) 395–7860.

Dated: January 30, 2004.

**Janice L. Jacobs,**

*Deputy Assistant Secretary of State for Visa Services, Bureau of Consular Affairs, Department of State.*

[FR Doc. 04–2829 Filed 2–9–04; 8:45 am]

BILLING CODE 4710–06–P

## DEPARTMENT OF STATE

**[Public Notice 4618]**

### Culturally Significant Objects Imported for Exhibition Determinations: "Nicholas and Alexandra: At Home With the Last Tsar and His Family"

**AGENCY:** Department of State.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "Nicholas and Alexandra: At Home with the Last Tsar and his Family," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Museum of Fine Arts, Santa Fe, New Mexico, from on or about May 28, 2004 until on or about September 6, 2004, at the Newark Museum, Newark, New Jersey, from on or about September 27, 2004 until on or about January 9, 2005, at the Cinncinati Museum Center, Cincinnati, Ohio, from on or about January 29, 2005 until on or about May 1, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact the Office of the Legal Adviser, U.S. Department of State, telephone: (202) 619–6982. The address is U.S. Department of State, SA–44, 301 4th Street SW., Room 700, Washington, DC 20547–0001.

Dated: February 3, 2004.

**C. Miller Crouch,**

*Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. 04–2823 Filed 2–9–04; 8:45 am]

BILLING CODE 4710–08–P

## DEPARTMENT OF STATE

**[Public Notice 4589]**

### Overseas Security Advisory Council (OSAC) Meeting Notice; Closed Meeting

The Department of State announces a meeting of the U.S. State Department—Overseas Security Advisory Council on February 24 and 25 at the Bechtel Corporation in San Francisco, California. Pursuant to Section 10(d) of the Federal Advisory Committee Act and 5 U.S.C. 552b(c) (1) and (4), it has

[12] 17 CFR 200.30–3(a)(12).

been determined the meeting will be closed to the public. Matters relative to classified national security information as well as privileged commercial information will be discussed. The agenda will include updated committee reports, a global threat overview, and other discussions involving sensitive and classified information, and corporate proprietary/security information, such as private sector physical and procedural security policies and protective programs and the protection of U.S. business information overseas.

For more information contact Marsha Thurman, Overseas Security Advisory Council, Department of State, Washington, DC 20522–2008, phone: (571) 345–2214.

Dated: January 20, 2004.

**Joe D. Morton,**

*Director of the Diplomatic Security Service, Department of State.*

[FR Doc. 04–2822 Filed 2–9–04; 8:45 am]

BILLING CODE 4710–24–P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### Motor Vehicles; Alternative Fuel Vehicle (AFV) Report

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice of availability—Fleet (AFV) report.

**SUMMARY:** In accordance with the Energy Policy Act of 1992 (EPAct) (42 U.S.C. 13211–13219) as amended by the Energy Conservation Reauthorization Act of 1998 (Pub. L. 105–388), and Executive Order (EO) 13149, "Greening the Government Through Federal Fleet and Transportation Efficiency," the Department of Transportation's FY 2003 annual alternative fuel vehicle report is available on the Department of Transportation Web site: *http://isddc.dot.gov/OLPFiles/OST/010978.pdf* The report is also available at: *http://isddc.dot.gov*, follow the search instructions to search for "DOT FY03 AFV."

**FOR FURTHER INFORMATION CONTACT:** George Kuehn, Office of Transportation and Facilities, 400 7th Street SW., Washington, DC 20590; telephone (202) 366–1614.

Dated: January 29, 2004.

**Rita Martin,**

*Director, Administrative Management Policy Division.*

[FR Doc. 04–2739 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–62–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2004–09]**

### Petitions for Exemption; Summary of Petitions Received

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petitions for exemption received and of dispositions of prior petitions.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

**DATES:** Comments on petitions received must identify the petition docket number involved and must be received on or before March 1, 2004.

**ADDRESSES:** You may submit comments [identified by DOT DMS Docket Number FAA–200X–XXXXX] by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

*Docket:* For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on February 4, 2004.

**Donald P. Byrne,**

*Assistant Chief Counsel for Regulations.*

**Petitions for Exemption**

*Docket No.:* FAA–2003–16475.

*Petitioner:* Soaring Society of America, Inc.

*Section of 14 CFR Affected:* 14 CFR 91.215(c).

*Description of Relief Sought:*

To allow members of the Soaring Society of America, Inc., to operate transponder-equipped gliders with the transponders turned off, when the glider is being operated more than 40 nautical miles from the primary airport in class B airspace and more than 20 nautical miles from the primary airport in class C airspace.

[FR Doc. 04–2882 Filed 2–9–04; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2004–10]**

### Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petitions for exemption received and of dispositions of prior petitions.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this

aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

**DATES:** Comments on petitions received must identify the petition docket number involved and must be received on or before March 1, 2004.

**ADDRESSES:** You may submit comments [identified by DOT DMS Docket Number FAA–200X–XXXXX] by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal Holidays.

**FOR FURTHER INFORMATION CONTACT:** Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on February 4, 2004.

**Donald P. Byrne,**

*Assistant Chief Counsel for Regulations.*

**Petitions for Exemption**

*Docket No.:* FAA–2003–15925.
*Petitioner:* AirTran Airways, Inc.
*Section of 14 CFR Affected:*
14 CFR 93.123.
*Description of Relief Sought:*
AirTran seeks reconsideration for the denial of its petition for exemption, which would allow AirTran to conduct 10 operations at LGA without the necessary slots required under § 93.123.

[FR Doc. 04–2883 Filed 2–9–04; 8:45 am]
**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Policy Regarding the Eligibility of Airport Ground Access Transportation Projects for Funding Under the Passenger Facility Charge Program

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice.

**SUMMARY:** In accordance with section 123(e) of the Vision 100—Century of Aviation Reauthorization Act, (Pub. L. 108–176, December 12, 2003), the Federal Aviation Administration (FAA) is publishing its policy with regard to the eligibility of airport ground access transportation projects for funding under the Passenger Facility Charge (PFC) program.

The FAA determines the eligibility of airport ground access transportation projects, no matter the technology proposed (*e.g.* road, heavy or light rail, water) for funding under the PFC program, on a case-by-case basis after a review of the particulars associated with each unique proposal. In general, a request to use PFC's to fund an airport ground access transportation project must be submitted by a qualified applicant and the project must be eligible for funding under the Airport Improvement Program (AIP); meet at least one of the PFC program objectives and, if applicable, at least one of the significant contribution requirements [1]; and be adequately justified (49 U.S.C. 40117(d)(3)). In addition, all PFC projects must conform to other applicable regulatory requirements as referenced in 14 CFR part158 (*e.g.*, environmental requirements, specified implementation schedules). Airport ground access transportation projects proposed at a PFC level higher than $3 must also conform to the AIP funding test (49 U.S.C. 40117(b)(4)(B); 14 CFR 158.17(a)(2)) and the airside needs test (49 U.S.C. 40117(d)(4); 14 CFR 158.17(a)(3)).

**ADDRESSES:** This is an informational notice only and comments are not being solicited at this time.

[1] As the FAA has applied the significant contribution requirement, a finding that a project meets a PFC objective is subsumed within a finding that a project meets the significant contribution requirement.

**FOR FURTHER INFORMATION CONTACT:** Sheryl Scarborough, Financial Analysis and Passenger Facility Charge Branch (APP–510), Room 619, Airports Financial Assistance Division, Office of Airport Planning and Programming, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–8825.

**SUPPLEMENTARY INFORMATION:** In recent yeas, the FAA has been requested to approve PFC funding of airport ground access transportation facilities. Proposals to build rail transit projects in particular have tended to involve large amounts of funds—from several hundred million to more than a billion dollars—and thereby generated close scrutiny, if not controversy. The Federal Transit Administration (FTA) estimates that three dozen or more localities currently have plans or proposals to build fixed guideway access projects to their airports.

We are publishing this policy to comply with the requirement of section 123(e) of the Vision Act. Section 123(e) directs the FAA to publish its current policy on airport ground access transportation project eligibility for PFC funding within 60 days after enactment of the Vision 100 Act. By consolidating guidance set forth in the preamble to the PFC regulation as well as the PFC regulation itself (14 CFR part 158), FAA Order 5500.1 "Passenger Facility Charge" (August 9, 2001), the AIP Handbook (change 1 to FAA Order 5100.38B (January 8, 2004), and FAA PFC Records of Decision and Final Agency Decisions approving the use of PFC revenue to finance airport ground access transportation projects, this notice should assist public agencies eligible to impose PFC's, air carriers, local transit operators, and other stakeholders in understanding how the FAA applies the statutory and regulatory criteria governing the PFC program to airport ground access transportation projects. The FAA has a more extensive background in evaluating highway ground access projects through its experiences with the various FAA airport grant programs and through the numerous requests for PFC funding of highway access projects (*e.g.* Las Vegas McCarran International, Miami International, and Baltimore-Washington International Airports). Therefore, although it can be used for any proposed mode of transportation, this summary of FAA policy reflects the FAA's recent experience in approving three major fixed guideway access projects—the Light Rail System (LRS) at John F. Kennedy International Airport

(JFK), the monorail project at Newark Liberty International Airport, and the Airport MAX project at Portland International Airport (PDX). This FAA policy is subject to refinement in the future as different issues are raised during the evaluation of new projects.

The FAA determines the eligibility and justification for airport ground access transportation projects, no matter the technology proposed (*e.g.*, road, heavy or light rail, water), on a case-by-case basis after a review of the particulars associated with each unique proposal (Preamble to 14 CFR part 158, § 158.15 Project eligibility (56 FR 24258, May 29, 1991)). In general, an airport ground access transportation project must: be submitted by a qualified applicant; be eligible for funding under the AIP; meet at least one of the PFC program objectives and, if applicable, at least one of the significant contribution findings; and be adequately justified (49 U.S.C. 40117(d)(3)). In addition, all PFC projects must conform to other applicable regulatory requirements as referenced in 14 CFR part 158 (e.g., environmental requirements, specified implementation schedules). Airport ground access transportation projects approved for PFC levels above $3 must also conform to the AIP funding test (49 U.S.C. 40117(b)(4)(B); 14 CFR 158.17(a)(2)) and the airside needs test (49 U.S.C. 40117(d)(4); 14 CFR 158.17(a)(3)), as discussed more fully below.

**I. Qualified Applicants for PFC Projects**

*1. Who May Apply?*

The PFC statute (49 U.S.C. 40117(a)(2)) and regulation (14 CFR part 158.5) provide that only "a public agency that controls a commercial service airport" may submit an application to fund a specific project with PFC revenues. As defined in 14 CFR 158.3, a public agency may be "a State or any agency of one or more States; a municipality or other political subdivision of a State; an authority created by Federal, State, or local law; a tax supported organization; or an Indian tribe or pueblo that controls a commercial service airport." In addition, the sponsor of an airport participating in the Pilot Program on Private Ownership of Airports (49 U.S.C. 47134) may also submit a PFC application. A commercial service airport is defined in 14 CFR 158.3 as "a public airport enplaning 2,500 or more passengers annually and receiving scheduled service."

*2. May Other Parties Participate in Project Design and Development?*

Public agencies are strongly encouraged to coordinate the design and development of airport ground access transportation projects with local and regional transportation planning boards (*e.g.*. metropolitan planning organizations). This is especially important in cases where the PFC-funded project necessitates access or access improvements to a public roadway or transit system off airport property. (Section 187 of the Vision 100 Act requires public agencies controlling large or medium hub airports that are planning to construct or relocate an airport or construct a new runway or major runway extension to offer the local metropolitan planning organization the opportunity to review any airport layout plan or master plan in which the proposed project is depicted. This provision is intended to ensure that any ground access improvements necessitated by the proposed project are identified in a timely manner.) However, projects to be funded with PFC revenues must conform to the eligibility conditions specified below. In addition, the public agency is the final authority on the type and scope of an airport ground access transportation project submitted for PFC funding. 49 U.S.C. 40117(b)(2) specifies that "A state, political subdivision of a state, or authority of a state or political subdivision that is not the eligible agency may not regulate or prohibit the imposition or collection of a passenger facility fee or the use of the passenger facility revenue."

**II. PFC Project Eligibility**

*1. How Is PFC Eligibility Established?*

Under 49 U.S.C. 40117(a)(3)(A), PFC eligibility for airport ground access transportation projects is identical to that of AIP projects. AIP eligibility of airport projects, codified in Chapter 471 of 49 U.S.C., is summarized in change 1 to FAA Order 5100.38B, AIP Handbook (January 8, 2004). 49 U.S.C. 47102(3)(1) specifically identifies projects to support the movement of passengers, cargo, and baggage as being eligible airport development.

In past decisions on the eligibility of airport ground access transportation projects, the FAA has relied on the eligibility conditions summarized in paragraphs 620a, "Access Roads," and 622b, "Rail Service to Airports" of change 1 to FAA Order 5100.38B (January 8, 2004) and its predecessor FAA Order 5100.38A (October 24, 1989), paragraphs 553, "Airport Roads," and 555 "Rapid Transit Facilities." The use of eligibility criteria for access roads to judge eligibility of rail and fixed guideway systems is based, in part, on a March 15, 1971, opinion by the FAA Assistant Associate General Counsel. In that opinion, the Assistant Associate General Counsel determined that rail service to an airport was AIP eligible under the category of airport "entrance and service roads." The eligibility criteria summarized in the paragraphs cited above were themselves established through agency legal opinions interpreting 49 U.S.C. and its predecessor statutes.

To be AIP and PFC eligible, the airport ground access transportation project must meet the following conditions: (1) The road or facility may only extend to the nearest public highway or facility of sufficient capacity to accommodate airport traffic; (2) the access road or facility must be located on the airport or within a right-of-way acquired by the public agency; and (3) the access road or facility must exclusively serve airport traffic . Related facilities, such as acceleration and deceleration lanes, exit and entrance ramps, lighting, equipment to provide operational control of a rail system or people mover, and rail system or people mover stops at intermediate point on the airport are eligible when they are a necessary part of an eligible access road or facility (change 1 to FAA Order 5100.38B (January 8, 2004) paragraphs 620a(5) and 622(a). Related facilities may also include information technology and other electronic systems that will improve the operation, capacity or safety of the ground access facility, overhead variable message signs, and traffic control systems.

In addition to the above eligibility criteria, the public agency must retain ownership of the completed ground access transportation project. The public agency may choose to operate the facility on its own or may choose to lease the facility to a local or regional transit agency for operation within a larger local or regional transit system.

*2. What Does the FAA Consider the Nearest Highway or Facility?*

An airport ground access transportation project extending off the airport must connect to the nearest public highway or facility (depending on the transportation mode in question) of sufficient capacity to accommodate airport traffic (change 1 to FAA Order 5100.38B, paragraph 620a(1)). More than one access facility and/or connection point may be eligible if the airport traffic is of sufficient volume to require more than one access route (change 1 to FAA Order 5100.38B,

paragraph 620a(4)). Situations where more than one access route is needed would occur if an existing access route could not be expanded to meet expected traffic due to physical, environmental, or other binding constraints; or if a particular access route is poorly situated to serve a significant flow of traffic associated with a geographically separate region served by the airport.

Moreover, the FAA has allowed an airport ground access transportation project to connect to more than one point of a public transportation mode if the connections are to physically separated systems. For instance, in the case of the LRS at JFK, the FAA allowed the LRS to connect to the nearest-points-of access of two separate public rail systems (*i.e.*, the New York City Transit Subway and the Long Island Rail Road). Given the size of the New York City metropolitan area and the extremely close proximity of one rail connection point to airport parking facilities to be served by the LRS, the FAA determined that the access to two rail sites serving geographically distinct areas was reasonable.

*3. What Qualifies as Airport-Owned Land or Rights-of-Way?*

Airport ground access transportation projects built entirely on airport-owned land within the traditional boundaries of an airport clearly meet the airport-owned land requirement for AIP eligibility, as stated in change 1 to FAA Order 5100.38B, paragraph 620a(2). Moreover, an airport ground access transportation project may extend off the traditional boundaries of an airport (to the nearest off-airport highway or access facility) provided that the right-of-way for the project will be owned and controlled by the public agency for the life of the project and the project is connected to the airport at some point, thus qualifying as an appurtenant area and within the airport boundary under 49 U.S.C. 47102(2)(A)(ii). To satisfy this eligibility requirement, the public agency must amend its Airport Layout Plan and Exhibit A to show the right-of-way. The FAA's application of these eligibility standards was upheld by the U.S. Court of Appeals for the District of Columbia Circuit for the JFK LRS PFC decision in the case of the *Air Transport Association of America* v. *FAA*, 169 F.3d. 1, 5 (D.C. Cir 1999) finding a certification by the eligible agency to take ownership of the right-of-way before it would use PFC funds to be adequate, and further, finding that the eligible airport ground access transportation project may be attached to the airport terminus to be considered within the airport boundary.[2]

*4. What Is Exclusive Airport Use?*

The requirement under change 1 of FAA Order 5100.38B paragraph 620a(3) that the airport ground access transportation project be for the exclusive use of airport patrons and employees means that the facility can experience no more than incidental use by non-airport users. "Incidental use by non-airport users" means that through system access control procedures, physical alignment, schedules, pricing or for other reasons, routine use by non-airport users would be unattractive and non-airport users in fact constitute only a minor percentage of total system ridership. Exclusive airport use does not mean that any non-airport use must be prevented at all costs. In evaluating this requirement, the FAA considers whether techniques that would enable the public agency to prevent non-airport use would be prohibitively expensive. However, use of the airport ground access transportation project by more than a minor percentage of non-airport users would raise the FAA's concerns with regard to a project's eligibility.

Determining whether a facility meets the standard of exclusive use requires a case-by-case evaluation, although certain types of facilities are easier to evaluate than others. A rail station located within the airport boundary (particularly one in or adjacent to an airport terminal as in the case of Lambert-St. Louis, Chicago O'Hare, Hartsfield-Jackson Atlanta, Ronald Reagan Washington National, and Baltimore-Washington airports) would typically be used only by airport users and therefore be an exclusive use facility (some exceptions may exist if the rail station is also convenient to a nearby non-airport facility). A facility near the boundary of an airport or which otherwise may attract non-airport use may qualify as exclusive use if system access control could be implemented by design features, pricing techniques (making non-airport use non-economical), routing to discourage non-airport use, or other methods approved by the FAA[3]. If a road or facility is intended to serve both airport and non-airport users, only those physically-discrete subsections of the road or facility that exclusively serve airport users could be funded with AIP or PFC funds. In the case of the PDX Airport MAX rail system, the FAA permitted PFC funding for only one of three discrete segments (the on-airport segment ending at the terminal) as it alone was solely intended for use by airport patrons and employees.

## III. PFC Objective and Significant Contribution Findings

In addition to AIP eligibility, the PFC statute as implemented by 14 CFR part 158, requires that PFC projects, including PFC-funded airport ground access transportation projects, must accomplish one or more PFC program objectives and, if applicable, be found to make a significant contribution to the national air transportation system in one or more specific areas, depending on the size of the airport and the proposed PFC level. In accordance with 49 U.S.C. 40117(d)(2), as implemented by 14 CFR 158.15(a), the PFC program objectives are: (1) Preserving or enhancing the safety, capacity, or security of the national air transportation system; (2) reducing noise or mitigate noise impacts resulting from an airport that is part of such system; or (3) furnishing opportunities for enhanced competition between or among air carriers. In accordance with 49 U.S.C. 40117(b)(4)(A) as implemented by 14 CFR 158.17(b), a large or medium hub airport proposing a project at a $4 or $4.50 PFC level must demonstrate that the project makes a significant contribution to: (1) Improving air safety and security; (2) increasing competition among air carriers; (3) reducing current or anticipated congestion; or (4)

[2] The Court reviewed the FAA's application of the eligibility standards from FAA Order 5100.38A (October 29, 1989), paragraph 553, "Airport Roads," and paragraph 555, "Rapid Transit Facilities." Among other things, the petitioner had contented that the right-of-way between the Jamaica Long Island Rail Road Station, a 3.1 mile elevated railway along the Van Wyck Expressway, and JFK did not meet FAA eligibility requirements because this right-of-way was not "on-airport." The petitioner argued that for a right-of-way to be on-airport, it must be attached to the airport landing area along its entire length. The court upheld the FAA's position, based upon FAA Order 5100.38A, paragraphs 553 and 555, that the right-of-way need only be attached to the airport landing area at some point, but not necessarily along the entire length of the right-of-way. The court also noted that the FAA's interpretation, that once a public agency owns the right-of-way, that strip of land is by definition airport-owned and therefore "within the airport" was "reasonable" and "consisted with the FAA's own regulations and past practice." 169 F. 3d at 6. The court also cited 56 FR 24,254, 24,258 (1991), the FAA's preamble to the final PFC rule, which states that "ground transportation projects are eligible if the public agency acquires the right-of-way." 169 F. 3d at 6.

[3] For instance, during the FAA's evaluation of the JFK LRS, it was suggested that local non-airport commuters might park in the JFK long term parking facilities and enter the LRS to access the Long Island Railroad or the subway lines. The FAA concluded that such non-airport uses of the LRS would be economically unfeasible due to the combined cost of the roundtrip LRS fare and airport parking relative to alternative means of accessing the non-LRS transit system.

reducing the impact of aviation noise on people living near the airport.

Any public agency requesting PFC funding for an airport ground access transportation project at a $1, $2, or $3 PFC level must meet the PFC Objectives requirement. Ground access transportation projects proposed for funding at a $4 or $4.50 PFC level at a small hub or smaller airport must also meet the PFC Objectives requirement. However, airport ground access transportation projects proposed for funding at a $4 or $4.50 PFC level at a large or medium hub airport must meet the significant contribution requirement.

*1. Which PFC Objectives Are Typically Met by an Airport Ground Access Transportation Project?*

Typically, public agencies propose that an airport ground access transportation project meets the objective of preservation or enhancement of capacity of the national air transportation system, in that airport passengers or air cargo customers may be afforded faster and/or more reliable access times to airports, thus reducing total trip times. The FAA uses reduced trip time as a rough gauge of capacity benefits as it means that the national air transportation system can accommodate the same number of people or amount of air cargo with less average delay, or alternatively, a larger number of people or a larger amount of air cargo at the same level of average delay. These airport passengers or air cargo customers could include users of the proposed access system, as well as users of other means of airport access who would benefit from reductions in ground congestion enabled by the proposed system.

A public agency may propose that an airport ground access transportation project meets other PFC objectives apart from or in addition to capacity preservation or enhancement. For instance, a project could benefit competition between airlines if the improved ground access results in a passenger being able to choose between air carriers operating at different airports. In all cases, the objective(s) cited for the project must be realistic and supported by analysis. The degree to which the project meets its objective(s) is, in turn, the basis for the determination of the project's justification.

*2. Which Significant Contribution Findings Are Typically Proposed for an Airport Ground Access Transportation Project?*

Similar to the PFC objectives requirement, public agencies typically prepare an airport ground access transportation project description and justification to meet the "reduce current or anticipated congestion"significant contribution finding. The public agency's analysis may be similar to that outlined under the PFC objectives discussion above. In analyzing the significant contribution benefits of a "congestion" project, the FAA considers the following questions; in addition to any unique aspects of a project: (1) Does the project support or is it a part of a capacity project to which the FAA has allocated Federal resources or that would qualify for such resources?; (2) Is the project included in an AIP Letter of Intent or does it satisfy the FAA's benefit-cost criteria for large AIP discretionary investments?; (3) Has the project been identified as an important item in an FAA Airport Capacity Enhancement Plan?; or (4) Does the project alleviate an important constraint on airport growth or service? (FAA Order 5500.1, Passenger Facility Charge, (August 9, 2001), paragraph 10–12b.)

*3. How Does the FAA Analyze an Airport Ground Access Transportation Project That Is Undertaken To Obtain Necessary Local Approvals for Other PFC Financed Projects?*

In some cases, a state or local government agency (other than the airport public agency) may condition its approval of an airport project requested by the public agency with the requirement that the public agency also build an airport ground access transportation project. To date, the FAA has not permitted the PFC objectives or other PFC requirements that must be met by the requested airport project to be imputed to the airport ground access transportation project simply because the access project has been made a condition of the airport project's approval as a matter of state or local law. Rather, the FAA has consistently required that the proposed airport ground access transportation project, on its own merits, satisfy one or more of the PFC objectives, as well as conform to the other requirements of the PFC statute and regulation, before granting approval of the airport ground access transportation project.

**IV. Adequate Justification**

The FAA notes that, in addition to meeting the statutory and regulatory criteria of eligibility, PFC-funded ground access transportation projects must be adequately justified. This requirement is established by 49 U.S.C. 40117(d)(3). The nature of the project justification depends in large measure on which PFC objective the public agency relief on to support the project. Airport ground access transportation projects are typically intended to preserve or enhance the capacity of the national air transportation system. In this case, the justification should be framed in terms of the project's effect on capacity.

*1. How Can a Public Agency Demonstrate Adequate Justification for an Airport Access Road Project?*

In the case of standard airport access road projects, the case for new or enlarged roads can usually be made by a straightforward traffic study. The traffic study should demonstrate the impact of the access road project in reducing roadway congestion and trip times to the airport. Usually, the need for new road capacity is evident to all users of an airport and can be clearly demonstrated based on these studies.

*2. How Can a Public Agency Demonstrate Adequate Justification for an Intermodal Project?*

Intermodal projects—especially rail or other fixed guideway systems—can be complex to analyze. To date, the FAA has issued PFC decisions on only a few large-scale airport rail projects and has employed two methods to determine adequate justification. Due to this limited scope of prior experience, the FAA continues to consider adequate justification on a case-by-case basis and is not prepared at this time to constrain public agencies' options for establishing justification. The FAA has relief on the specialized expertise of the FTA to validate measured capacity effects of airport rail projects and will continue to do so.

An airport ground access transportation project can be found adequately justified if it has the effect of alleviating a ground access constraint that otherwise would impede or restrain use of the airport by air passengers. Using this method, the public agency must demonstrate that, but for the proposed system, use of the airport would be substantially less, either now or in the future, than it would otherwise be due to ground access constraints. The Office of the Inspector General (OIG) agreed with this as an approach to the adequate justification requirement in a January 21, 1998, management advisory to the FAA pertaining to the JFK LRS PFC decision. In the case of the JFK

LRS, the FAA found the LRS to be adequately justified based on analysis that showed that, but for the LRS, 3.35 million fewer air passengers would be able to access JFK by the year 2013 due to roadway access constraints.

The FAA has also accepted as adequate justification the public agency's demonstration that the benefits of the project in terms of reduced travel time to the airport (either for project passengers themselves or for all air passengers who benefit from less congested roadways) are reasonable relative to the PFC cost of the project. This approach was used, in part, to establish adequate justification for the Airport MAX light rail system that will link PDX to the regional rail network. Use of this method of analysis is voluntary for the public agency, as current regulations do not require public agencies to use benefit-cost analysis to show adequate justification for a PFC project.

However, the requirement for adequate justification is not voluntary. A decision not to a benefit-cost analysis does not relieve a public agency of the need to demonstrate adequate justification in some other way. The FAA and FTA will consider other methods of establishing adequate justification that a public agency may believe better addresses its unique access project. At a minimum, an acceptable approach must demonstrate that a rail project will produce a reasonable stream of congestion reduction or other access benefits to air passengers relative to the scale and cost of the project. Thus, under whatever method is selected, the FAA would normally expect the level of justification for the project to increase as the amount of PFC funding requested for the project increases. We strongly recommend that the public agency consult with the FAA and FTA early in the planning/study process (and well in advance of submission of a PFC application to fund such a project) to identify a mutually acceptable approach to establishing adequate justification for the particular project.

**V. Other Issues Potentially Affecting PFC Decisions on Airport Ground Access Transportation Projects**

In its January 21, 1998, management advisory to the FAA, the OIG recommended that the FAA consider two other elements about the JFK LRS in addition to the project's effect on air passenger use of JFK (see Adequate Justification, above). Because of the great expense of the LRS project, the OIG recommended that the FAA verify that the project, if approved, would not create a risk to investment plans for enhancing airside safety, security, and capacity. The OIG also recommended that the public agency explain why the LRS should be funded without contribution from surface transportation funds or other non-airport revenues.

*1. Must a Public Agency Fully Fund Airside Safety, Security, and Capacity Projects Before Applying PFC Funds to Airport Ground Access Transportation Projects?*

The answer to this question depends on what PFC level the public agency proposes for the project.

The PFC statute and regulation do not assign priority to projects meeting any one objective of the PFC program or to airside projects in preference to non-airside projects for projects proposed at a $1, $2, or $3 PFC level. Accordingly, the FAA cannot require that a public agency fund an airside project in preference to an airport ground access transportation project at these PFC levels. However, the FAA would be very concerned to find that critical airport safety, security, and/or airside capacity needs could not be funded as a result of the funding of an airport ground access transportation project. In order to evaluate such concerns, the FAA may require that the public agency provide relevant materials for the FAA's review. The PFC regulation, 14 CFR 158.25, already requires that the public agency submit the airport's capital plan with the PFC application. If a funding deficiency is revealed, the FAA would encourage the public agency to correct this deficiency.

Airport ground access transportation projects proposed at a $4 or $4.50 PFC level, regardless of the size of the airport, must meet an airside needs test pursuant to 49 U.S.C. 40117(d)(4); 14 CFR 158.17(a)(3). This test requires that the public agency demonstrate that it has made adequate provision for financing the airside needs of the airport, including runways, taxiways, aprons, and aircraft gates. Typically, the FAA reviews any available planning and inspection documents to determine the airside needs of the airport and then reviews the public agency's airport capital plan, submitted with the PFC application, to ensure that any needed airside projects are included in the capital plan.

*2. Does the Allocation of Some Non-PFC Funds to an Airport Ground Access Transportation Project Increase the Likelihood That the Project Will Be Approved for PFC Funding?*

The PFC eligibility of an airport ground access transportation project does not depend upon whether the public agency also contemplates using other sources to fund portions of the project. There is no requirement in the PFC statute or regulation for public agencies to fund such projects intermodally (*i.e.*, from multiple transit funding sources). The FAA has identified factors that could encourage or discourage a public agency in pursuing intermodal funding. The magnitude of aviation benefits expected of the project to establish adequate justification for PFC funding will be less if the amount of PFC funding requested is reduced by non-PFC participation. Non-PFC or non-airport financial participation may also help build local consensus for the project by ameliorating concerns on the part of the aviation community about the use of airport resources for non-airside investments. However, the partial funding of a project from non-PFC sources does not negate the exclusive use requirement associated with PFC funding. In any instance where PFC funding is used to fund a component of an intermodal project, that component must be for exclusive airport use (*see* PFC Project Eligibility, above) and the public agency must adequately demonstrate that the funding sources are viable. The exclusive use requirement might complicate the ability of a public agency to qualify for the expenditure of funds from traditional sources of transit capital (*e.g.* FTA's major capital investments program) unless the project can be easily separated into exclusive and mixed-use components.

*3. Must a Public Agency Use or Pledge To Use AIP Grant Funds on an Airport Ground Access Transportation Project Before the Project Can Be Approved for PFC Funding?*

The answer to this question depends on what PFC level the public agency proposes for the project.

The PFC statute and regulation do not require that a public agency use AIP grant funds for projects proposed at a $1, $2, or $3 PFC level.

Airport ground access transportation projects proposed at a $4 or $4.50 PFC level, regardless of the size of the airport, must meet an AIP funding test. This test requires that the FAA make a finding that the project cannot be paid for from AIP funds reasonably expected to be available in order to approve the project (49 U.S.C. 40117(b)(4); 14 CFR 158.17(a)(2)).

### VI. Use of Other Airport Revenue To Finance Airport Ground Access Transportation Projects

Eligibility for funding of airport ground access transportation projects with airport revenues is different than that for PFC or AIP funds. Guidance for use of such airport revenues on airport ground access transportation projects is provided in "Policies and Procedures Concerning the Use of Airport Revenue," Section V.A.9 (64 FR 7718–7719, February 16, 1999).

Issued in Washington, DC on February 3, 2004.

Catherine M. Lang,

*Deputy Associate Administrator for Airports.*

[FR Doc. 04–2884 Filed 2–9–04; 8:45 am]

BILLING CODE 3510–DS–M

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2004–16999]**

### Notice of Receipt of Petition for Decision That Nonconforming 2002–2004 Aston Martin Vanquish Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 2002–2004 Aston Martin Vanquish passenger cars are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2002–2004 Aston Martin Vanquish passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is March 11, 2004.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St. SW., Washington, DC 20590. Docket hours are from 9 a.m. to 5 p.m. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202) 366–3151.

**SUPPLEMENTARY INFORMATION:**

#### Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Webautoworld.com Corp. of Pampano Beach, Florida ("Webautoworld") (Registered Importer 02–295) has petitioned NHTSA to decide whether 2002–2004 Aston Martin Vanquish passenger cars are eligible for importation into the United States. The vehicles which Webautoworld believes are substantially similar are 2002–2004 Aston Martin Vanquish passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 2002–2004 Aston Martin Vanquish passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

Webautoworld submitted information with its petition intended to demonstrate that non-U.S. certified 2002–2004 Aston Martin Vanquish passenger cars, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2002–2004 Aston Martin Vanquish passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 101 *Controls and Displays,* 102 *Transmission Shift Lever Sequence,* 103 *Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 113 *Hood Latch Systems,* 116 *Brake Fluid,* 118 *Power Window Systems,* 124 *Accelerator Control Systems,* 135 *Passenger Car Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* 302 *Flammability of Interior Materials,* and 401 *Interior Trunk Release.*

The petitioner claims that the vehicles also comply with the Bumper Standard found in 49 CFR part 581.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies and sidemarker lights with reflectors; (b) installation of U.S.-model tail light assemblies and sidemarker lights with reflectors.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirror:* Replacement of the passenger side rearview mirror with a U.S.-model component or inscription of the required warning statement on the mirror's face.

Standard No. 114 *Theft Protection:* Programming of the vehicle's computer

to activate the key warning buzzer and the belt warning buzzer.

Standard No. 208 *Occupant Crash Protection:* Reprogramming of the vehicle's computer to activate the seat belt warning system. The petitioner states that the vehicles should be equipped at the front and rear outboard seating positions with combination lap and shoulder belts that are self-tensioning and that release by means of a single red pushbutton. The petitioner further states that the vehicles are equipped with driver's and passenger's airbags, and with a seat belt warning lamp that is identical to the lamp installed on U.S.-certified models.

The petitioner also states that a vehicle identification plate must be affixed to the vehicles near the left windshield post and a reference and certification label must be affixed in the area of the left front door post to meet the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh St. SW., Washington, DC 20590. Docket hours are from 9 a.m. to 5 p.m. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: February 4, 2004.

**Kenneth N. Weinstein,**

*Associate Administrator for Enforcement.*

[FR Doc. 04–2740 Filed 2–9–04; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–864X]**

### Hennepin County Regional Railroad Authority-Abandonment Exemption-in McLeod, Carver and Hennepin Counties, MN

Hennepin County Regional Railroad Authority (HCRRA) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 43.9+/-mile line of railroad, between milepost 24.6+/-near Wayzata and milepost 68.5+/-in Hutchinson, in McLeod, Carver and Hennepin Counties, MN. In its notice, HCRRA indicates that the right to conduct freight rail operations on the line is pursuant to a freight rail operations easement in its favor. HCRRA further indicates that the underlying property located in McLeod County is owned by McLeod County Regional Railroad Authority (MCRRA), in Carver County is owned by the Carver County Regional Railroad Authority (CCRRA), and in Hennepin County is owned by HCRRA, and that MCRRA, CCRRA and HCRRA are all political subdivisions of the State of Minnesota. HCRRA has filed this notice to terminate its common carrier obligation on the line and, upon the effective date of the proposed abandonment exemption, it has agreed to release the freight rail operations easement in its favor for that portion of the line located in Carver County to CCRRA, and for that portion of the line located in McLeod County to MCRRA, and HCRRA will retain its portion of the line located in Hennepin County, all for the purposes of preserving the line for future rail transportation use and other compatible transportation uses. The line traverses United States Postal Service Zip Codes 55323, 55350, 55354, 55356, 55360, 55361, 55364, 55367, 55375, 55381, 55384, 55387, and 55391.

HCRRA has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on March 11, 2004, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by February 20, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by March 1, 2004, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.[3]

A copy of any petition filed with the Board should be sent to HCRRA's representative: Marilyn J. Maloney, Assistant County Attorney, 2000A Government Center, Minneapolis, MN 55487.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

HCRRA has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by February 13, 2004. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See* Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

[3] HCRRA has requested that the Board make certain determinations regarding the imposition of public use and trail use conditions here. The Board's Class Exemption process, which HCRRA has invoked, does not provide for such determinations in issuing a notice of exemption, and it is not clear that these determinations are necessary in this proceeding. While no one has made a proper filing for either a public use or trail use condition, should a party wish to proceed under the Board's public use or trail use procedures, such party should make the appropriate filings within the time frames set forth above, as provided in the Board's rules at 49 CFR 1152.28 (Public use procedures) and at 49 CFR 1152.29 (Prospective use of right-of-way for interim trail use and rail banking, respectively).

after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), HCRRA shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by HCRRA's filing of a notice of consummation by February 10, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at "*www.stb.dot.gov.*"

Decided: February 2, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 04–2590 Filed 2–9–04; 8:45 am]

BILLING CODE 4915–00–P

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–859 (Sub-No. 1X) and STB Docket No. AB–290 (Sub-No. 245X)]**

### Pennsylvania Lines LLC—Abandonment Exemption—in Northampton County, PA, and Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Northampton County, PA

Pennsylvania Lines LLC (PRR) and Norfolk Southern Railway Company (NSR) (collectively, petitioners) have jointly filed a notice of exemption under 49 CFR Part 1152, Subpart F—*Exempt Abandonments and Discontinuances of Service* for PRR to abandon, and NSR to discontinue service over, a 3.7-mile line of railroad between milepost EK–53.0 at Hellertown and milepost EK–56.7 at Bethlehem, in Northampton, PA. The line traverses United States Postal Service Zip Codes 18015, 18016, 18017, 18018, 18020, 18025 and 18055.

PRR and NSR have certified that: (1) No local traffic has moved over the line for at least 2 years; (2) no overhead traffic has moved over the line for at least 2 years and overhead traffic, if there were any, could be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to these exemptions, any employee adversely affected by the abandonment or discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on March 11, 2004, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by February 20, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by March 1, 2004, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.[3]

A copy of any petition filed with the Board should be sent to applicants' representative: James R. Paschall, General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk Southern Railway Company, Norfolk, VA 23510.

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

[3] On February 2, 2004, the Bucks County Transportation Management Association (Bucks County) filed a letter in opposition to the abandonment of the rail line. Bucks County states that the line represents the only existing rail line between Philadelphia and the Allentown/Bethlehem area and that abandonment of the line would eliminate any possibility of restoring commuter rail service through this area. Bucks County and any other interested person may file petitions for relief within the deadlines established in this notice.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

PRR and NSR have filed an environmental report which addresses the effects, if any, of the abandonment and discontinuance on the environment and historic resources. SEA will issue an environmental assessment (EA) by February 13, 2004. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), PRR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by PRR's filing of a notice of consummation by February 10, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: February 4, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 04–2718 Filed 2–9–04; 8:45 am]

BILLING CODE 4915–00–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

February 2, 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 March 11, 2004 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–0145.
*Form Number:* IRS Form 2439.
*Type of Review:* Extension.
*Title:* Notice to Shareholder of Undistributed Long-Term Capital Gains.
*Description:* Form 2439 is sent by regulated investment companies and real estate investment trusts to report undistributed capital gains and the amount of tax paid on these gains designated under Internal Revenue Code (IRC) section 852(b)(3)(D) or 857(b)(3)(D). The company, the trust, and the shareholder file copies of Form 2439 with IRS. IRS uses the information to check shareholder compliance.
*Respondents:* Business or other for-profit.
*Estimated Number of Respondents/ Recordkeepers:* 8,363.
*Estimated Burden Hours Respondent/ Recordkeeper:*
Recordkeeping—3 hr., 21 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:* 43,739 hours.
*Clearance Officer:* Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 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. 04–2852 Filed 2–9–04; 8:45 am]
**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

February 4, 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 March 11, 2004, to be assured of consideration.

*Internal Revenue Service (IRS)*
*OMB Number:* 1545–0148.
*Form Number:* IRS Form 2758.
*Type of Review:* Extension.
*Title:* Application for Extension of Time to File Certain Excise, Income, and Other Returns.
*Description:* Internal Revenue Code (ICR) 6081 permits the Secretary to grant a reasonable extension of time for filing any returns, declaration, statement, or other document. This form is used by fiduciaries and certain organizations to request an extension of time to file their returns. The information is used to determine whether the extension should be granted.
*Respondents:* Business or other for-profit, not-for-profit institutions.
*Estimated Number of Respondents/ Recordkeepers:* 70,371.
*Estimated Burden Hours Respondent/ Recordkeeper:*
Recordkeeping—5 hr.
Learning about the law or the form—12 min.
Preparing and sending the form to the IRS—16 min.
*Frequency of Response:* On occasion.
*Estimated Total Reporting/ Recordkeeping Burden:* 375,923 hours.
*Clearance Officer:* Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 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. 04–2853 Filed 2–9–04; 8:45 am]
**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 966

**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 966, Corporate Dissolution or Liquidation.

**DATES:** Written comments should be received on or before April 12, 2004 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, 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 Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

**SUPPLEMENTARY INFORMATION:**
*Title:* Corporate Dissolution or Liquidation.
*OMB Number:* 1545–0041.
*Form Number:* Form 966.
*Abstract:* Form 966 is filed by a corporation whose shareholders have agreed to liquidate the corporation. As a result of the liquidation, the shareholders receive the property of the corporation in exchange for their stock. The IRS uses Form 966 to determine if the liquidation election was properly made and if any taxes are due on the transfer of property.
*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 organzations.
*Estimated Number of Respondents:* 26,000.
*Estimated Time Per Respondent:* 6 hours, 7 minutes.
*Estimated Total Annual Burden Hours:* 159,120.
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: February 3, 2004.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 04–2854 Filed 2–9–04; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[LR–213–76]**

### 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 regulation, LR–213–76 (TD 8095), Estate and Gift Taxes; Qualified Disclaimers of Property (Section 25.2518–2(b)).

**DATES:** Written comments should be received on or before April 12, 2004 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulations 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:* Estate and Gift Taxes; Qualified Disclaimers of Property.

*OMB Number:* 1545–0959. Regulation Project Number: LR–213–76.

*Abstract:* Internal Revenue Code section 2518 allows a person to disclaim an interest in property received by gift or inheritance. The interest is treated as if the disclaimant never received or transferred such interest for Federal gift tax purposes. A qualified disclaimer must be in writing and delivered to the transferor or trustee.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 2,000.

*Estimated Time Per Respondent:* 30 minutes.

*Estimated Total Annual Burden Hours:* 1,000.

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: February 3, 2004.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 04–2855 Filed 2–9–04; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 8703

**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 8703, Annual Certification of a Residential Rental Project.

**DATES:** Written comments should be received on or before April 12, 2004 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, 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:* Annual Certification of a Residential Rental Project.

*OMB Number:* 1545–1038.

*Form Number:* 8703.

*Abstract:* Form 8703 is used by the operator of a residential rental project to provide annual information that the IRS will use to determine whether a project continues to be a qualified residential rental project under Internal Revenue Code section 142(d). If so, and certain other requirements are met, bonds issued in connection with the project

are considered "exempt facility bonds" and the interest paid on them is not taxable to the recipient.

*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.

*Estimated Number of Respondents:* 6000.

*Estimated Time Per Respondent:* 6 hours, 32 minutes.

*Estimated Total Annual Burden Hours:* 39,180.

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: February 4, 2004.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 04–2856 Filed 2–9–04; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Revenue Procedure 2004–15

**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 Revenue Procedure 2004–15, Waivers of Minimum Funding Standards.

**DATES:** Written comments should be received on or before April 12, 2004 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the revenue procedure 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:* Waivers of Minimum Funding Standards.

*OMB Number:* 1545–1873.

*Revenue Procedure Number:* Revenue Procedure 2004–15.

*Abstract:* Revenue Procedure 2004–15 describes the process for obtaining a waiver from the minimum funding standards set forth in section 412 of the Code.

*Current Actions:* There are no changes being made to the revenue procedure at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit institutions, farms, and state, local or tribal governments.

*Estimated Number of Respondents:* 55.

*Estimated Annual Average Time Per Respondent:* 86 hours.

*Estimated Total Annual Hours:* 4,730.

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: February 4, 2004.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 04–2857 Filed 2–9–04; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0577]**

### Agency Information Collection Activities Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment.

The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before March 11, 2004.

**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0577."

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0577" in any correspondence.

**SUPPLEMENTARY INFORMATION:**

*Title:* Award Attachment For Certain Children with Disabilities Born of Vietnam Veterans, VA Form 21–0307.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* VA Form 21–0307 is used to provide children of Vietnam veterans with Spina Bifida information about VA health care and vocational training and the steps they must take to apply for such benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on November 13, 2003, at pages 64427–64428.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 500 hours.

*Estimated Average Burden Per Respondent:* 15 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 2,000.

Dated: January 26, 2004.

By direction of the Secretary.

**Jacqueline Parks,**

*IT Specialist, Records Management Service.*

[FR Doc. 04–2796 Filed 2–9–04; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Vocational Rehabilitation and Employment Task Force; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the VA Vocational Rehabilitation and Employment (VR&E) Task Force will be held on Thursday, February 18, 2004, at the Paralyzed Veterans of America (PVA) National Headquarters, 801 18th Street, NW., Main Conference Room, Washington, DC 20006. The meeting will be open to the public.

The purpose of the Task Force is to conduct an independent review of the VR&E program within the Veterans Benefits Administration. The Task Force will provide recommendations to the Secretary of Veterans Affairs on improving the Department's ability to deliver employment and vocational rehabilitation services to veterans with service-connected disabilities and employment handicaps.

The principal purpose of the meeting is to conduct final deliberations on those recommendations contained in the Task Force report which will be formally presented to the Secretary of Veterans Affairs in the near future. The meeting will convene at 10 a.m. and conclude after the Task has completed discussions on the report.

No time will be allocated for receiving oral presentations from the public. Members of the public may submit written comments for review by the Task Force to Mr. John O'Hara, Designated Federal Officer, Vocational Rehabilitation and Employment Task Force, c/o Office of Policy, Planning, and Preparedness (008B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Mr. O'Hara's e-mail is *john.o'hara@mail.va.gov* and his fax number is (202) 273–5991.

Dated: February 2, 2004.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 04–2686 Filed 2–9–04; 8:45 am]

**BILLING CODE 8320–01S–M**


Federal Register

Tuesday,
February 10, 2004

Part II

# Department of Transportation

**Federal Aviation Administration**

**14 CFR Parts 121 and 139**
**Certification of Airports; Final Rule**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Parts 121 and 139**

**[Docket No. FAA–2000–7479; Amendment Nos. 121–304, 135–94]**

**RIN 2120–AG96**

# Certification of Airports

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the airport certification regulation and establishes certification requirements for airports serving scheduled air carrier operations in aircraft designed for more than 9 passenger seats but less than 31 passenger seats. In addition, this rule amends a section of an air carrier operation regulation to conform with changes to airport certification requirements. This rule is necessary to ensure safety in air transportation at all certificated airports.

**DATES:** Effective June 9, 2004.

**FOR FURTHER INFORMATION CONTACT:** Linda Bruce, Airport Safety and Operations Division (AAS–300), Office of Airport Safety and Standards, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8553; or e-mail: *linda.bruce@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) web page (*http://dms.dot.gov/search*);

(2) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm;* or

(3) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

## Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact its local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBREFA on the Internet at *http://www.faa.gov/avr/arm/sbrefa.htm,* or by e-mailing us at *-AWA-SBREFA@faa.gov.*

## Background

### *Regulatory History*

Since 1970, the FAA Administrator has had the statutory authority under title 49, United States Code (U.S.C.) 44706 to issue Airport Operating Certificates (AOCs) to airports serving certain air carriers and to establish minimum safety standards for the operation of those airports. The FAA uses this authority to issue requirements for the certification and operation of certain land airports through part 139 of title 14, Code of Federal Regulations (14 CFR part 139).

This statutory authority was limited to those land airports serving passenger operations of an air carrier that are conducted with an aircraft designed for at least 31-passenger seats. In response to recommendations made by the General Accounting Office (GAO) in 1987 and the National Transportation Safety Board (NTSB) in 1994, the Secretary of Transportation sought authority from Congress to broaden the FAA's authority to certificate airports, and the FAA's authority was broadened when Congress passed the Federal Aviation Reauthorization Act of 1996 (Public Law 104–264), amending 49 U.S.C. 44706. This amendment granted the FAA the authority to certificate airports serving scheduled air carrier operations conducted in aircraft with more than 9 passenger seats but less than 31 passenger seats, except in the State of Alaska. There was no change to the FAA's existing authority to regulate airports serving air carrier operations using aircraft with more than 30 seats.

In April 2000, Congress further mandated, in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (Air-21; Public Law 106–181), that the FAA issue a Notice of Proposed Rulemaking (NPRM) within 60 days and a Final Rule 1 year after the close of the NPRM comment period implementing 49 U.S.C. 44706(a)(2), relating to the issuance of AOCs for small scheduled passenger air carrier operations.

The FAA implemented its new authority on airport certification by publishing an NPRM on June 21, 2000 (65 FR 38636). This NPRM proposed to revise the current airport certification requirements in 14 CFR part 139 and to establish certification requirements for airports serving scheduled air carrier operations in aircraft with more than 9 passenger seats but less than 31 passenger seats. The NPRM also proposed a conforming amendment to 14 CFR part 121. The public comment period was originally scheduled to close on September 9, 2000, but was extended to November 3, 2000, in response to several requests made by airport operators and the State of Maine.

In the NPRM, the FAA proposed to revise certain outdated safety requirements and require certification of airports not currently certificated that serve scheduled air carrier operations conducted in aircraft with more than 9 passenger seats but less than 31 passenger seats. The proposal also clarified existing requirements, incorporated existing industry practices, and responded to an outstanding petition for rulemaking and certain NTSB recommendations.

Further, the FAA proposed to revise the existing airport certification process to incorporate all airports covered by the statute, including those serving scheduled, smaller air carrier aircraft. Under this changed certification process, airports would be reclassified into four new classes, based on the type of air carrier operations served. Class I, II, and IV airports would be those that currently hold AOCs and Class III would be those airports being newly certificated.

Airports serving all types of scheduled operations of air carrier aircraft designed for at least 31 passenger seats (large air carrier aircraft), and any other type of air carrier operations, would be known as Class I airports. These airports currently hold an AOC.

Airports that currently hold a Limited Airport Operating Certificate would be known as either Class II or IV airports. The FAA proposed that Class II airports would be those that serve scheduled operations of small air carrier aircraft (aircraft designed for more than 9

passenger seats but less than 31 passenger seats) and unscheduled operations of large air carrier aircraft. Class IV airports would be those that serve only unscheduled operations of large air carrier aircraft.

As proposed, Class III airports would be those airports that serve only scheduled operations of small air carrier aircraft and, as noted above, would be required for the first time to be certificated under part 139. As specified in the authorizing statute, proposed airport certification requirements would not be applicable to airports located in the State of Alaska that only serve scheduled operations of small air carrier aircraft.

Similar to how the FAA currently certificates airports, the proposal required airport operators choosing to be certificated under part 139 to document their procedures for complying with part 139, as well as with the safety and operational requirements. To accommodate variations in airport layout, operations, air carrier service, and to address other local considerations, the FAA proposed that compliance procedures for the more burdensome requirements be tailored for each airport operator.

*Industry Participation*

Through the Aviation Rulemaking Advisory Committee (ARAC), the FAA sought industry input on regulatory and nonregulatory issues on the certification of airports serving smaller air carrier operations. The FAA asked the ARAC to consider alternatives to minimize the operational burden on smaller airports, including options for aircraft rescue and firefighting (ARFF) services. The FAA also suggested that the ARAC conduct a survey of affected airports to gauge the impact of any proposed requirement.

In 1995, the ARAC appointed the Commuter Airport Certification Working Group to complete these tasks. This working group comprised representatives from industry trade and union associations, including Air Line Pilots Association (ALPA), Aircraft Owners and Pilots Association (AOPA), American Association of Airport Executives (AAAE), National Air Transportation Association (NATA), National Association of State Aviation Officials (NASAO), and Regional Airline Association (RAA). The FAA and Landrum and Brown, an airport planning and engineering consulting firm, also provided technical support.

However, after the passage of the Federal Aviation Reauthorization Act of 1996, the FAA decided to consider exercising its new authority to regulate airports and asked the ARAC to immediately provide the FAA a report on certifying airports serving small air carrier aircraft that included draft regulatory language.

While the working group agreed on many issues, two members (ALPA and NATA) disagreed with several of the group's recommendations on regulatory requirements, including marking and lighting, ARFF, and the handling of hazardous substances and materials. Subsequently, in February 1997, both the majority and minority views of the working group, and those of individual workgroup members, were presented to the FAA.

As noted in the NPRM, the FAA considered these positions in this rulemaking. However, the decisions in this document are the FAA's.

**Discussion of Comments**

The FAA received 929 comments on the NPRM, of which 858 are similar letters from individuals and organizations addressing concerns about Centennial Airport in Greenwood, CO (see discussion on public charters below). The remaining 72 commenters addressed part 139 and part 121 issues. These commenters included—

- *Air carriers:* Eagle Canyon Airlines d.b.a. Scenic Airlines, Era Aviation, and Champlain Enterprises d.b.a. U.S. Airways Express.
- *Airport operators, including state and local governments:* Augusta State Airport (ME), Boone County Airport (AR), Chautauqua County Airports Commission (NY), Cheyenne Airport (WY), City of Alamogordo (NM), City of Phoenix (AZ), City of Show Low (AZ), City and County of Twin Falls (ID), City of Yankton (SD), Clark County Department of Aviation (NV), Clinton County Airport (NY), County of Hill (MT), Dallas/Fort Worth Int'l Airport (TX), Dane County Regional Airport (WI), Dawson Community Airport (MT), Fort Lauderdale—Hollywood Int'l Airport (FL), Hancock County'Bar Harbor Airport (ME), Havre City—County Airport (MT), Garfield County (UT), Grant County Commissioners (NM), Jamestown Airport Authority (ND), Kingman Airport Authority (AZ), Lebanon Municipal Airport (NH), Manchester Airport (NH), Mercer County Airport (WV), Metropolitan Airports Commission (MN), Miles City Airport Commission (MT), Ocala Regional Airport (FL), Port Authority of New York and New Jersey, Rutland Region Transportation Council (VT), Sidney—Richland Airport (MT), Spencer Municipal Airport (IA), State of Alaska, State of Hawaii, State of Iowa, State of Michigan, State of Montana, State of Maine, State of New York, State of Vermont, State of West Virginia, Williamson County Regional Airport (IL), and Yuma County Airport Authority (AZ).
- *Representatives of employees:* Air Line Pilots Association, The Aircraft Rescue and Fire Fighting Working Group, International Association of Fire Chiefs, Coalition of Airline Pilots Association, International Association of Fire Fighters, and International Brotherhood of Teamsters.
- *Associations:* Aircraft Owners and Pilot Association, Airports Council International-North America, American Association of Airport Executives, National Air Transportation Association, National Association of State Aviation Officials, National Business Aviation Association, National Fire Protection Association, Northeast Chapter of American Association of Airport Executives, Regional Airline Association, and the Wyoming Airport Operators Association.
- The National Transportation Safety Board.
- U.S. Department of Agriculture.
- U.S. Department of Defense.
- Individuals.

Except for issues about public charters, commenters support the new structure of the regulations. However, commenters were evenly divided on their support or opposition to the proposed requirements for airports serving smaller air carrier operations. As anticipated, airport operators express concerns over the increased burden and cost impacts of the proposed rule. They are particularly concerned about the costs to comply with proposed ARFF requirements. Conversely, the firefighter and pilot labor organizations believe the proposal did not go far enough.

Most operators of certificated airports did not comment on the proposal. Of the 656 currently certificated airports (both civilian and military airports), only 18 airport operators sent comments. Most of these airport operators recommended changes to the proposal. Of the 37 proposed Class III airports (airports that are to be newly certificated), 14 airport operators sent comments. Although all of these airport operators recommend changes to the proposal, only one supports certifying proposed Class III airports.

The final rule is adopted, as modified and detailed below. In adopting the final rule, the FAA has tried to strike a balance and has made changes to the final rule in response to the comments. Comments specific to a section are discussed below in the section-by-section analysis, following the discussion of Public Charters and General Comments.

**General Comments**

*Public Charters*

*Comment:* The FAA received 858 similar letters from individuals and organizations addressing concerns about Centennial Airport in Greenwood (near Denver), CO. These commenters state the NPRM does not consider legislation amending 49 U.S.C. 41104 (Air-21; Public Law 106–181). The legislation, in part, forbids air carriers, including indirect air carriers, from providing regularly scheduled charter air transportation to or from uncertificated airports with aircraft designed for more than 9 passenger seats (49 U.S.C. 41104(b)). The apparent interest of these commenters, though not stated specifically in the form letter, but made clear by other comments, is to ban regularly scheduled charter operations from serving Centennial Airport, which is not now certificated under part 139.

*FAA Response:* The comments received address an issue that is beyond the scope of this rulemaking and a matter not regulated by the FAA. Originally, Congress included an amendment to Public Charter Operations (49 U.S.C. 41104) in the Air-21 legislation. However, Section 41104(b) is directed to the air carriers' economic authority, which is regulated and administered by the Office of the Secretary within the Department of Transportation (DOT). In response to the concerns raised by these commenters and others, Congress passed further legislation, the Airport Security Improvement Act of 2000 (Public Law 106–528, 11/22/2000), in which technical amendments were made to this section. The DOT has determined that no implementing regulations are required as this is a stand-alone statutory requirement that became effective December 22, 2000.

However, to ensure that air carriers—who are governed by 14 CFR 121.590, Use of Certificated Land Airports in the United States—are aware of the statutory requirements of 49 U.S.C. 41104(b), the FAA has added an advisory note explaining those provisions in the flush paragraph following the amendatory language of 14 CFR 121.590 and 14 CFR 139.5. For further questions on public charter operations conducted under 14 CFR part 380, contact DOT, Office of Aviation Analysis, at (202) 366–5903.

*General Comments on Part 139*

As noted in the above section, many of the comments received from airport operators express concern regarding the cost to comply with proposed ARFF requirements, particularly at proposed Class III airports. While specific comments on ARFF requirements are addressed in the section-by-section discussion below, the FAA has made several changes in the final rule that affect ARFF cost concerns and warrant a general discussion on the matter.

To standardize ARFF at certificated airports, the FAA proposed that all certificated airports serving both scheduled and unscheduled operations be required to comply with all ARFF requirements. However, the FAA agrees that requiring all airports to comply with all ARFF requirements may pose a substantial cost for airports that do not currently provide minimum ARFF coverage or do so only to cover an occasional unscheduled air carrier flight. This would include both currently certificated airports and airports that would be newly certificated (Class III airports).

The FAA is directed by the authorizing statute (Title 49, U.S.C. 44706) to issue requirements for the certification and operation of airports. The statute requires the FAA to establish minimum safety standards for certificated airports that provide for the operation and maintenance of adequate safety equipment, including firefighting and rescue equipment. The authorizing statute also allows the FAA to exempt certain airport operators from all or some of ARFF requirements (certificated airports that have less than one-quarter of one percent of the total number of annual passenger boardings) and allows the FAA to adopt regulatory alternatives for commuter airports (Class III airports) that are "least costly, most cost-effective or the least burdensome" but provide comparable safety at all certificated airports.

The FAA has revised part 139 to better exercise its statutory authority to provide appropriate exemptions from some or all prescribed ARFF requirements and allow for alternative means of compliance for certain airports (Class III airports). While the FAA believes that a single set of airport certification standards promote the consistent application of safety measures, the use of statutory exemptions and alternative compliance measures that are monitored closely by the FAA will ensure that ARFF requirements are appropriate for the airport size and type of air carrier operations.

As adopted, this rule requires all certificated airports to provide some level of ARFF service. Where appropriate, the FAA will provide limited exemptions on a case-by-case basis for airports with infrequent or smaller air carrier operations from some or all prescribed ARFF requirements. In addition, the alternative ARFF compliance measures have been established for Class III airports. This is intended to provide Class III airports relief. The FAA recognizes that it would be too burdensome to require these airports to provide the same level of ARFF services required of airports serving large air carrier operations.

The FAA also received the following general comments on the proposal:

*Comment:* A commenter, a Class I airport operator, states that its facility is already fully compliant with the proposal and would therefore not be affected by the NPRM.

*FAA Response:* As mentioned in the NPRM preamble's "General Discussion of the Proposal" section, many airport operators will need to do little to comply with revised part 139 requirements. However, some airport operators will be required to revise their certification manuals to comply with the adopted changes to existing requirements. Other operators may be required to implement certain safety measures on a more frequent basis if they serve small air carrier operations that do not occur concurrently with large air carrier aircraft operations.

*Comment:* Two commenters support the proposal. One commenter, the National Transportation Safety Board, states that the promulgation of the proposal will "enhance the level of safety at airports served by commuter airlines." The other commenter states that the inclusion of airports serving smaller air carrier operation in part 139 is a "viable means to increase air travel safety."

*FAA Response:* The FAA believes this rule will enhance safety in air transportation.

*Comment:* Five commenters oppose the adoption of certification requirements for airports serving scheduled operations of small air carrier aircraft. They state that such requirements are unnecessary as these airports have a good safety record and their implementation would be prohibitively expensive. One of these commenters states that the current part 139 is enough to ensure safety in air transportation.

*FAA Response:* The FAA disagrees that the proposed changes to part 139 are unnecessary. The FAA has determined that the changes to part 139 are necessary to ensure safety in air transportation at all covered airports. This was not based on the fact that some airports have a poor safety record (no category of airport has a poor safety record); rather the changes are intended to provide, to the extent possible, safety

in air transportation at all airports covered by the statute and part 139.

The FAA believes that airports serving small air carrier operations will not have difficulty complying with most part 139 requirements. While airport operators that choose to be certificated under part 139 will be required to prepare a tailored Airport Certification Manual (ACM) detailing how they will comply with part 139 safety and operational requirements, these airport operators will be allowed flexibility in complying with the requirements, including ARFF requirements. In tailoring an ACM, the FAA will consider with each airport operator variations in airport layout and air carrier operations served.

In addition, the FAA will assist an airport operator in obtaining Federal funds to be used to comply with part 139 requirements. If compliance with part 139 is still too burdensome, particularly where the local community resources are limited, the airport operator may petition the FAA for an exemption, as specified under the authorizing statute. The FAA also has established alternative compliance measures in the final rule for Class III airports (see the section-by-section analysis of § 139.111, Exemptions and § 139.315, Aircraft rescue and firefighting: Index determination).

*Comment:* Two commenters state that Title V, Section 518, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (Air-21; Public Law 106–181), titled "Small Airport Certification," appears to have resulted in this NPRM. However, other provisions of the act appear to undermine the policy on air service to rural areas and the Essential Air Service (EAS) program because rural communities lack sufficient resources to comply with the provisions of the proposed rule.

*FAA Response:* The FAA disagrees. Section 518 directs the FAA to issue an NPRM to implement the section of the authorizing statute (49 U.S.C. 44706(a)(2)) allowing the FAA to certificate certain airports serving small air carrier operations. Section 518 does not specify safety requirements and standards that the FAA must propose for the certification of these airports and does not conflict with those sections of Air-21 that set aside Federal funds for air service to rural communities. In fact, Air-21 requires Airport Improvement Program (AIP) funds to be set aside for costs related to the certification of airports serving small air carrier operations. As of the date of the publication of this final rule, the FAA is required to set aside $15 million of AIP funds for such costs each year for 4 fiscal years following the effective date of this rule (see Section 128 of Air 21).

In meeting the requirements of Section 518, the FAA chose to certificate these airport operators in a manner similar to that used for currently certificated airports. However, the FAA recognizes that in some instances the cost to comply with certain certification requirements may be substantial for these smaller airports. The FAA will work with airport operators to establish compliance appropriate for the size of airport and types of operations served to ensure that they are the least costly and burdensome, but still provide safety in air transportation.

*Comment:* Six commenters, including operators of airports that are likely to be Class III airports, state that existing airport revenue and operating income cannot cover the initial and recurring costs associated with part 139. These commenters request the FAA provide a permanent source of funding to help airport operators in complying with the new requirements or exempt these airport operators from the more costly requirements, such as ARFF.

Several of these commenters state that federally mandated safety requirements should be fully funded. In the absence of such funding, these commenters believe airport operators should be granted exemptions if they can demonstrate an unreasonable cost, burden, or that the requirements are impractical. One of these commenters also suggests that AIP funds set aside for small airports be used by small airports to cover costs associated with the proposal.

*FAA Response:* The FAA partly agrees. In some instances, the cost to comply with certain part 139 requirements could be too burdensome for airport operators serving small air carrier operations. In such cases, the FAA will work with the airport operator in developing and tailoring an ACM to achieve safety in air transportation at that airport. Further, the FAA will assist the airport operator in obtaining Federal funds, as appropriate. In addition, the FAA has the statutory authority to grant exemptions from part 139 requirements, including ARFF requirements, that would be too costly, burdensome, or impractical and has established alternative compliance measures for Class III airports (see the section-by-section analysis of § 139.111, Exemptions and § 139.315, Aircraft rescue and firefighting: Index determination).

Most airports that would be newly certificated under this rule (Class III airports) have accepted Federal funds and are required by grant assurances to comply with the FAA standards. As noted in the proposal (65 FR 38664), all airports that are likely to be Class III airports have received Federal funds for capital developments, safety equipment, and in certain circumstances, airport maintenance. Between 1982 and 2002, operators of proposed Class III airports received $207 million in Federal funds.

With this infusion of Federal funds, most proposed Class III airports already comply with many part 139 requirements. The standards used to comply with grant assurances are the standards used to comply with part 139. For those compliance items not eligible for Federal funding, the FAA will work with the airport operator or consider granting exemptions, as described earlier.

The FAA does not have the authority to provide a permanent source of funding. This authority remains a matter for Congress.

Although legislative changes that may affect AIP and EAS funding have been proposed by Congress as of the date of this publication, Congress has already directed the FAA in Air-21, as discussed above, to set aside $15 million of AIP funds each year for 4 fiscal years following the effective date of this rule to help airport operators meet the requirements of this rule (49 U.S.C. 47116(e)). Congress also has increased EAS funding, which may be used to offset the costs incurred by small air carriers as the result of this rulemaking. Otherwise, the FAA has limited discretion in distributing Federal funds to airport operators under the authorizing statute. Without legislation, the FAA is unable to provide the permanent funding suggested by the commenters.

*Comment:* A commenter, an operator of an airport likely to be a Class I airport under the rule, states that initial costs to comply with the proposed rule will be eligible for AIP funds. However, the commenter further notes that the long-term costs of compliance, such as maintenance and labor, will be the airport operator's responsibility and may burden the local community. This commenter notes that the certification of proposed Class III airports could be costly, but it will enhance the safety of aviation and airports in the Federal transportation system.

*FAA Response:* The FAA agrees.

*Comment:* Many of the commenters that oppose the proposal state that it will have a negative economic impact on air carrier service at smaller airports.

These commenters believe the implementation of the proposal will result in the loss of air carrier service because the cost to comply is to too high to be absorbed by the local community and the airport's tenant air carriers. This is particularly true of air carriers that receive subsidies through the Department of Transportation's EAS program.

Some of these commenters provided economic and operational cost data to support their positions.

*FAA Response:* The FAA recognizes that the regulations may have an adverse economic effect on some airports. As previously stated, the FAA will assist the airport operator in developing ACM's that meet the intent of the rule and consider unique and local airport issues, including economic issues.

Congress authorized the FAA to certificate certain airports. The authorizing statute focuses on safety in air transportation, not economics. However, the authorizing statute does direct the FAA to prepare a report on the economic impact of this final rule on air carrier service. The FAA considered the economic and operational cost data provided by the commenters in preparing the regulatory evaluation and the Report to Congress required by the authorizing statute. Both documents are available in the regulatory docket.

*Comment:* A commenter expresses concerns over the economic impact that the proposal, if adopted, will have on general aviation. In particular, the commenter expresses concern that added airport certification costs will be passed onto general aviation users, most of whom do not want or need the extra services.

The commenter suggests that through "flexibility, creative means, and by facilitating compliance," the FAA should retain a critical role in lessening the adverse economic impact the proposal will impose on certain airports. The commenter believes this can be achieved if the FAA is flexible in carrying out its authority to certificate airports and issues further policy and guidance specifying compliance alternatives to help airport operators comply with part 139 in a cost-effective manner.

This commenter also states that several part 139 compliance issues are a cause of contention for general aviation and that additional rulemakings and policy must be developed before a final rule is published. In particular, the commenter requests compliance guidance for ARFF equipment, wildlife hazard management, and fueling requirements, as well as guidance on the exemption process, including alternatives specified in the authorizing statute.

*FAA Response:* The FAA disagrees. Although all airport users share the benefits of part 139 compliance, the cost of part 139 compliance is typically passed onto air carriers and their passengers.

While part 139 is for the benefit of certain air carrier operators, the cost to comply with part 139 ultimately results in the maintenance and improvement of the airport that benefits all airport users. General aviation aircraft also use, at most airports, areas used by air carrier aircraft, such as runways, taxiways, and ramps. Such areas are usually better maintained and equipped than similar areas at airports serving only general aviation aircraft. General aviation aircraft operators also benefit from emergency response services, daily safety inspections, and airport condition reporting provided at airports certificated under part 139. The FAA believes general aviation aircraft operators will benefit from the part 139 requirements.

Airport operators that receive Federal funds are prohibited under grant assurances from using revenue generated by the airport for non-airport purposes. In addition, they may not divert such revenue to non-airport accounts, such as the general fund of the local government that owns the airport. However, the use of airport revenues generated from general aviation users to comply with part 139 requirements, such as ARFF response provided by off-airport sources, would not be a violation of the airport's grant assurances.

The FAA agrees that in some instances additional compliance guidance may be useful, particularly for airport operators seeking certification for the first time. However, the FAA believes additional rulemakings are not necessary because there is already a process in place for providing airport operators compliance guidance that includes advisory circulars (ACs) and CertAlerts.

*Comment:* A commenter, a proposed Class I airport operator, supports the proposed rule, with the exception of ARFF requirements. The commenter believes the cost of providing ARFF coverage is considerable and would result in termination of air carrier service should airport operators pass ARFF costs on to tenant air carriers. The commenter recommends that requirements for proposed Class III airports only focus on accident prevention, including more emphasis on aircraft operating and communication procedures at nontowered airports. The commenter suggests that an additional airport classification be created for nontowered airports that serve scheduled air carrier operations and requires enhanced aircraft operating and communication procedures, including the use of the Common Air Traffic Advisory (CTAF) frequency.

*FAA Response:* The FAA agrees in part. Both the existing and proposed part 139 requirements place a greater emphasis on accident prevention than accident mitigation. As stated in the proposal at 65 FR 38664, most part 139 requirements are intended to reduce the possibility of an accident by providing a safe and standardized operating environment. While requiring airport operators serving small air carrier operations to comply only with accident prevention measures would be the least costly regulatory approach, the FAA believes that some level of accident mitigation, including ARFF, still is necessary to enhance safety in air transportation at all covered airports.

The FAA agrees that the cost of complying with certain part 139 ARFF requirements would be too burdensome for some airport operators serving small air carrier operations. In such instances, the FAA will use its statutory authority to consider exemptions from part 139 requirements, including ARFF requirements, that would be too costly, burdensome, or impractical and has established alternative compliance measures for Class III airports (see the section-by-section analysis of § 139.111, Exemptions and § 139.315, Aircraft rescue and firefighting: Index determination).

The FAA partly disagrees with the recommendation to change part 139 to require additional aircraft operation and communication procedures at nontowered airports. Such air traffic control and flight communication procedures go beyond the scope of part 139 and the proposal. However, the FAA has made changes to part 139 to require personnel at non-towered airports (or during periods when an air traffic control tower is closed) to monitor CTAF when in movement areas and safety areas (see section-by-section analysis of § 139.319, Aircraft rescue and firefighting: Operational requirements.

*Comment:* A commenter notes that the proposal states that AIP funds are available for capital costs associated with the implementation of the proposed rule. The commenter states that such funds are limited, and many operating and maintenance costs are not AIP eligible. The commenter believes that additional operating and

maintenance costs associated with the proposal will be burdensome to smaller airports and will result in these airports being poorly operated.

*FAA Response:* The FAA partly agrees. The commenter is correct in asserting that AIP funds are limited. As discussed in the proposal at 65 FR 38664, most operating and maintenance costs associated with part 139 are not eligible for Federal funds.

AIP funds may be used to purchase safety equipment needed to comply with part 139 requirements only under two situations. First, the equipment is required under regulation, or second, the FAA has determined that this equipment will contribute significantly to the safety or security of persons or . property at an airport (see the section-by-section analysis of § 139.109, Duration of certificate).

In some instances, administrative costs associated with preparing and documenting operating procedures required under part 139 may be AIP eligible if such efforts result in a capital improvement project. For example, the cost to develop a wildlife hazard management plan may be eligible if the plan requires the installation of a fence or habitat modification. In addition, some maintenance costs associated with pavement and lighting are AIP-eligible for airports that serve less than 10,000 annual enplanements.

The FAA disagrees that the cost associated with the implementation of this rule will lead to "poorly operated" airports. Instead, the FAA believes that the implementation of the proposal will ensure the consistent application of safety measures. The FAA will work with airport operators to tailor part 139 requirements to individual airports and will exercise its statutory authority to consider exemptions from part 139 requirements, if appropriate. The exemption process is discussed in detail under the section-by-section analysis of § 139.111.

*Comment:* A commenter recommends that the FAA study the benefit of building and staffing an air traffic control tower at proposed Class III airports. The commenter believes this would be a more proactive response to safety concerns than implementing the proposal.

*FAA Response:* The FAA disagrees. Installation of air traffic control towers will not address many accident prevention measures. The potential for aircraft collisions with ground obstructions (such as wildlife, construction, and maintenance equipment) and certain airspace obstructions can be reduced if an airport operator complies with part 139 safety requirements. Further, compliance will reduce many of the uncertainties and miscommunications that can cause accidents by ensuring airport facilities (*i.e.*, pavement, lighting, markings, and signs) are available, consistent from airport to airport, and properly maintained.

*Comment:* Several commenters recommended that the FAA adopt the ARAC majority report rather than implement the proposal.

*FAA Response:* The FAA agrees in part. As stated in the proposal at 65 FR 38638, the FAA did consider the ARAC majority report, including recommended rule language, as discussed in the proposal's Section-by-Section Analysis that follows. In many instances, the FAA used the majority's recommended rule language and supporting data. However, the FAA did not adopt the entire majority report for several reasons. First, the majority report opposed regulating airports serving scheduled operations of small air carrier aircraft and in many instances, recommended regulatory language that would not ensure safety at all covered airports. Second, the majority report recommended rule language that was intended for a separate rulemaking for small air carrier airports rather than changing existing part 139 requirements. However, this did not take into account airports with mixed air carrier operations. Third, the FAA determined that the majority report based many of its recommendations on incorrect assumptions about existing part 139 requirements and incorrect cost data.

*Comment:* A commenter recommends an alternative approach to regulating airports serving small air carriers if the FAA chooses not to adopt the ARAC majority position. This alternative would only require these airport operators to coordinate an emergency response plan with local government agencies and to acquire emergency response equipment with AIP funds. Emergency equipment purchased with AIP funds would be based with the appropriate emergency response personnel.

*FAA Response:* The FAA partly disagrees. The FAA believes that both risk reduction measures and accident mitigation measures, including an emergency response plan, are necessary to ensure safety in air transportation at airports covered by the statute.

The actual location and use of emergency equipment purchased with AIP funds and airport revenue is restricted by law. The FAA provides Federal funding for emergency equipment for airport use only. Title 49, U.S.C. 47133, and the FAA Policy and Procedures Concerning the Use of Airport Revenue (64 FR 7696) restrict the use of airport revenue to airport purposes. Consequently, equipment acquired with airport revenue must be used primarily for airport purposes.

**Section-by-Section Analysis**

*Section 121.590 Use of Certificated Land Airports in the United States*

*Proposal:* The existing language of § 121.590 was modified to conform to the proposed changes made to part 139. The existing requirements for air carriers operating aircraft designed for at least 31 passenger seats were not changed.

Added to this section was the proposed requirement for air carriers who conduct scheduled passenger-carrying operations with airplanes designed for more than 9 passenger seats but less than 31 passenger seats to operate at part 139 airports in the United States, except in the state of Alaska. Also added to this section was the proposed requirement restricting air carrier passenger-carrying operations to those airports with the appropriate part 139 airport classification (Classes I–IV).

In addition, the FAA proposed to require that air carriers and commercial operators who conduct passenger-carrying operations with airplanes designed for at least 31 passenger seats or who conduct scheduled passenger-carrying operations with airplanes designed for more than 9 passenger seats but less than 31 passenger seats to conduct those operations at airports operated by the U.S. Government only if those airports meet the equivalent requirements of part 139.

Finally, provisions excepting certain air carriers from operating into part 139 certificated airports were added to conform to proposed changes to part 139.

*Comment:* A commenter questions why the proposal appears to require supplemental operations in Alaska, using airplanes with more than 9 passenger seats but less than 31 passenger seats to follow the same requirements for operating into a part 139 certificated airport that apply to domestic or flag operations using the same type airplanes.

The commenter notes that 14 CFR 119.3 requires that operators who conduct on-demand operations under part 135, and who also use the same type airplanes in their domestic or flag operations under part 121, must instead operate these airplanes under the supplemental operations rules of part 121.

If the FAA intended supplemental operations in Alaska, using airplanes with more than 9 and less than 31 passenger seats, to be conducted at airports certificated under part 139, it would unduly burden air carriers and airport operators, as well as the flying public. The commenter, therefore, recommends that paragraph (c) of the proposed section be changed to include supplemental operations.

*FAA Response:* The FAA agrees. The unintended consequence of the proposal has been corrected in this final rule. The final rule makes it clear in the reorganization of the requirements of the section and the definitions in new paragraph (f) that supplemental operations conducted with airplanes designed for fewer than 31 passenger seats (as determined by the type certificate issued by a competent civil aviation authority) are not required to be operated at a part 139 airport in the United States.

*Comment:* A commenter recommends adding a provision to this section that would prohibit the operation of all-cargo aircraft at or over 60,000 pounds maximum weight at airports that do not have adequate ARFF capability in place at the time of operations.

*FAA Response:* The FAA finds that the commenter's recommended revision to this section cannot be adopted because it is outside the scope of the proposal.

*Section as Adopted:* This section is adopted with changes. The FAA is revising proposed § 121.590 based on comments received on § 121.590 and comments received on proposed § 139.101, General requirements, on the compliance times needed for the development, submittal, and approval of ACM's, including revisions thereto, as well as a revision of the statutory provisions of 49 U.S.C. 44706 and 41104(b), by—

(1) Changing the title to add "in the United States";

(2) Reorganizing the provisions in paragraphs (a), (b), and (c) and restating those provisions in new paragraphs (b) through (e);

(3) Revising paragraph (a) to—

(i) Add the exemption provisions of 49 U.S.C. 44706(c) that allow the FAA to exempt certain airport operators from part 139 ARFF requirements,

(ii) Clarify that no air carrier, and no pilot used by an air carrier, may operate at a part 139 airport unless that airport is classified under part 139 to serve the type of airplane to be operated and the type of operation to be conducted, and

(iii) Add compliance dates after which operations at part 139 airports will be prohibited if those airport operators have not obtained a new or revised AOC. For Class I airports, the date is 12 months after the effective date of the rule. For Class II, III, and IV airports, the date is 18 months after the effective date of the rule;

(4) Adding new paragraph (f) to define terms used in this section;

(5) Clarifying that air carriers who conduct certain operations are not required to conduct those operations at part 139 airports through the use of the terms "all cargo operation," "domestic operation," "flag operation," and "supplemental operation" defined in § 119.3, Certification: Air carriers and commercial operators, of this subchapter; and through the use of the terms "domestic type operation," "flag type operation," and "supplemental type operation" defined in new paragraph (f) of this section; and

(6) Adding an advisory note describing the new economic statutory provisions pertaining to the use of part 139 airports for regularly scheduled charter air transportation flights, in the flush paragraph following new paragraph (h).

**Subpart A—General**

*Section 139.1 Applicability*

*Proposal:* The language of this section, which prescribes rules for the certification and operation of airports serving certain air carrier operations, was expanded, clarified, and reorganized into proposed new paragraphs (a) and (b).

Proposed paragraph (a) incorporated a new group of airports that would require an AOC before serving certain air carrier operations. Further, the FAA proposed to move language currently found in § 139.101(a)—which specifies that part 139 is applicable to land airports in the United States, the District of Columbia, or any U.S. territory or possession—to proposed paragraph § 139.1(a).

Proposed paragraph (b) listed the types of airports that would be exempt from part 139, including U.S. Government-operated airports, certain Alaskan airports, and heliports.

*Comment:* Several commenters are unclear as to why Alaskan airports serving scheduled operations of small air carrier aircraft have a statutory exemption from part 139. Still others ask for the same exclusion for such airports in their States, noting that their States have financial and operational hardships similar to those of the State of Alaska. These commenters request that their States be added to proposed paragraph (b), which specifies airports in the State of Alaska do not need an AOC if they serve air carrier operations that use aircraft designed for more than 9 passenger seats but less than 31 passenger seats.

*FAA Response:* The FAA disagrees. Congress created the statutory exemption for Alaskan airports (49 U.S.C. 44706(a)(2)). In addition, to ensure the consistent application of safety and operational standards at airports serving air carrier operations, the FAA has decided to issue AOCs to all other airports, as permitted under the authorizing statute.

An airport operator can petition for relief from part 139 requirements by requesting an exemption under § 139.111. The FAA will consider granting this relief if the airport operator can substantiate that compliance with part 139 would cause financial and operational hardships. The airport operator may also decide to decline certain air carrier operations rather than comply with part 139.

*Comment:* A commenter requests that the language in proposed paragraph (b) excluding certain airports in the State of Alaska be repeated in paragraph (a). Otherwise, the commenter states, Alaskan airports serving a mixture of air carrier operations would also be required to comply with part 139 standards during times when they only serve small air carrier operations.

*FAA Response:* The FAA concurs and has revised proposed paragraph (b) (new paragraph (c)) to clarify that part 139 is not applicable to Alaskan airports during periods of time when no large air carrier operations are being served.

*Comment:* A number of commenters recommend that part 139 be extended to cover air cargo operations. They state that air cargo aircraft might carry hazardous freight that would justify ARFF capabilities. One commenter even suggests that this section be amended to specify that ARFF requirements be applicable to land airports that serve any cargo operation by aircraft with a maximum weight of 60,000 pounds or more.

*FAA Response:* The FAA disagrees. In 49 U.S.C. 44706(a), Congress limits the FAA's authority to grant AOCs to those airports serving certain passenger air carrier operations. Congress would have to amend this authority before the FAA could issue AOCs based on air cargo operations.

Although the FAA does not issue AOCs to cover air cargo operations, such operations already benefit from part 139 safety measures. At approximately 343 certificated airports, required part 139 safety measures are typically applied continuously as air carrier schedules vary so much that it is more convenient

and economical to comply with part 139 requirements at all times.

*Comment:* In response to the FAA's request for information on the certification of heliports, a commenter recommends using the National Fire Protection Association (NFPA) standards for heliports (NFPA 418, Standards for Heliports) in conjunction with AC 150/5390–2, Heliport Design. Another commenter suggests the FAA consult with other government offices to determine if passengers using heliports deserve the same safety standards as passengers flying into an airport certificated under part 139.

*FAA Response:* While in general agreement with these comments, the FAA has determined it is not in the public interest to certificate heliports at this time. Heliports typically are used by general aviation operators and serve very few air carrier operations (currently only one heliport is voluntarily certificated under part 139 although it does not serve air carrier operations conducted in helicopters with more than 30 seats). Further, there are very few helicopters that can seat more than nine passengers, and even fewer still are used for scheduled passenger operations. Since Congress has not given the FAA the authority to certificate facilities serving general aviation operations and the vast majority of operations served by heliports are by general aviation operators, certificating the few heliports that serve air carrier operations would not significantly enhance safety.

However, the FAA will continue to monitor the situation and encourage heliport operators to follow AC 150/5390–2 and NFPA 418 since the provisions of part 139 are designed for airports serving fixed-wing aircraft and often do not transfer to heliports. In addition, those heliport operators that have accepted Federal funds may be obligated to comply with AC 150/5390–2 under their grant assurances.

*Comment:* Three commenters express opposition to the FAA's finding that airports operated by the U.S. Government, including the Department of Defense (DOD), are not subject to part 139. These commenters believe that DOD standards for their airports differ significantly from part 139 and that such facilities are not maintained in a manner adequate for air carriers. At a minimum, these commenters recommend that the revised regulation should include definitions of "joint-use airport" and "shared-use airport" and clarify that the civilian operations of such airports would come under the purview of part 139.

*FAA Response:* The FAA partly disagrees. Congress did not give the FAA the statutory authority to regulate airports operated by U.S. Government agencies. However, a new paragraph (b) has been added to this section to clarify that part 139 requirements apply to the civilian portions of a shared-use or joint-use airport that elects to obtain a part 139 certificate. Consequently, proposed paragraph (b) has been redesignated as new paragraph (c). Further, the terms "joint-use airport" and "shared-use airport" have been defined (see discussion comments for § 139.5, Definitions, below).

*Comment:* A commenter disagrees with the use of the phrase "aircraft designed for seating capacity" in place of the phrase "aircraft seating capacity." This commenter argues that there are circumstances where aircraft may have been designed with a seating capacity greater than the operator is using without being required to amend the aircraft type certificate. The commenter also notes that the proposal is inconsistent with existing air carrier regulations (parts 119, 121, and 135) because these regulations typically base operational and equipment requirements on aircraft seating capacity.

*FAA Response:* The FAA disagrees with this comment. The statutory authority for 14 CFR parts 119, 121, and 135 differs from the authorizing statute for airport certification. The authorizing statute for airport certification specifies "design" rather than "seating capacity." However, the change to "design" from "seating capacity" was not done consistently throughout the proposal. This has been corrected.

*Comment:* Another commenter notes that references to the number of passenger seats specified in the authorizing statute differ from the proposal's preamble and the rule language. Specifically, the discussion of Class III airports refers to airports serving aircraft with 10 to 30 seats rather than "more than 9 passenger seats but less than 31 passenger seats" as specified in the statute.

*FAA Response:* While both descriptions of the number of required passenger seats are correct and have the same meaning, further references to aircraft seats will use the statutory language.

*Comment:* A commenter requests that the San Francisco International Airport be required to implement a nighttime curfew of aircraft operations between 10 p.m. and 7 a.m. The commenter lives under a flight path used by aircraft operators using this airport.

*FAA Response:* The FAA does not concur with this request. The mitigation of aircraft noise is beyond the scope of this rulemaking and the FAA's authority to certificate airports. Establishing a nighttime noise curfew is a complex process that is initiated by the airport operator under 14 CFR part 161, Notice and Approval of Airport Noise and Access Restrictions.

*Section adopted:* This section is adopted with changes. An editorial change was made to paragraphs (a) and (b) so that the language of these paragraphs better conforms to the statutory language.

For the reasons discussed above, a new paragraph was added and changes were made to proposed paragraph (b). A new paragraph (b) was added to clarify the applicability of part 139 at airports where civilian and military aircraft operations commingle. Consequently, proposed paragraph (b) was redesignated as new paragraph (c), and a new element was added to clarify that part 139 is not applicable to Alaskan airports during periods of time when no large air carrier operations are being served. With the addition of new paragraph (c)(4), proposed paragraph (b)(4) regarding heliports is now redesignated paragraph (c)(5).

*Section 139.3 Delegation of Authority*

*Proposal:* This proposed new section sets forth the FAA's delegation authority for FAA employees to act on behalf of the FAA Administrator in the oversight of the certification of airports. As proposed, the Administrator's delegation authority would not change, and the FAA's Associate Administrator for Airports would be authorized to act for the Administrator. Existing § 139.3, Definitions, was moved to proposed § 139.5, Definitions.

*Comment:* Nine commenters oppose the provision of this section that sets forth the duties that the Administrator delegates to the FAA regional offices, specifically the authority to amend an ACM. These commenters interpret this provision to mean that the FAA has the exclusive authority to amend an ACM and recommend that proposed § 139.3(b)(3) be revised to read, "Approve ACM's and any amendments thereto required under this part."

*FAA Response:* While the FAA does have the exclusive authority to approve amendments to an ACM, this new section was not intended to preempt procedures under proposed § 139.205, Amendment of airport certification manual, that permit either the certificate holder or the FAA to propose an amendment to an ACM. To avoid confusion, and possible conflicts with

exemption procedures of § 139.111, proposed paragraph (b) has been deleted. However, this change does not affect the FAA Administrator's delegation to FAA employees in the oversight of the certification of airports.

*Section as Adopted:* This section is adopted with changes for the reason discussed above. Paragraph (b) has been deleted and paragraph (a) combined with the section's first sentence to form a single paragraph.

In addition, the reference to 49 U.S.C. 44706 has been deleted from this section. Only the authority to deny and issue an AOC is found in 49 U.S.C. 44706. The Administrator's authority to revoke an AOC is found in 49 U.S.C. 44709. Rather than cite several sections of the authorizing statute, which may change as the statute is periodically revised, this section has been revised to refer generally to the Administrator's authority.

*Section 139.5 Definitions*

*Proposal:* This redesignated section establishes terms, and their definitions, used in part 139. Revisions proposed to this section reflect proposed changes made throughout the rule. As such, several existing definitions were modified or deleted and new definitions were proposed.

*Comment:* Five commenters note that the definition of "small air carrier aircraft" poses a dilemma. These commenters state that the degree of compliance with part 139 is based on the number of passenger seats—except for ARFF requirements, which are based on the length of aircraft. Since there are many air carrier aircraft that are less than 90 feet in length (ARFF Index A) with greater than 30 passenger seats, the commenters reason that the use of aircraft seats versus aircraft length would restrict a Class III airport from serving aircraft that require an ARFF Index greater than Index A. They believe it is unreasonable to deny an airport from serving the scheduled operations of any air carrier in the ARFF Index if the airport operator has adequate ARFF capability.

To reconcile, these commenters recommend that the definition of "small air carrier aircraft" be changed to "aircraft less than 90 feet in length" and the definition of "large air carrier aircraft" be changed to "aircraft 90 feet in length or longer." In addition, they suggest that all references to seating capacity in the regulation be deleted.

*FAA Response:* The FAA disagrees. Seating capacity of an air carrier aircraft serving an airport is the criterion used to determine if an AOC is required. This is specified by statute and will not be removed from part 139. In addition, seating capacity of air carrier aircraft is used to classify certificated airports and to determine the specific part 139 requirements for each type of airport classification. This should not be confused with ARFF Index requirements that use the length of an air carrier aircraft to determine the type of ARFF equipment and quantity of extinguishing agents that must be used.

The FAA acknowledges that an airport operator could be serving small air carrier aircraft (more than 9 passenger seats but less than 31 passenger seats) that are longer than 90 feet. In such cases, the airport operator would have to meet the ARFF Index appropriate to the size of aircraft served, regardless of the number of passenger seats. For example, an airport classified as a Class III airport could be required to meet Index B if it serves scheduled air carrier operations conducted in an air carrier aircraft that has 19 seats and is 110 feet in length. Further, part 139 does not limit the airport operator from providing more ARFF coverage than required; *e.g.*, the air carrier aircraft served requires Index A but the airport operator can provide Index C coverage. However, the airport operator must always provide, at a minimum, the ARFF Index specified in the ACM.

*Comment:* Two commenters state that the definition of "air carrier" contained in 14 CFR part 1 is not compatible with part 139. These commenters note that part 1 defines an air carrier as a person who is engaged in air transportation, yet part 139 standards are specific to passenger-carrying operations in aircraft with a certain number of seats. They are concerned that the use of the part 1 definition could require an airport serving any type of passenger, mail, or cargo operations to come under the purview of part 139. One commenter even suggests that the part 1 definition would require an airport serving a Cessna 172 engaged in air transportation to be certificated under part 139.

*FAA Response:* The FAA disagrees. The definition of air carrier in part 1 is used within the context of part 139. Section 139.1 prescribes rules for the certification and operation of airports serving scheduled and unscheduled air carrier operations conducted in aircraft with a certain number of seats. Section 139.5 further defines what is a scheduled operation and an unscheduled operation. Since the regulation is read as a whole, only air carrier operations meeting both the definition of part 1 and the criteria defined in part 139 would require an airport operator to be certificated under part 139. Thus, air transportation conducted in the aircraft referenced by one commenter, a Cessna 172, would not require an airport operator to have an AOC as it neither meets the part 139 criteria for seating capacity nor covered air carrier operations.

*Comment:* A commenter notes that the definition of "movement area" does not reference air traffic control (ATC). This individual states that in the Pilot/Controller Glossary of the FAA's Aeronautical Information Manual (AIM), the definition of movement area states, "At those airports with a tower, specific approval for entry onto the movement area must be obtained from ATC." The commenter recommends that this language be added to the definition of movement area to be consistent with the definition contained in the AIM, as well as the description of the non-movement area boundary markings in AC 150/5340–1, Standards for Airport Markings.

*FAA Response:* The FAA disagrees. The part 139 definition of "movement area" is intended to describe only the physical boundaries in which certain part 139 requirements are applicable. Part 139 does not address air traffic control procedures. Not all part 139 airports have air traffic control towers, and at those part 139 airports with towers, there already exists processes for communicating air traffic control procedures to pilots and other airport users, such as contained in the AIM.

*Comment:* Several commenters request that the terms "joint-use airport" and "shared-use airport" be defined because of applicability requirements at airports where civilian and military aircraft operations commingle. (*See* discussion comments for § 139.1, Applicability.)

*FAA Response:* The FAA agrees. This section is revised to include the definitions of joint-use airport and shared-use airport. "Joint-use airports" are defined as airports owned by the United States, which lease a portion of these facilities to the local government for civilian air carrier operations. "Shared-use airports" are defined as co-located U.S. and local government airports at which portions of the movement areas, such as runways, taxiways, and ramps, are shared. These definitions were discussed in the proposal's preamble on 65 FR 38642.

*Section as Adopted:* This section is adopted with changes. For the reasons discussed above, the terms "joint-use airport" and "shared-use airport" have been added.

Several definitions have been modified for clarity. As there are many places in the regulation where the term "air carrier aircraft" is used without

reference to the number of passenger seats, the terms "small air carrier aircraft" and "large air carrier aircraft" are now defined under the single term "air carrier aircraft." In addition, the definition of "safety area" has been modified to clarify that the safety area may also be used by aircraft landing short of a runway and to correspond to the definition of runway and taxiway safety areas contained in AC 150/5300–13, Airport Design. Also, the definition of "Index" has been reordered for clarity, and the definition of "heliport" has been moved as it was not listed in the correct alphabetical order.

Further, modifications have been made to the definitions of "scheduled operation" and "unscheduled operation." The term "commercial operator" has been deleted from both definitions as adopted changes to § 121.590 regarding air carrier operations into airports operated by the U.S. Government make this phrase unnecessary. Also, the definition of "unscheduled operation" has been reordered for clarity and the term "feral" has been added to the definition of "wildlife" to make clear that the FAA considers animals that have escaped from domestication and become wild a potential hazard to aircraft.

In addition, an advisory note has been added to the end of the section to alert airport operators that air carriers conducting certain public charter operations have additional statutory requirements to operate to and from an airport certificated under part 139, as specified under 49 U.S.C. 41104(b). For further questions regarding public charter operations, contact DOT, Office of Aviation Analysis, at (202) 366–5903.

*Section 139.7 Methods and Procedures for Compliance*

*Proposal:* This relocated and retitled section specifies that a certificate holder must comply with the requirements of part 139 in a manner acceptable to the Administrator. Revisions to this section clarify that the Administrator considers the methods and procedures contained in FAA ACs to be an acceptable manner in which to comply with the requirements of part 139, but not the only way to comply.

*Comment:* One commenter asks if the change to this section meant that no other standards and procedures other than those contained in ACs would be acceptable to the Administrator. To clarify, the commenter suggests that the previous statement "or other standards and procedures approved by the Administrator" be reinserted.

*FAA Response:* The FAA disagrees. The deletion of the statement "or other standards and procedures approved by the Administrator" was done to simplify this section, and its absence should not be interpreted to mean that only methods and procedures contained in ACs are acceptable. As stated on 65 FR 38643 of the NPRM, certificate holders may comply with part 139 requirements by means other than those specified in the ACs. However, any alternative must be authorized by the FAA and must provide an equivalent level of safety.

*Comment:* An airport operator also requests that the FAA reinsert references to specific ACs throughout the regulation. This commenter believes that it is generally accepted that when referencing a document within a regulation, the referenced document becomes part of the regulation by virtue of its reference therein.

*FAA Response:* This assumption is not correct. References to ACs in part 139 are intended only to alert the certificate holder of the availability of a preapproved method for complying with the regulation. Their use is not mandatory, but the Administrator must approve any alternative means of compliance. Further, listing specific AC numbers throughout the regulation has proven impractical. ACs are revised periodically, and referring to them generically ensures the regulation remains current.

Most ACs used to comply with part 139 are available, free of charge, on the FAA Web site at *http://www.faa.gov/arp/*. Proposed changes to these ACs also are posted on this Web site, and comments on such proposals are encouraged.

*Section as Adopted:* This section is adopted as proposed.

**Subpart B—Certification**

*Section 139.101 General Requirements*

*Proposal:* This section required each airport operator to adopt, and comply with, an ACM. The section title was shortened, current paragraphs (a) and (b) were combined into a new paragraph (a), and new paragraphs (b) and (c) were proposed. Compliance dates for submitting an ACM were established, language no longer applicable was deleted, and revisions were made to correspond to the new certification process.

*Comment:* A commenter recommends that the language of § 139.101(c) be changed from "approved and implemented" to "submitted to the FAA for approval."

*FAA Response:* The FAA agrees. Approval and implementation dates will vary depending on when the airport operator submits an ACM for approval and when the FAA approves the document. As such, proposed paragraph (c) is revised to require only the submittal of an ACM for FAA approval.

*Comment:* Seven commenters request additional time to submit an ACM. In particular, these commenters express concern that Class III airports would need more time than proposed since these airports would be developing a manual for the first time, rather than amending an existing document. They request that Class III airports be allowed 18 months to develop and submit their ACM's. Additionally, one commenter requests that the FAA allow Class I airports 6 months (180 days), and another suggests 24 months (2 years) for all airport classes.

*FAA Response:* The FAA agrees that additional compliance time may be needed for all airport classes and has modified paragraph (c). Class I airports will be allowed an additional 3 months, for a total of 6 months, to submit their revised ACM's. Class II and III airports will be allowed an additional 4 months, for a total of 12 months. Class IV airports also will be allowed an additional 6 months, for a total of 12 months.

In addition to this extended time period for compliance, all airport classes will have an additional 120 days to comply with the rule as implementation dates are based on the rule's effective date. As specified by the authorizing statute, this rule becomes effective 120 days after its submission to Congress. The FAA intends to submit the rule to Congress on the same day it is published in the **Federal Register**.

*Comment:* Three commenters are concerned that their limited airport staff would not have time to develop an ACM and a consultant would have to be hired. One of these commenters estimates that it would cost $10,000 to have a manual professionally developed.

*FAA Response:* The FAA is not requiring an airport operator to use a consultant to develop an ACM. The airport operator has the discretion to develop its ACM in any manner it deems best. If an airport operator decides to develop its own manual, FAA resources are available to simplify this process. This includes the FAA airport certification and safety inspectors who are available via telephone or e-mail and guidance materials pertaining to ACM's, particularly AC 120/139.201–1, Airport Certification Manual (ACM) and Airport Certification Specifications (ACS), which will be updated and reissued to correspond to the issuance of this rule.

*Section as Adopted:* This section is adopted with changes for the reasons discussed above. The language in proposed paragraph (c) is changed from "approved and implemented" to "submitted to the FAA for approval." In addition, the time that certificate holders have to submit their manuals is extended. Class I airports have 6 months from the effective date to submit their manuals. All other airport classes have 12 months.

Several modifications also have been made to paragraph (c). The term "airports" has been replaced with "persons" to clarify that a person, not an airport, is the holder of an AOC. Additionally, references to other sections have been deleted. These references implied that there are alternative compliance dates for certain sections of an ACM. This is incorrect.

*Section 139.103 Application for Certificate*

*Proposal:* This section revised requirements to apply for an AOC. In addition, application requirements found elsewhere in the regulation were added, and terms that were no longer applicable were deleted.

*Comment:* Several commenters request clarification on whether they can continue to serve air carrier operations during the time between the issuance of this rule and the FAA approval of their ACM.

*FAA Response:* During this transition period, an airport operator that currently holds an AOC will be permitted to serve air carrier operations, as specified in its existing ACM or airport certification specifications. Similarly, an airport operator that will be a certificate holder for the first time and already is serving air carrier operations on the date this rule becomes effective can continue to serve such operations until the FAA approves its ACM.

*Section as Adopted:* This section is adopted as proposed.

*Section 139.105 Inspection Authority*

*Proposal:* This section incorporated existing inspection authority provisions found in existing § 139.105, Inspection authority, and § 139.301, Inspection authority. Specifically, it stated that the Administrator may make inspections and tests to determine compliance with airport certification regulations. Revisions also were made to update language referencing statutory authority and to delete terms that were no longer applicable.

*Comments:* No comments were received on this section.

*Section as Adopted:* This section is adopted as proposed.

*Section 139.107 Issuance of Certificate*

*Proposal:* This section revised standards that must be met before the FAA could issue a certificate, including requirements for an ACM. A new provision was added that requires applicants to provide written documentation that air carrier service would begin on a specific date. In addition, terms that were no longer applicable were deleted, and the standard "public interest" was revised to read "safety in air transportation" to reflect revisions to the authorizing statute.

*Comments:* No comments were received on this section.

*Section as Adopted:* This section is adopted with an editorial clarification. The term "certificate holder" in paragraph (a) has been changed to "applicant" to clarify that this section applies to an applicant for a certificate, not a current certificate holder.

*Section 139.109 Duration of Certificate*

*Proposal:* This section revised existing language into new paragraph (a) and proposed a new paragraph (b) that modify existing standards for the suspension or revocation of an AOC by stipulating that the Administrator may revoke an AOC if air carrier operations have not occurred for 24 consecutive months. This section also included language notifying the certificate holder that it can appeal an order revoking its certificate.

*Comment:* Four commenters oppose the language stipulating that the Administrator may revoke an AOC. These commenters are particularly concerned with the new provision that specifies that the duration of a certificate is tied to air carrier service. They question why an airport operator should lose its operating certificate when not serving air carrier operations if it continues to meet the requirements of part 139. These commenters note that an AOC helps market an airport to air carriers and protects the airport against budget cutbacks imposed by the local governing body. One of these commenters suggests that an "inactive" category be established to allow an airport to go without air carrier service for five years before its certificate is revoked.

*FAA Response:* While the FAA understands that an AOC helps market an airport to air carriers and protects the airport against budget cutbacks imposed by the local governing body, the FAA issues AOCs under part 139 to ensure safety in air transportation, not to encourage air carrier service or for budgetary reasons. However, in response to comments, the FAA has reconsidered its approach to inspecting an airport certificate holder at an airport that is no longer currently serving air carrier operations.

Accordingly, the FAA has deleted proposed paragraph (b) and will work with airports not serving air carrier service on a case-by-case basis to determine the need for inspections. The FAA also will consider developing an "inactive" category for such airports in its inspection policies, but will not change the rule at this time.

*Comment:* One commenter is concerned about the impact the revocation of a part 139 AOC would have on an airport operator's Federal funding.

*FAA Response:* Federal funding provided to airport operators through the Airport Improvement Program (AIP) is not dependent on a part 139 AOC. AIP funds are available to all airports that are identified in the FAA's National Plan of Integrated Airport Systems (NPIAS).

The NPIAS identifies U.S. airports that are important to national transportation and, therefore, eligible to receive grants under the AIP. To be included in the NPIAS, an airport must meet certain criteria. Such criteria do not require an airport to be certificated under part 139. Most of the 3,344 airports identified in the NPIAS are not certificated under part 139. A copy of the NPIAS is available on the FAA's Web site at *http://www.faa.gov/arp.*

Certain airports identified in the NPIAS receive an annual apportionment of AIP funds based on the number of passengers enplaned. These funds are known as entitlement funds and distributed to airports based solely on passenger activity levels, not part 139 certification. Funding and certification are unrelated, although the loss of air carrier service may result in an airport operator losing both its AIP funds and AOC.

Additionally, an airport's certification status does not affect its priority in receiving AIP funds. The FAA prioritizes the distribution of AIP funds based on the type of project to be funded, not an airport's certification status.

In some instances, the loss of a part 139 AOC may affect certain AIP funding for safety equipment: AIP funds may be provided for safety equipment purchases needed to comply with part 139 requirements. As of the date of the publication of this final rule, safety equipment is only eligible for AIP funding under two situations. The

equipment is required under regulation or the FAA has determined that this equipment will contribute significantly to the safety or security of persons or property at an airport (49 U.S.C. 47102(3)(B)(ii), as amended).

*Comment:* The FAA received one comment from an airport operator on the cost of surrendering a certificate and then later regaining it versus maintaining a certificate uninterrupted. At some point, this airport operator surrendered its AOC and then, in 1991, applied for another certificate. The cost to do this was $125,000, excluding administrative expenses. This commenter notes that the concept of an airport simply maintaining its facility to part 139 standards is faulty as the discretion given FAA inspectors allows for varying interpretations as to what is required. Thus, an airport operator may be found not in compliance although it has tried to remain so while not certificated.

*FAA Response:* The FAA agrees that the methods and procedures for complying with certain part 139 requirements may change during the time when an airport's certificate is surrendered and then reinstated. Thus, an airport operator that continued to comply with its certification manual during this timeframe may not meet part 139 requirements when reapplying for an AOC. In such instances, there may be a one-time cost to become certificated again that the airport operator might otherwise have absorbed over a longer period if it had remained certificated.

To avoid such situations, an airport operator should request that the local FAA Airports Regional Office continue to provide it with airport information notices, including changes to the airport certification program. The FAA regional offices maintain a contact list of airport operators (often a combination of part 139 certificate holders and noncertificate holders, recipients of AIP funds, and those serving only general aviation operations), State aviation agencies, and other interested parties. This list is used to distribute information about airport safety and standards, the part 139 airport certification program, and upcoming training events and to request comments on proposed changes to regulations and standards. Many regions also distribute informational newsletters, sponsor training events, and maintain Internet sites that provide airport operators up-to-date information on airport certification issues. As resources permit, the FAA regional offices may conduct occasional safety inspections of noncertificated airports and make recommendations based on current part 139 standards.

If an airport operator uses these resources to keep informed of changes to the part 139 airport certification program, the cost should be the same to comply voluntarily with part 139 as it would be to maintain an uninterrupted AOC.

In addition, the FAA disagrees with the commenter's assertion that FAA airport certification and safety inspectors are allowed to make varying interpretations of part 139. This is not the FAA policy. An airport operator should contact the local FAA Regional Airports Division Manager if an FAA inspector's interpretation of the regulation seems incorrect or if it seems that the airport operator is being held to a different standard than other certificate holders.

*Section as Adopted:* This section is adopted with changes. For the reasons discussed above, proposed paragraph (b) has been deleted.

*Section 139.111 Exemptions*

*Proposal:* This section detailed the procedures for a certificate holder to petition for an exemption from the requirements of part 139, including ARFF requirements. Changes were proposed that would require a petition for relief from ARFF requirements to include additional information, as specified in proposed § 139.321, ARFF: Exemptions. In addition, changes were proposed to update references to 14 CFR part 11.

*Comment:* Four commenters state that the alternative emergency response services specified in proposed § 139.321 are as stringent as the ARFF requirements that a petitioner would be seeking relief from. These commenters request that the FAA provide total relief from an ARFF requirement if an airport operator can show that the requirement is unreasonably costly, burdensome, or impractical, as specified in the authorizing statute.

*FAA Response:* The FAA agrees. Proposed § 139.321 has been deleted in its entirety in the final rule, and all requirements for petitions for relief from all or some ARFF requirements are now contained in § 139.111(b). As discussed in the General Comments section above, a new paragraph (e) has been added to § 139.315 to provide an alternative means of compliance with ARFF requirements for Class III airports.

Based on comments received, several operators of Class II and III airports may be petitioning the FAA for relief from all ARFF requirements due to cost considerations. However, most of these airport operators did not provide the FAA sufficient supporting cost or operational data to justify their position that compliance with ARFF requirements would be too costly. To ensure petitioners adequately justify that ARFF requirements are unreasonably costly, burdensome, or impractical, paragraph (b) has been modified to detail the type of financial information the FAA would need when considering a request for exemption.

The new paragraph added to § 139.315 provides an alternative means of compliance for Class III airports that would allow the certificate holder to either comply with Index A ARFF requirements or comply with alternate ARFF requirements that provide a comparable level of safety (see discussion comments for § 139.315, Aircraft rescue and firefighting: Index determination). These alternate ARFF requirements must be approved by the FAA and include provisions for prearranged emergency response services and that emergency responders are familiar with air carrier schedules, airport layout, and airfield communications. Such services may be those identified in the airport emergency plan required under § 139.325, Airport emergency plan. There are no timed response, equipment, or personnel requirements as were proposed in the now deleted § 139.321, ARFF: Exemptions.

*Comment:* A commenter states that criteria the FAA uses to determine if an airport operator can petition for relief from ARFF requirements is outdated and ineffective. The commenter believes that allowing airports with "less than one-quarter of 1 percent of the total passengers enplaned at all air carrier airports" to petition the FAA for relief from ARFF requirements is too liberal. The commenter notes that one-quarter of 1 percent of the total U.S. passenger enplanements has grown from 478,372 enplanements in 1972 to 1,588,505 enplanements in 1999.

Instead, the commenter suggests that the FAA base ARFF exemptions on the 1982 amendment of the Airport and Airway Improvement Act's definition of "primary airports." The commenter states that this law defined a primary airport as a commercial service airport that is determined by the Secretary of Transportation to have .01 percent or more of the total number of passengers enplaned annually at all commercial service airports. Under this revised criterion, the commenter argues that only airports with 63,540 enplanements or less could petition for relief from ARFF requirements.

*FAA Response:* The FAA disagrees. The authorizing statute specifies that

the FAA may consider exempting from ARFF requirements an airport that enplanes annually less than one-quarter of 1 percent of the total number of passengers enplaned at all air carrier airports. Congress would have to amend this authority before the FAA could limit ARFF exemptions to only those airports categorized as primary airports.

In addition, the commenter's revised criterion is based on an incorrect definition. The commenter suggests using the definition of "primary airport" found in the 1982 amendment of the Airport and Airway Improvement Act. In 1994, Congress amended and recodified the Airport and Airway Improvement Act. Under the current statute, a primary airport is defined as a commercial service airport the Secretary of Transportation determines to have more than 10,000 passenger boardings each year (49 U.S.C. 47102 (11)).

*Comment:* Two commenters request guidance on the circumstances under which the FAA would grant an exemption to part 139 requirements. Without this guidance, the commenters believe it would be difficult for airport operators to determine whether serving scheduled air carrier operations could be justified in light of the incremental cost of part 139 certification. One of these commenters recommends that the FAA develop criteria for approving exemptions that would improve safety and also allow small airports with small budgets to focus their resources on accident prevention rather than accident mitigation.

*FAA Response:* The FAA partially agrees. The FAA has the authority to approve an exemption request from any part 139 requirements and will consider any petition for exemption from these requirements that is submitted in the manner outlined in the final rule, as adopted. However, varying airport operations, sizes, and local circumstances make it difficult to generalize what exemptions would be granted and it would be difficult to provide in this final rule.

As stated in the proposal (65 FR 38664), the FAA considered requiring airport operators that serve small air carrier operations to comply only with accident prevention measures, or risk reduction requirements, and not accident mitigation requirements (such as ARFF and emergency planning). While this approach to regulating these airports would promote a minimum level of safety through consistent compliance with risk reduction requirements, experience has shown that not all airport owners and operators would place enough emphasis on preparing for emergency response without some FAA oversight.

Since accident mitigation costs could have a significant economic effect on airports serving small air carrier aircraft, the FAA has added language to clarify how an airport operator can apply for an exemption from all or some ARFF requirements that would be too costly, burdensome, or impractical. Language also has been added to allow alternative compliance measures for Class III airports (see the section-by-section analysis of § 139.111, Exemptions and § 139.315, Aircraft rescue and firefighting: Index determination).

*Comment:* A commenter states that the FAA should not use its authority to grant exemptions as a means of remedying funding shortages at smaller certificated airports. Instead, the commenter recommends that the FAA develop a new funding mechanism.

*FAA Response:* The FAA disagrees. Instead of alternative funding sources, the FAA can use its exemption authority in instances where compliance with part 139 would be unduly burdensome. The authorizing statute requires the FAA to consider regulatory alternatives for airports serving small air carrier operations that are the "least costly, most cost-effective, or least burdensome" and will provide "comparable safety" at all certificated airports. As noted earlier, the authorizing statute also provides exemption authority from ARFF requirements for certain airports. The FAA will use its general exemption authority under 49 U.S.C. 44701 and its specific authority to grant limited exemptions from ARFF requirements under 49 U.S.C. 44706 to require safety measures at all airports serving small air carrier aircraft consistent with the requirements of 49 U.S.C. 44706.

After publication of the proposal, Congress did direct the FAA to set aside a portion of existing AIP funds to assist airport operators in meeting the terms of this rule (49 U.S.C. 47116(e)). As of the date of the publication of this final rule, the FAA is required to set aside $15 million of AIP funds per year for 4 fiscal years following the effective date of this rule. Beyond that, the FAA has limited options for developing new funding mechanisms. The FAA executes statutes for the distribution of Federal funds to airport operators, as directed by Congress. Congress would have to appropriate any additional Federal funds.

*Section as Adopted:* This section is adopted with changes. For the reasons discussed above, proposed § 139.321 is deleted in its entirety, and all references to § 139.321 in § 139.111 have been deleted. All requirements for petitions for relief from ARFF requirements are now contained in § 139.111, and this paragraph has been modified to require the petitioner to provide the FAA additional information.

*Section 139.113 Deviations*

*Proposal:* This section permits the certificate holder to deviate from requirements of Subpart D—Operations of the regulation during emergency conditions. A revision was proposed to allow the certificate holder more flexibility during emergencies requiring a deviation from some part 139 requirements, including the flexibility to notify the FAA of deviations by telephone, or other means of electronic communications, rather than requiring an automatic written notification. In addition, the term "Airport Certification Manual" was added to clarify that the certificate holder may, when responding to an emergency, deviate from both its certification manual and any requirements of subpart D.

*Comments:* No comments were received on this section.

*Section as Adopted:* This section is adopted as proposed.

## Subpart C—Airport Certification Manual

*Section 139.201 General Requirements*

*Proposal:* This section was retitled and specified that each airport operator shall adopt, and comply with, an ACM in accordance with part 139. It further specified that the Administrator may authorize an airport operator to serve air carrier operations not otherwise permitted under the regulation.

This section consolidated existing requirements from §§ 139.201, 139.203, 139.207, 139.209, 139.211, and 139.215 into a single section. Requirements that an airport subject to this part may not be operated without an operating certificate, or in violation of its certificate, were combined, as were the requirements for preparing and maintaining a manual. In addition, language no longer applicable was deleted, revisions were made to correspond to the new certification process, and implementation dates were established.

*Comment:* Four commenters request that the reference to ACs in paragraph (d) be limited to those in the 150 series that pertain to airports.

*FAA Response:* The FAA disagrees. The AC pertaining to the development of an ACM is not in the 150 series. Rather, it is in the 120 series (AC 120/139.201–1, Airport Certification Manual (ACM) and Airport Certification

Specifications (ACS)). Further, referencing specific AC series has proven impractical. ACs are revised periodically, and referring to them generically ensures the regulation remains current.

*Section as Adopted:* This section is adopted with administrative changes. Minor grammatical edits have been made to paragraph (b)(3).

*Section 139.203 Contents of Airport Certification Manual*

*Proposal:* Under the proposal, existing standards of § 139.203 for maintaining an ACM were incorporated into proposed § 139.201, General requirements, as previously discussed. The contents of existing § 139.205, Contents of airport certification manual, and § 139.213, Contents of airport certification specifications, were revised and became the new proposed § 139.203. This section required all certificate holders to have an ACM and to include in their certification manual a description of procedures and equipment used to comply with the requirements of part 139, particularly subpart D. New manual contents were required for each airport class to correspond to the new classifications of certificated airports and changes to subpart D.

Class I airport certificate holders were required to include in their manual all elements that are currently required and several new elements. Airport operators currently holding a Limited Airport Operating Certificate were required to convert their existing airport certification specifications into an AOC and include several new elements. These airports were classified as either Class II or Class IV airports. Class II airport operators were required to include more elements in their manual than were operators of Class IV airports. In addition, airports that would be newly certificated under the proposal (Class III airports) were required for the first time to develop an ACM.

*Comment:* A commenter disagrees that airports serving small air carrier aircraft would be permitted some flexibility in complying with requirements that the commenter believes are more burdensome. This commenter argues that § 139.203 makes no distinction between Class I, II, and III airports as all three airport classifications must have the same certification manual contents. Likewise, the commenter states that nowhere in the proposed regulation are Class III airports allowed to comply with requirements differently than Class I and II airports.

*FAA Response:* The FAA disagrees. While § 139.203 does require Class III airports to comply with the same subpart D sections as Class I and II airports, several of these sections have different requirements for Class III airports. For example, Class III airports would not have to conduct an emergency disaster drill every 3 years (§ 139.325(h)) and would not be required to have internally illuminated signs, except for holding position and Instrument Landing System (ILS) critical area signs (§ 139.311(b)(3)).

*Comment:* Two commenters object to the FAA proposing that Class IV airport operators need not include in their manuals procedures for complying with certain subpart D requirements. To encourage standardization, one of these commenters recommends that all certificated holders be required to include in their ACM procedures for complying with all subpart D requirements. The other commenter suggests that Class IV airport operators at least be required to address their manual procedures for complying with proposed § 139.313, Snow and ice control; § 139.323, Traffic and wind direction indicators; § 139.331, Obstructions; § 139.335, Public protection; and § 139.337, Wildlife hazard management.

*FAA Response:* The FAA partly agrees and has revised this section as discussed below. However, commenters may have misunderstood what is required for a Class IV ACM. This may be the result of errors contained in the proposal. The proposal incorrectly identified Class IV ACM requirements and contradicted statements in the preamble. These errors are in the chart on page 38648 that compares current and proposed part 139 requirements and in the chart contained in proposed § 139.203, Contents of airport certification manual, paragraph (b) on page 38674. A correction was issued on August 15, 2001 (66 FR 42807).

As noted in the correction, Class IV airport operators would continue to address in their ACM procedures for complying with several subpart D requirements, including any proposed revisions to such requirements. The existing requirements are for personnel, paved and unpaved surfaces, safety areas, marking, lighting, signs, and airport conditions reporting. Additional manual elements were proposed that include procedures for complying with subpart D requirements for ARFF, the storage and handling of hazardous materials, wind and traffic indicators, and self-inspections. Such changes are adopted as proposed.

The proposal did not require Class IV airport operators to include in their manuals procedures for avoiding power interruption or failure, snow and ice control, control of ground vehicles, marking and lighting obstructions, protection of NAVAIDS, public protection, wildlife hazard management, and marking and lighting construction and unserviceable areas.

However, based on comments received, the FAA reviewed manual content requirements for Class IV airport operators. The FAA agrees with commenters that it is necessary for safety and standardization purposes to require Class IV airport operators to include in their manual procedures for the removal, marking, or lighting of obstructions, as specified in subpart D. To ensure all certificate holders monitor the status of obstructions, and take appropriate action when necessary, proposed § 139.203(b)(26) has been revised to require all part 139 certificate holders remove, mark, or light obstructions within their control.

For example, an object, such as a tree or tower, may penetrate certain airspace and affect aircraft operations. To determine the impact on airspace of such objects, the FAA conducts an aeronautical study and makes recommendations that may require the owner to remove, mark, or light any object deemed an obstruction. If this is not possible, visual and instrument approaches to runways near the obstruction may be changed to help ensure aircraft stay clear of the object. This ongoing process involves both certificated and non-certificated airports, and most airports certificated under part 139 have already removed, marked, or lighted any obstruction to FAA standards.

*Comment:* A commenter questions whether differences between similar elements of the table contained in § 139.203 are intentional. Specifically, this commenter notes that § 139.203(b)(18) differs slightly from § 139.203(b)(19). Both element (18) and (19) address storing and handling hazardous materials but element (19) does not reference a subpart D section as does element (18). This is also the case for elements (20) and (21), which address traffic and wind direction indicators, and elements (23) and (24), which address self-inspections.

*FAA Response:* These differences were not intentional. Rather, language from a previous version of part 139 was inadvertently left in § 139.203(b). As discussed previously, a correction was issued on August 15, 2001 (66 FR 42807).

*Comment:* A commenter, an operator of a Class I airport, agrees with the proposed requirement to include in the ACM a description of personnel training and equipment and a system for maintaining records. However, this commenter notes such additional requirements would have an economic impact. No cost data is provided to support the commenter's position.

*FAA Response:* The FAA agrees that there will be costs associated with new personnel and recordkeeping requirements. While many Class I airports already comply with these requirements and need only to document their existing procedures, other airport operators, particularly those newly certificated under the revised rule, may have additional labor and training costs. Due to variances between airports, such costs will differ from airport to airport, even among airports within the same classification.

Several other airport operators provided the FAA with cost and operational data regarding compliance with new personnel and recordkeeping requirements (see section-by-section analysis of § 139.301, Records, and § 139.303, Personnel). The FAA has evaluated this data and made adjustments to associated cost estimates, as appropriate (Chapter V of the Regulatory Evaluation).

*Comment:* A commenter opposes the requirement that Class III airports include in their ACM's a description of how they will meet ARFF requirements of subpart D. The commenter is concerned that this requirement will make air carrier service cost prohibitive, particularly for airport operators in New York State.

*FAA Response:* The FAA agrees that, in some instances, the cost to comply with ARFF requirements may be too costly for Class III airport operators, even if such costs are passed onto airport users. As discussed in the section-by-section analysis of § 139.111, new procedures have been established for certain airport operators to petition the FAA for relief from ARFF requirements that are unreasonably costly, burdensome, or impractical. In addition, the FAA has established alternative compliance measures for Class III airports (*see* the section-by-section analysis of § 139.111, Exemptions and § 139.315, Aircraft rescue and firefighting: Index determination).

However, the FAA does not agree that § 139.203 should be changed to exclude Class III airports from complying with ARFF requirements specified in subpart D. To standardize ARFF at certificated airports, all certificated airports serving both scheduled and unscheduled operations are required to comply with these ARFF requirements, subject to the exemption discussed above. Accordingly, no changes have been made to proposed § 139.203(b)(16), and all operators of certificated airports are required to include procedures in their ACM's for complying with ARFF requirements appropriate to the air carrier aircraft and operations served.

*Comment:* One commenter notes that the table in § 139.203 indicates that Class IV airports do not have to comply with certain sections of subpart D, contradicting language in these subpart D sections. Specifically, the commenter is concerned that the language "each certificate holder shall" in specified subpart D sections means that every certificate holder must comply even if § 139.203 states otherwise.

*FAA Response:* The FAA disagrees. Section 139.203 is tied to subpart D as it establishes what subpart D requirements a certificate holder is required to address in its ACM. If § 139.203 does not require compliance with a subpart D section, then the certificate holder is not obligated to comply with that section.

*Comment:* A commenter notes that the reference to § 139.319(l) in proposed § 139.203(b)(6) is incorrect. The reference should be to § 139.319(k).

*FAA Response:* The FAA agrees. Section 139.203(b)(6) was changed in the correction issued on August 15, 2001 (66 FR 42807).

*Section as Adopted:* This section is adopted with changes. Section numbers referenced throughout § 139.203 have been changed to reflect the correction issued on August 15, 2001 (66 FR 42807), and the renumbering of some subpart D sections.

For reasons discussed above, § 139.203(b)(23) has been revised to require Class IV airport operators to include procedures in their certification manuals for removal, marking, or lighting of obstructions.

In addition, a minor editorial change was made to paragraph (a), as well as changes to paragraph (b)(13), to clarify that a certificate holder's runway markings and holding position markings must be indicated in the runway and taxiway identification plan. Further, the reference to proposed § 139.321 in paragraph (b)(17) was changed to § 139.111, paragraphs (b)(22) and (28) were updated to reflect the title change to the referenced subpart D sections, and paragraph (b)(26) was changed to clarify that all wildlife hazard management procedures are to be included in the ACM, not just the wildlife hazard management plan.

*Section 139.205 Amendment of Airport Certification Manual*

*Proposal:* Under the proposal, the contents of existing § 139.205, Contents of airport certification manual, were moved and consolidated into proposed § 139.203, Contents of airport certification manual. In existing § 139.217, Amendment to airport certification manual or airport certification specifications, procedures and requirements for amending the ACM were redesignated as proposed § 139.205 and retitled. This section revised existing amendment procedures and requirements to reflect changes made to the certification process and deleted language that was no longer applicable. In addition, this section delegated to the Associate Administrator for Airports the authority to act on a petition for the Administrator. The section also established a deadline for the FAA to dispose of an amendment.

*Comment:* A commenter states that the FAA should not have the unilateral authority to amend an ACM. This commenter argues that there are sufficient safeguards within part 139 authorizing the FAA Administrator to revoke or suspend an AOC.

*FAA Response:* The FAA disagrees. The commenter is confusing the process to amend an ACM with the process to revoke an AOC. Revocation of an AOC is the result of an enforcement action due to noncompliance with part 139 requirements. The process to amend an ACM would not be used in this instance.

For various reasons, the FAA or the certificate holder may need to amend the ACM to ensure that the manual accurately reflects how the certificate holder is complying with part 139, to implement new standards, or to address an emergency situation. Such an amendment typically addresses a few sections of the rule, and the certificate holder's overall compliance is unaffected.

Either the FAA or a certificate holder can propose an amendment to the ACM, as specified under proposed § 139.205. However, the FAA has the exclusive authority to approve amendments to an ACM. This is currently the case and would not change with this rulemaking. In fact, this rule makes very few changes to the amendment process, except to clarify that the FAA will respond within a time certain as to the disposition of an amendment it has initiated. The certificate holder still may petition that the Associate Administrator for Airports, under § 139.205(d), reconsider an amendment initiated by the FAA.

The Associate Administrator for Airports stays the effective date of the amendment, pending a decision.

*Section as Adopted:* This section is adopted with an administrative change. Language in paragraph (b) has been changed to clarify that the amendment process requires the certificate holder to file an application for an amendment in writing and submit it to the FAA Regional Airports Division Manager.

**Subpart D—Operations**

*Section 139.301 Records*

*Proposal:* Under the proposal, the contents of existing § 139.301 dealing with inspection authority was moved and consolidated with § 139.105, Inspection authority, and this new section on records was proposed. This new section required all certificate holders to maintain, and make available to FAA inspectors, records to show compliance with part 139. Existing recordkeeping requirements found throughout part 139 were combined with new recordkeeping requirements. This section also required a certificate holder that serves less than 10,000 annual air carrier operations to make and maintain records of each scheduled or unscheduled operation of large air carrier aircraft and scheduled operations of small air carrier aircraft that occurred during the previous 2 years.

*Comment:* Three commenters oppose the new requirement for a certificate holder that serves less than 10,000 annual air carrier operations to make and maintain records of certain air carrier operations. One of these commenters was unclear on the need to keep such records and suggests that air carriers be required to provide this data instead. Another commenter suggests that FAA air traffic control towers collect the data. All agree that it would be difficult for airport operators to comply with this requirement.

*FAA Response:* Due to changes made to proposed § 139.105, Duration of certificate, the FAA has deleted the requirement for certain certificate holders to make and maintain records of air carrier operations. Instead, the FAA will request air carrier operations data on a case-by-case basis from those operators of airports at which the FAA is considering discontinuing inspections or requesting the operator surrender its AOC (*see* section-by-section analysis of § 139.105, Inspection authority).

*Comment:* One commenter states that the new recordkeeping requirements will create additional costs for airport operators if the training required under proposed § 139.303, Personnel, is more than "on-the-job" training.

*FAA Response:* The FAA agrees but does not envision the training required to be more than "on-the-job" training. This training is discussed in more detail in the following section, § 139.303, Personnel.

*Section as Adopted:* For the reason discussed above, this section is adopted with changes. Proposed paragraph (b) has been replaced with a new paragraph that identifies recordkeeping requirements found throughout part 139 and the length of time these records must be maintained. Consequently, references to other sections in paragraph (c) have been deleted.

*Section 139.303 Personnel*

*Proposal:* This section expanded on the existing requirement for all certificate holders to have available sufficient qualified personnel necessary to comply with the requirements of part 139. Changes were made to clarify the certificate holder's responsibilities to train and equip personnel performing duties required under the proposed part 139. Requirements also were proposed to ensure a certificate holder provides its personnel the necessary resources to properly perform these duties. Further, new training and recordkeeping requirements were proposed.

*Comment:* A commenter states that it supports the "requirement for initial and recurrent training of personnel, and complementary training records."

*FAA Response:* The FAA agrees.

*Comment:* Five commenters state that the revised section is unclear as to who should be trained and what the training curriculum should address. They recommend that the section be revised to clearly define what personnel must be trained, what topics the training should cover, and what the training records should include. One of these commenters suggests that the section be revised so that it only applies to personnel responsible for part 139 compliance and not general administrative personnel.

*FAA Response:* The FAA agrees. Proposed paragraphs (c) and (d) have been revised and new paragraphs (e) and (f) added. These revisions clarify who must be trained, how frequently this training must be provided, what subject areas training must cover, and what training records must be kept.

In proposing new training requirements, it was not the FAA's intent to extend this requirement to administrative personnel. While such personnel may assist in the maintenance of an ACM or records to show compliance, they typically do not access movement areas or perform duties that directly affect the safety of air carrier operations, such as repairing runway lights or conducting inspections of movement areas. As such, new paragraph (c) is limited to personnel that access movement areas and safety areas to perform duties necessary to comply with the ACM and part 139.

As requested, new paragraph (c) also specifies subject areas that required training must cover. These subject areas include airport familiarization, procedures for accessing and operating in movement areas and safety areas, airfield communications, duties specified in the ACM and part 139, and any additional training required under part 139, such as training required for ARFF and emergency medical personnel.

New paragraph (c) does not specify how training must be conducted. This is intentional to allow the certificate holder some flexibility in complying with training requirements in a manner best suited for local circumstances. Thus, training could consist of on-the-job training, formal classroom lectures, industry training meetings, or some combination thereof.

While this section does not require the certificate holder to test personnel to determine comprehension of the required subject areas, the FAA recommends that the certificate holder establish some sort of testing procedures to determine the effectiveness of training. During inspections, FAA inspectors may test covered personnel to determine if training has been completed and the effectiveness of this training.

Paragraph (c) still requires the certificate holder to ensure covered personnel are trained before the initial performance of part 139 duties. However, this applies only to personnel assigned to part 139 duties after the effective date of this rule. This requirement is not retroactive for personnel that currently perform part 139 duties, and paragraph (d) has been revised to clarify that initial training records need only be maintained for training given after the effective date of the rule.

This paragraph also requires personnel performing part 139 duties to receive recurrent training in the specified curriculum at least once every 12 consecutive calendar months. This requirement is applicable to all covered personnel but is not retroactive. Beginning 1 year after the effective date of this rule, the certificate holder must ensure that all covered personnel receive recurrent training.

Such recurrent training need not be accomplished at one time and could be staggered throughout the year. As long

as the five required subject areas are covered, recurrent training could be as involved as initial training or an informal discussion between a supervisor and employee.

*Comment:* Four commenters oppose the revision of existing personnel requirements, claiming they are unnecessary and overly burdensome. One of these commenters notes that FAA annual inspections ensure that airport operators have sufficient and qualified personnel. Thus there is no need for new recordkeeping and recurrent training requirements. Two other commenters state there is no benefit to conducting or documenting recurrent training for duties that are done frequently, if not daily.

The remaining commenter states that its two employees already know their duties; thus training would be unnecessary and would require the commenter to hire an administrative clerk, at $26,557 a year, to comply.

*FAA Response:* The FAA disagrees with the commenters that revisions to this section will be burdensome and will require the certificate holder to hire additional personnel. Most certificate holders already comply with this section and need only to document existing training procedures.

As discussed above, the FAA has made several changes to this section to clarify training requirements. In particular, the changes made to paragraph (d) to clarify that training requirements are not retroactive address the commenters' concerns about the cost to train existing employees. Rather, within a year of the effective date of this rule, these employees would need to receive annual recurrent training that covers the five specified subject areas. As noted above, the FAA allows the certificate holder some flexibility in conducting and scheduling this training so that the certificate holder can comply with the requirements of this section in a manner best suited to its operations and budget needs.

The FAA also does not agree that documenting the training would require the certificate holder to hire additional personnel. The training documents required under this section can be as simple or complex as the certificate holder desires. This section only requires training records to contain a description and date of training received for each covered employee.

For instance, a handwritten or typed letter containing this information for each covered employee that the certificate holder certifies is accurate meets the requirements of this section. In complying with similar training records for ARFF personnel, some certificate holders have developed a generic form to minimize the time it takes to record ARFF and emergency medical training. A copy of this form is made for each covered employee, and then specific information about the individual is filled in as training occurs. Each subject area that must be covered is listed on this form, next to which is a space to fill in the training date and the signature of the training instructor. This form is kept in a training notebook and is provided to the FAA inspector during periodic inspections to show compliance with part 139 training requirements. This low-cost approach to a recordkeeping system is an acceptable means of complying with recordkeeping requirements of this section.

Additionally, the FAA disagrees with the commenter that annual FAA inspections ensure compliance with part 139 without the need for onerous recordkeeping and recurrent training program. This commenter argues that if an airport is found in compliance with part 139, then it is providing sufficient and qualified personnel.

While full compliance with part 139 during a FAA inspection is certainly a good indicator that the certificate holder is complying with personnel requirements, such inspections typically occur once a year. Part 139 personnel requirements ensure that the airport operator provides qualified and sufficient number of personnel to comply with part 139 at all times, not just during FAA inspections. Such requirements also ensure a more consistent approach to training. This is particularly important for personnel that may not perform their duties on a regular basis, such as ARFF and emergency medical personnel.

Even personnel that perform their duties on a daily basis can benefit from recurrent training. Such employees may become complacent in their duties and recurrent training will help ensure that they continue to perform their duties, correctly and safely. Recurrent training also provides the opportunity for employees to discuss any changes to part 139 and any revisions to standards or the ACM.

*Comment:* Two commenters request that this section clearly state what the FAA considers to be "sufficient and qualified personnel."

*FAA Response:* The FAA agrees. Based on comments received, these requirements have been clarified and restated.

This section, as adopted, requires the certificate holder to ensure such personnel are trained in the subject areas specified in paragraph (c) and to document this training as required under paragraph (d). The FAA will consider a certificate holder to have qualified personnel if the certificate holder has complied with these requirements. As previously stated, to determine if the certificate holder has qualified personnel to comply with its ACM and part 139, FAA inspectors may test covered personnel.

The FAA intentionally did not define the term "sufficient." It would be impractical to define the number of personnel each certificate holder would need to comply with part 139 due to the variations between airport size and layout, type of operations served, and the local governing body. If a certificate holder is found to be in noncompliance with part 139 and its ACM, the FAA will review the number and qualification of employees used to comply with part 139. This review may result in the FAA requiring the certificate holder to provide additional personnel.

*Comment:* Two commenters state that the FAA has underestimated the time a certificate holder will need to set up a recordkeeping system for training records. They note that FAA's recordkeeping estimates for certificate holders to comply with this section—4,848 hours for initial recordkeeping hours and 13,909 hours annual recordkeeping—equates to 8 hours per airport to set up a recordkeeping system. They claim this is not enough time for any size airport, particularly large airports with staff numbering in the hundreds, and recommend the FAA conduct further analysis to develop a more reasonable time estimate. No cost or operational data is provided to support these comments, nor did commenters provide an alternate time estimate.

*FAA Response:* The FAA disagrees. This time estimate was based on the assumption that current certificate holders have an established system for maintaining training records for ground vehicle operations, as required under existing § 139.329 Ground vehicles. Since the training requirements of this section apply to the same individuals that must be trained under existing § 139.329, the FAA estimates that these airport operators would need only 8 hours to update this system to incorporate new training records required under this section.

Some of these airport operators have automated their recordkeeping systems, which create and store required records electronically. These systems may take longer than 8 hours to update, but this section does not require such automation. As noted above, a paper form that is reproduced and completed

for each covered employee is sufficient, and recordkeeping time estimates are based on such a system.

Recordkeeping time estimates for newly certificated airports also were determined to be eight hours. Since a simple paper system is acceptable for complying with the recordkeeping requirements of this section and these airport operators have small staffs, the FAA determined operators of such airports would need no more than a day to establish such a system.

The time needed to update recordkeeping systems may be further reduced by changes made to paragraph (c) that limit training to personnel that enter movement areas. This change may reduce the number of records that need to be maintained.

*Section as Adopted:* This section is adopted with changes. As discussed above, modifications have been made to paragraph (c). This paragraph now stipulates that training required under this section is limited to personnel that enter movement areas to perform duties. Additionally, new language has been added to specify the five subject areas that required training must include and to require recurrent training every 12 months.

Several modifications were made to paragraph (d) to clarify requirements for training records. Now, only records of training given after the effective date of the rule need to be maintained, and such records must be kept for 24 consecutive calendar months.

In addition, two new paragraphs have been added. New paragraph (e) identifies other new and proposed part 139 training requirements. New paragraph (f) clarifies that a certificate holder can use individuals other than its own employees to comply with part 139.

Language from proposed § 139.323(d) that specified the conditions that a certificate holder must meet in order to use an independent organization or designee to conduct fuel fire safety inspections was moved to new § 139.303(f) and revised so it is applicable to all sections. A certificate holder that chooses to use a third party to comply with a part 139 requirement is still required to ensure that the third party's duties and responsibilities are included in the ACM and records are maintained to show that the third party is in compliance with part 139 and the ACM. This would include any training required under part 139. The certificate holder using a third party is still fully responsible for meeting part 139 requirements.

*Section 139.305 Paved Areas*

*Proposal:* This section contained existing requirements for maintaining paved areas used by air carrier aircraft. All certificate holders were required to maintain paved areas, including loading aprons, parking areas, taxiways, and runways, in a manner that adequately supports air carrier aircraft operations.

The FAA proposed few changes to these requirements. The terms "full strength" and "shoulder" were deleted from paragraph (a)(1) to eliminate confusion as to which areas to apply the 3-inch abutting surface limitation. Also, language stating specific series numbers within the AC system was changed to a general reference to the AC system.

*Comment:* One commenter recommends the FAA expedite the rulemaking for continuous friction measuring equipment. Specifically, the commenter suggests that the FAA publish a supplemental notice of proposed rulemaking so requirements for friction measurements could be included in this final rule.

*FAA Response:* The FAA disagrees. As noted in the proposal (65 FR 38641), this rulemaking intentionally does not address runway friction measurement (both winter and maintenance) as the ARAC is already considering this matter. Issuing a supplemental rulemaking would unnecessarily delay this rulemaking.

*Section as Adopted:* This section is adopted with one clarification. A sentence has been added to paragraph (a)(3) clarifying that a pavement crack and surface variation must be immediately repaired if it produces loose aggregate or other contaminants.

*Section 139.307 Unpaved Areas*

*Proposal:* This section contained existing requirements for maintaining unpaved areas used by air carrier aircraft. All certificate holders were required to maintain unpaved areas, including loading aprons, parking areas, taxiways, and runways, in a manner that adequately supports air carrier aircraft operations.

*Comment:* No comments were received.

*Section as Adopted:* This section is adopted as proposed.

*Section 139.309 Safety Areas*

*Proposal:* This section contained existing requirements for the establishment and maintenance of a safety area for each runway and taxiway available for air carrier use. Except for minor changes to paragraphs (a) and (c), these requirements remained the same and were applicable to all part 139 airports.

Paragraph (a) was revised to require that certificate holders ensure runway safety areas are maintained in accordance with the standards of this section, unless otherwise approved in the ACM. Further, paragraph (c) was revised to make a general reference to the availability of the AC system.

*Comment:* A commenter recommends eliminating the clauses in paragraph (a) that "grandfathers" nonstandard safety areas and imposes a deadline for all part 139 certificated airports to have at least a 1,000-foot safety area at the end of each air carrier runway. The commenter also suggests that if land is not available to achieve the 1,000-foot safety area at the end of the runway, the FAA should require part 139 certificate holders to use alternate methods, such as arresting materials or declared distances, to achieve a similar level of safety.

*FAA Response:* The FAA disagrees. As noted in the proposal (65 FR 38650), compliance dates listed in paragraphs (a)(1) and (2) are part of a "grandfather" clause to allow existing safety areas that were adopted when part 139 was amended in 1987 (52 FR 44276, November 18, 1987.) Before 1987, many airport operators invested resources to develop safety areas before standards were established. Further, physical limitations of airports resulted in establishment of some safety areas that did not meet the standard.

In developing the proposal, the FAA did consider removing these grandfathering clauses but determined the most efficient means to ensure all safety areas at part 139 certificated airports meet current standards is to continue to do so through AIP-funded runway/taxiway renovation projects. Airport operators that accept AIP funds for runway or taxiway renovations are obligated under grant assurances to ensure that such renovations meet current standards, including those for runway safety areas. Since 1988, many safety areas at part 139 airports have been brought up to current standards through this process. Due to the advanced age of the remaining runways and taxiways, similar renovation or replacement should occur in the next few years, and associated safety areas also should be brought up to current standards if necessary. Where terrain does not permit a standard safety area, the FAA will require alternative methods of compliance, such as those recommended by the commenter, to be developed on a case-by-case basis.

*Section as Adopted:* The section is adopted as proposed, except for some minor administrative language changes for clarity.

*Section 139.311 Marking, Signs, and Lighting*

*Proposal:* This section contained existing requirements for runway and taxiway markings, signs, and lighting. This section was retitled, and several clarifications were made to correspond to changes made to the certification process (proposed § 139.203, Contents of airport certification manual) and to separate marking, signs, and lighting requirements into three distinct paragraphs.

A change was made to existing marking requirements to clarify standards for taxiway edge markings. In addition, the word "runway" was deleted from the term "runway holding position markings" in this paragraph to permit special aircraft operations that require holding position markings other than those located prior to the runway.

Sign requirements were relocated to a new paragraph (b) and revised to require Class I, II, and IV airports operators to internally illuminate all required signs. Class III airports were required to internally illuminate only holding position and instrument landing system (ILS) critical area signs. In addition, language was added to provide for those instances where an airport has a runway without edge or in-pavement lighting and thereby does not have a power source to internally illuminate signs.

References to 14 CFR part 77 concerning obstructions were deleted, language pertaining to lowest minimums authorized for a runway was modified, and new language was added to require the certificate holder to comply with this section in a manner satisfactory to the FAA. In addition, expired implementation dates were deleted and a new compliance date was proposed for Class III airports.

*Comment:* One commenter expresses support for revised language that may provide relief for airport operators that have runways without a power source and are unable to internally illuminate required signs. This commenter commends the FAA's pledge in the proposal (65 FR 38650) to work with such airport operators to develop alternative signs until funding is available to install a power source. The commenter states this approach is practicable and should accommodate a variety of equally safe solutions, such as retroreflective signs.

*FAA Response:* The FAA agrees.

*Comment:* Two commenters state the requirement to illuminate all mandatory signs will have a financial impact on airport operators, particularly on operators of small airports. One of these commenters suggests that operators of small airports be allowed to use retroreflective signs. The other commenter, an operator of a large Class I airport, notes that this requirement would have a financial impact but does not provide financial or operational data.

*FAA Response:* The FAA agrees that there will be costs associated with the requirement to internally illuminate all required signs and has addressed these costs in the regulatory evaluation. Nonetheless, several factors will help mitigate such costs, particularly for operators of small airports.

Operators of Class III airports will be required to internally illuminate only mandatory holding position signs, thereby reducing the number of signs these small airport operators must illuminate. Further, these airport operators can apply for Federal funds to purchase and install these signs. While there is no guarantee that Federal funds will be available and airport operators must still provide matching funds, most current part 139 certificate holders installed their current sign systems using Federal funds. The FAA anticipates this will be the same for operators of airports who will be newly certificated under this rule.

Also, as discussed above, the FAA has committed to work with airport operators to develop alternative means of compliance, including the use of retroreflective signs, until funding is available to purchase and install required signs. In addition, Class III airports have an additional 3 years after the effective date of this final rule to comply with sign requirements. As noted in the proposal (65 FR 38651), this additional compliance time will allow time to develop a sign plan, order and take delivery of signs, and install signs.

Operators of small airports that will be classified as either Class I, II, or IV airports should already comply with the requirements of this section. For the past 10 years, the FAA has been funding the installation of internally illuminated sign systems at part 139 airports that comply with the requirements of this section. Any changes that need to be made to these systems as the result of this rule likewise will be eligible for Federal funding.

*Comment:* In response to a request for comments, one commenter states its opposition to the use of retroreflective signs at Class III airports because of concerns that retroreflective signs might not be visible to all air carrier pilots. This commenter, the Air Line Pilots Association (ALPA), raised this issue as a member of the ARAC, and its objection to retroreflective signs was discussed in the proposal (65 FR 38650).

In particular, ALPA is concerned that retroreflective signs may not be visible to all air carrier pilots because of differences in aircraft configurations and the location of taxi lights. The association states that the basis for this position is "the collective experience" of its 58,000 airline pilot members and requests that the FAA provide any information it has to the contrary. ALPA also recommends the FAA conduct tests of retroreflective signs at the FAA's Technical Center in Atlantic City, NJ.

*FAA Response:* The FAA disagrees. Other than ALPA's comment, the FAA did not receive any other comment that would support the claim that retroreflective signs are not visible to pilots of certain air carrier aircraft, as requested in the proposal (65 FR 38650). Nor did ALPA provide data collected from its membership that identifies the aircraft type from which pilots have experienced problems seeing retroreflective signs or the airports at which these signs are located.

The FAA has determined that retroreflective signs provide a reasonable means for airport operators to install a sign that can be seen in most low-visibility conditions when an internally illuminated sign is impractical or cost prohibitive. Other than ALPA's claim that retroreflective signs are problematic, the FAA has received no other report of problems with these signs from the industry or from aircraft operators. Accordingly, the FAA will allow Class III airports to use retroreflective signs to identify taxiing routes.

*Comment:* In response to the FAA's request for comments on whether the installation of unlighted retroreflective signs would provide an adequate sign system for Class III airports, a Class III airport operator provided its opinion on retroreflective markers used at its facility to mark the runway edge. This commenter states that such retroreflective markers "do not provide adequate lighting for aircraft on approach to landing." The commenter notes that such markers are only effective for taxiing aircraft and cannot be seen from the air. This commenter concludes that retroreflective markers are dangerous and unsafe during low-visibility weather conditions and that only lighted runways with lighted signs can assure maximum runway usage and improve safety.

*FAA Response:* While the FAA was not seeking comments on the use of retroreflective markers on runway edges, the FAA disagrees with the commenter's conclusion that use of

retroreflective markers creates an unsafe condition. During certain visual conditions and aircraft operations, retroreflective markers are an acceptable means to mark the edge of pavements.

Further, the commenter incorrectly assumes that retroreflective markers are intended to be seen from the air. Retroreflective markers are intended only to provide visual guidance to a pilot operating an aircraft on the ground. Lighting that provides visual decent guidance information to pilots during an approach to the runway is the only airport lighting intended to been seen in the air. This lighting, known as approach lighting, is never retroreflective.

The FAA determines the type of runway lighting, including approach lights, to be used based on runway takeoff and landing minimums. Runway takeoff and landing minimums are the horizontal and vertical visual distances the pilot must be able to see during poor meteorological conditions in order to use the runway. The FAA considers many factors in determining takeoff and landing minimums, such as runway length and obstructions near the runway, and these minimums will vary from runway to runway.

While § 139.311 does require the certificate holder to provide and maintain runway lighting, the standard is determined independently of the part 139 airport certification process. This is because the FAA authorizes runway takeoff and landing minimums for all types of runways, including many located at airports that are not certificated under part 139. In some instances, the FAA may authorize minimums that would permit a part 139 certificate holder to use retroreflective markers to denote the runway edge.

The FAA agrees with the commenter that lighted runways and signs improve safety, but it will not require part 139 certificate holders to install runway lighting and markings other than those necessary for the authorized takeoff and landing minimums.

*Comment:* One commenter, ALPA, recommends the FAA expedite the rulemaking for distance remaining signs (signs that are installed every 1,000 feet along the runway to advise pilots how much of the runway remains). Specifically, ALPA suggests that the FAA publish a supplemental notice of proposed rulemaking so requirements for distance remaining signs could be included in this final rule.

*FAA Response:* The FAA disagrees. As noted in the proposal (65 FR 38641), this rulemaking intentionally does not address distance remaining signs. This matter was referred to the ARAC. At its meeting on June 21, 2001, the ARAC accepted the working group's majority report on distance remaining signs. The majority report recommended that no regulation change was needed to require distance remaining signs as the vast majority of airport operators have already installed such signs on their air carrier runways. In addition, ARAC considered ALPA's minority position that the FAA should publish a notice of proposed rulemaking requiring distance remaining signs. Both the majority and minority opinions are included in the recommendation forwarded to the FAA.

*Comment:* A commenter recommends that the final rule require certificate holders to install precision approach path indicators (PAPI) at the end of each air carrier runway. A PAPI is a system of lights normally installed on the left side of the runway providing visual descent guidance information to pilots during an approach to the runway. The commenter believes this is necessary, as PAPIs are important visual aids that help ensure pilots make stabilized approaches.

*FAA Response:* The FAA disagrees that the final rule should include a requirement for PAPIs. Requiring the installation of PAPIs goes beyond the scope of the proposal and would require a supplemental notice of proposed rulemaking. Further, the use of a PAPI is determined by the type of instrument approach that the FAA has authorized for the runway and may not be appropriate for all runways at part 139 airports.

*Section as Adopted:* This section is adopted with minor changes. A clarification was made to § 139.311(a)(3). The word "taxiway" has been inserted in front of the words "edge markings" to clarify that the edge markings required under paragraph (a)(3) are taxiway edge markings. Runway edge markings are already addressed in paragraph (a)(1). Additionally, paragraph (c)(4) was edited for clarity.

*Section 139.313 Snow and Ice Control*

*Proposal:* This section contained existing requirements to develop and implement snow and ice control plans. These requirements applied to those Class I, II, and III airports located in an area where snow and icing conditions regularly occur.

No changes were proposed to the existing requirements that snow and ice plans include procedures for removal and control of snow and ice accumulations, and that notification be provided to air carriers when movement areas are unusable due to snow and ice. Minor changes were made to paragraph (a). The term "regularly" was deleted and new language added to clarify that the FAA will determine which airports require snow and ice control plans. In addition, the standard for positioning snow off movement areas was modified by deleting the term "full strength." References to airport condition reporting requirements also were updated to correspond to new section numbering, and references to specific ACs were replaced with a generic reference.

*Comment:* A commenter states that by omitting the term "regularly" in paragraph (a) and replacing it with the language "as determined by the Administrator," the requirement for a snow and ice control plan would be subject to interpretation absent any specific guidelines.

*FAA Response:* The FAA disagrees. The term "regularly" is not currently defined and is subject to interpretation. The new language allows greater flexibility for the certificate holder and the FAA. As the plan will be specific to each airport, there should be no ambiguity as to what each airport is requested to do.

*Section as Adopted:* This section is adopted with changes. An editorial change was made to proposed paragraph (b)(5) to update a section designation number and another was made to proposed paragraph (b)(6) to delete the redundant language "procedures for snow and ice control."

*Section 139.315 Aircraft Rescue and Firefighting: Index Determination*

Proposal: This section contained existing criteria for determining the certificate holder's level of ARFF coverage, or Index. The levels of ARFF coverage are divided into five categories, or Indexes, that are used in other sections to prescribe minimum ARFF services and equipment appropriate to the size of aircraft served. This did not change in the proposal.

While Index criteria remained the same, a change was made to paragraph (c) to clarify which Index is required when the largest aircraft serving a certificated airport has less than the minimum number of daily aircraft departures. In addition, language was added to emphasize that in all circumstances, the minimum ARFF Index will be Index A.

*Comment:* Many of the comments received on this section express concerns that the proposal did not update ARFF standards. Some of these commenters suggest a complete revision of ARFF standards, while others recommend changes for specific

standards, including the criteria used for determining Index.

*FAA Response:* The FAA agrees that some part 139 ARFF standards may need revisions. However, the proposal did not include any major revision of ARFF standards. The FAA has asked ARAC to review this matter. The ARAC has created an ARFF Working Group to review part 139 ARFF standards and to propose new regulatory language, as appropriate. Comments on this proposal that address specific ARFF standards will be forwarded to this ARFF Working Group for consideration. Otherwise, these comments will not be addressed as they are beyond the scope of the NPRM.

*Comment:* A commenter supports the FAA's decision to expand part 139 requirements to small commuter airports, noting that without part 139 certification, there is no incentive for these airports "to meet the minimal lifesaving measures in part 139." The commenter also states that it supports the upcoming ARAC review of part 139 ARFF standards, particularly standards for response times, staffing, and extinguishing agent amounts.

*FAA Response:* The FAA agrees.

*Comment:* A Class I airport operator states that all certificate holders should be required to meet at least Index A requirements, subject to limited exemptions. The commenter states that airport operators should work with local firefighting agencies to determine the most economical and efficient means of complying with ARFF requirements and include the resulting agreement in the airport's emergency plan. The commenter also notes that employees of smaller airports should be cross-trained in ARFF duties to minimize the financial impact.

*FAA Response:* The FAA agrees. All certificated airports serving both scheduled and unscheduled operations are required to comply with at least Index A ARFF requirements, subject to the limited exemption discussed in the analysis of § 139.111. In addition, alternative compliance measures have been established for Class III airports (see the section-by-section analysis of § 139.315, Aircraft rescue and firefighting: Index determination).

*Comment:* Nine commenters oppose the requirement that all certificated airports comply with at least minimum Index A requirements. These commenters, Class II and III airport operators and sponsors, state that complying with the requirements of proposed § 139.315, ARFF: Index determination, § 139.317, ARFF: Equipment and agents, and § 139.319, ARFF: Operational requirements, would pose a financial burden and detrimentally affect air carrier service at their airports. Some of these commenters provide cost and operational data to support their position. Many state that without Federal funds to cover ARFF costs, they would consider not serving air carrier operations covered by part 139, while others request an exemption from ARFF requirements should the FAA decide to adopt the proposal.

Additionally, commenters state that airport sponsors will not be able to provide funds needed to comply with ARFF requirements, particularly if required to hire additional personnel. A few of these commenters also note that local laws limit the use of local funds for Federal mandates or restrict the collection of taxes. Several commenters also question the accuracy of the FAA's cost estimates.

*FAA Response:* The FAA agrees that in some instances the costs to comply with even minimum ARFF requirements may be prohibitive at certain airports. As discussed earlier, the FAA will consider requests for relief from ARFF requirements under 49 U.S.C. 44706 in such instances where compliance with such requirements would be unreasonably costly, burdensome, or impractical and alternative compliance measures have been established for Class III airports (see the section-by-section analysis of § 139.315, Aircraft rescue and firefighting: Index determination).

The operational and cost data provided by these commenters is addressed in the regulatory evaluation. In reviewing this data, the FAA noticed that several commenters assumed that either they would have to provide certain ARFF services not required or comply with ARFF requirements in a manner that far exceeds what was proposed. These issues are addressed separately under the appropriate section.

The implementation of this rule will require the FAA to either issue new certificates or reissue existing certificates. During this certification process, the FAA will work with airport operators to determine the appropriate level of ARFF. Depending on the commenter's existing emergency services and airport operations, there may be several compliance options available that could be tailored to the airport to significantly reduce costs. For example, existing airport personnel could be crossed-trained to perform ARFF duties, and Federal funds may be available to purchase ARFF equipment. In the event that additional ARFF equipment and personnel are needed, the FAA will assist the airport operator in applying for Federal funds and provide guidance on acquiring ARFF equipment, training events, and the availability of regional resources. This may include a local network of ARFF and other firefighting personnel that provide guidance, training, and other support to smaller airports.

Some commenters also request Federal funds to cover ARFF costs. As discussed previously, safety equipment (including ARFF equipment) that is required under part 139 is eligible for AIP funds. However, as of the date of the publication of this final rule, the AIP authorizing statute does not allow Federal funds to be used for ARFF labor and training costs.

*Comment:* Four commenters express concerns that the proposal did not address ARFF coverage for cargo aircraft operations. One of these commenters also states that ARFF requirements should apply to "wide-body aircraft" operations as well.

*FAA Response:* The FAA partly disagrees. As discussed in section-by-section analysis of § 139.1, 49 U.S.C. 44706(a) limits the FAA's authority to grant AOCs to those airports serving certain passenger air carrier operations. Congress would have to amend this statutory authority before the FAA could issue AOCs based solely on air cargo operations and then, subsequently, require ARFF coverage during such operations.

However, the FAA already has the authority to certificate airports serving aircraft described as "wide-body charters" (unscheduled air carrier operations in aircraft with more than 30 seats). In the proposal, certificate holders serving both scheduled and unscheduled operations were required to provide ARFF coverage appropriate to the size of aircraft served. This requirement has been adopted without change.

*Comment:* Two commenters recommend that smaller airports be allowed to use alternative methods to provide ARFF coverage. One commenter suggests the FAA use the majority ARAC working group recommendation to allow airports with a low frequency of air service to coordinate an emergency plan with reasonable response times with the local fire department. The other commenter recommends the FAA reach an agreement with the U.S. Department of Defense (DOD) to provide ARFF training or expand the number of federally funded regional ARFF training centers. This commenter also recommends that the FAA permit ARFF services to be performed by a tenant air carrier, fixed

base operator (FBO), or a private company. Additionally, both commenters suggest that smaller airports be allowed to house ARFF equipment at a local fire station and train firefighters at that station in ARFF procedures.

*FAA Response:* The FAA agrees in part. As adopted, the final rule allows Class III airports to either comply with Index A ARFF requirements or use alternative means to comply with ARFF requirements that provide a comparable level of safety, as approved by the Administrator. Such alternate means must be included in the FAA-approved ACM and, at a minimum, address four specific operational items, including type of equipment to be provided and airport familiarization training for emergency service providers. Alternative rescue and emergency services may be those used to comply with airport emergency plan requirements under § 139.325, Airport emergency plan.

Commenters' recommendations to use non-airport personnel to perform ARFF duties are already acceptable under existing FAA policy. Part 139 does not require a certificate holder to use only professional firefighters. The certificate holder has the discretion to use whomever it deems appropriate to meet ARFF personnel requirements so long as such individuals are trained in the subject areas specified in § 139.319. These personnel could include personnel from a local fire station, an airport tenant, a private company, or DOD facilities adjoining the airport. This did not change in the proposal.

The proposal did not limit a certificate holder's ability to make arrangements with the local fire station to store equipment and provide all or part of required ARFF coverage. The FAA allows ARFF equipment to be housed at the local fire station as long as the equipment purchased with Federal funds is used in compliance with grant assurances and such an arrangement allows the certificate holder to comply with part 139 vehicle readiness and response time requirements. This also is the case for firefighters based at the local fire station if they are trained and equipped in accordance with § 139.319. Many certificated airports already have made such arrangements with their local fire departments, and the FAA encourages an airport operator that is proposing an alternate means of compliance under § 139.315(e) or petitioning for relief from ARFF requirements under § 139.111 to consider such arrangements in its petition.

The FAA also makes use of DOD staff and resources wherever possible, particularly at joint-use and shared-use airports, and routinely coordinates with DOD on ARFF research projects. Further, the FAA encourages certificate holders to use federally funded regional ARFF training facilities. However, the FAA does not foresee funding the construction of more of these training facilities, as existing facilities are not being used to their full capacity.

*Comment:* One commenter recommends that certificate holders use military surplus ARFF vehicles to help offset ARFF costs.

*FAA Response:* The FAA agrees. For many years, airport operators have been acquiring Federal surplus equipment through the surplus property programs of the U.S. General Services Administration and the DOD.

*Section as Adopted:* The section is adopted with changes. As discussed above, a new paragraph (e) has been added to allow certificate holders of a Class III Airport Operating Certificate to alternate means to comply with ARFF requirements. The new paragraph specifies that such alternate means must be included in the FAA-approved ACM and address four specific operational items, including type of rescue and firefighting equipment to be provided.

*Section 139.317 Aircraft Rescue and Firefighting: Equipment and Agents*

*Proposal:* This section contained existing standards for ARFF equipment and fire-extinguishing agents. Several modifications were made to these standards. The term "clean agent" was added to describe a new category of fire extinguishing agents that replace halon 1211. The phrase "unless otherwise authorized by the Administrator" was added to provide relief to airports waiting for Federal funds to purchase adequate equipment or to address other local circumstances that may require temporary use of alternative equipment or extinguishing agents.

In addition, standards for extinguishing agent substitutions were removed, leaving only the requirement that the FAA must authorize the use of alternate extinguishing agents. Likewise, language was deleted that provided relief to certain airport certificate holders whose ARFF vehicles were unable to comply with the standards required when the regulation was amended in 1987.

All certificate holders were required to comply with this section. A 2-year compliance date was proposed for those airport operators required for the first time to comply with § 139.317 (proposed Class II, III, and IV airports).

*Comment:* Many of the comments on this section recommend changes to specific standards, including the number of required ARFF vehicles, equipment carried on these vehicles, and the type and quantity of extinguishing agent.

*FAA Response:* As discussed above, the NPRM did not propose any major revision of ARFF standards, and the ARAC has since accepted the task to review part 139 ARFF standards. Comments received that address specific ARFF standards in this section will be forwarded to the ARAC for consideration. Otherwise, these comments will not be addressed as they are beyond the scope of the NPRM.

*Comment:* The National Transportation Safety Board (NTSB) comments that it issued Safety Recommendation A97–107 following an aircraft accident in Quincy, IL, on November 19, 1996 (see 65 FR 38652 for a summary of this accident). This safety recommendation asked the FAA "to develop ways to fund airports that are served by scheduled passenger operations on aircraft having 10 or more passenger seats and require these airports to ensure that ARFF units with trained personnel are available during commuter flight operations and are capable of timely response." The NTSB further states that this proposal is an acceptable approach to addressing this safety recommendation and that it supports the proposed revisions that require airport operators to provide ARFF coverage during scheduled operations of air carrier aircraft with 10 or more seats. The NTSB also affirms its position that commuter airline passengers are entitled to one level of safety.

*FAA Response:* The FAA agrees. However, comments received from operators of small airports indicate that they are unable to comply with part 139 in the same manner as large airports. The limited number of annual enplanements received by these facilities makes it difficult for them to collect enough revenue to allow them to comply with full Index A ARFF requirements. This is particularly the case at airports with fewer than 10,000 annual enplanements.

As discussed earlier, the FAA plans to use its exemption authority in instances where compliance with part 139 would be unduly burdensome, costly, or impractical. Additionally, the FAA will use its specific authority to grant limited exemptions from ARFF requirements under 49 U.S.C. 44706 to require safety measures at all airports serving small air carrier aircraft. Any airport operator that petitions for relief from ARFF

requirements must provide certain evidence that such requirements are unreasonably costly, burdensome, or impractical.

Regarding alternative funding sources, Congress recently directed the FAA to set aside a portion of existing AIP funds to assist airport operators in complying with the requirements of this rule (see 49 U.S.C. 47116(e)). Beyond that, the FAA has very limited options for developing new funding mechanisms, and Congress would have to appropriate any additional Federal funds.

*Comment:* Three commenters state that the quantity of water required to be carried for foam production by Index E vehicles under § 139.317(e)(2) was the same as the quantity of water required for Index D vehicles under § 139.317(d)(2). They note the current regulation requires more water for Index E vehicles than Index D and asked if this change was a typographical error.

*FAA Response:* The proposed change to § 139.317(e)(2) was an error. No change was intended, and this paragraph has been corrected. The total quantity of water for foam production still must be 6,000 gallons for Index E vehicles.

*Comment:* A commenter recommends eliminating the "grandfather" provisions for ARFF vehicles and to establish a date certain by which all ARFF vehicles used by certificate holders must meet the requirements of this section.

*FAA Response:* The FAA agrees and had intended to delete paragraph (f) in the proposal. A correction was issued on August 21, 2000 (65 FR 50669).

Proposed paragraph (g)(3) also contains a "grandfather" provision for ARFF vehicles. This paragraph has been deleted to be consistent with the removal of paragraph (f). Consequently, as of the effective date of this rule, most certificate holders are required to use ARFF vehicles that comply with the requirements of this section. Class II, III, and IV airport operators will have additional time to comply.

*Comment:* Four commenters recommend an extension of the deadline, ranging from an additional 1 to 3 years, for Class II, III, and IV airport operators to comply with this section. These commenters all state that airport operators need more time to acquire funding, and several noted that local government budget processes would not allow these airport operators to secure the necessary funds within the proposed 2-year deadline.

*FAA Response:* The FAA agrees that additional compliance time is warranted and has amended paragraph (k) to allow Class II, III, and IV airport operators an additional year to comply. These airport operators now have 3 years from the effective date of this rule to comply with this section or request an exemption under § 139.111. The FAA has determined that 3 years is a reasonable period for most airport operators to apply for and receive Federal funds and acquire local funds. On a case-by-case basis, the FAA may consider granting additional time to those airport operators experiencing budgetary or procurement problems.

*Comment:* A commenter notes that the proposal states that the FAA will consider a time extension for airport operators unable to meet compliance dates proposed in §§ 139.317(l) and 139.319(m) but does not provide criteria by which it would evaluate such requests. This commenter states that, in contrast, proposed § 139.321 establishes criteria that airports must satisfy before the FAA would consider an exemption from some or all of ARFF equipment, extinguishing agent, and operational requirements. The commenter requests that the FAA make "clear in the final rule that it will not grant any extensions of time to the compliance dates, except in extraordinary circumstances that satisfy strict criteria that the FAA sets forth in the final rule."

*FAA Response:* The FAA partly agrees. Statements made in the proposal regarding time extensions for airport operators unable to meet ARFF compliance dates (65 FR 38653 and 65 FR 38654) should have stated that the FAA would consider granting time extensions to those airport operators that petitioned for such relief as required under § 139.111. The FAA will consider granting exemptions based on criteria established in this section.

As discussed earlier, most of the "strict criteria" of proposed § 139.321 that the commenter referenced has been deleted from the rule. All requirements for petitions for relief from ARFF requirements, including compliance deadlines, are now contained in § 139.111.

The FAA may consider granting time extensions for compliance in situations other than extraordinary circumstances. For example, a certificate holder may petition for relief if it cannot comply with certain compliance dates because the ARFF vehicle manufacturer has delayed the delivery of a required vehicle for reasons beyond the control of the airport operator. Because every petition will be different due to varying airport size, operations, and organization, the FAA will consider each request for a time extension on its merits.

*Section as Adopted:* This section is adopted with changes. As noted in the August 21, 2000, correction (65 FR 50669), the deletion of proposed paragraph (f) resulted in the re-designation of § 139.317(g) through (l) as paragraphs (f) through (k).

For the reasons discussed above, the quantity of required water in paragraph (e)(2) has been corrected to read 6,000 gallons, and paragraph (f)(3) has been deleted. Paragraph (k) also has been modified to allow Class II, III, and IV airport operators an additional year to comply with the requirements of this section.

In addition, paragraph (j) has been changed. The phrase "in the 150 series" has been deleted and the word "standards" replaced by the word "methods." As discussed in the proposal (65 FR 38643), similar changes were made throughout the rule to language referencing advisory circulars and should have been made to this paragraph as well.

*Section 139.319 Aircraft Rescue and Firefighting: Operational Requirements*

*Proposal:* This section contained existing standards for the training of ARFF personnel; ARFF vehicle marking, lighting, and readiness; and emergency access roads. This section also established criteria for a certificate holder for adjusting ARFF coverage to correspond to changes in air carrier operations.

Changes were proposed to clarify training requirements for rescue and firefighting personnel and emergency medical personnel, including requirements for training records. In addition, all references to specific series numbers within the AC system were deleted, and changes were made to reflect changes in terminology used to describe fire-extinguishing agents. Several changes also were proposed to require the certificate holder to equip ARFF vehicles with guidance material for responding to hazardous materials/dangerous goods incidents.

It was proposed that all certificate holders be required to comply with this section. A 2-year compliance date was proposed for those airports required to comply with this section for the first time (proposed Class II, III, and IV airports).

*Comment:* Many of the comments received on this section recommend changes to specific standards, including training requirements for ARFF and medical personnel, response times, and vehicle readiness. Some of these commenters also recommend that these standards be reconciled with other

Federal and industry firefighting standards.

*FAA Response:* As discussed previously, the NPRM did not propose any major revisions of ARFF standards and the ARAC has since accepted the task to review part 139 ARFF standards. Comments received that address specific ARFF standards in this section will be forwarded to the ARAC for consideration. Otherwise, these comments will not be addressed as they are beyond the scope of the NPRM.

*Comment:* Two commenters state that cross training of airport personnel could reduce the cost of complying with ARFF requirements. One of these commenters notes that if an airport operator has management and maintenance personnel, the actual number of staff required for ARFF would be low. This commenter reasons that the FAA's willingness to be flexible with airport operators currently required to comply with Index A requirements, particularly with staffing issues, overcomes the argument made by other commenters that ARFF requirements are too onerous. The commenter also states that small airport operators would not be that much more burdened if they must comply with existing requirements for ARFF response capability during air carrier operations for a defined period before and after air carrier aircraft operations. Noting that current airport staff or the local fire department could be used to meet ARFF response requirements, this commenter believes that the annual cost for initial compliance with ARFF equipment and training could be less than $20,000, excluding the staffing costs, and half this amount annually thereafter.

*FAA Response:* The FAA agrees in part. This section does not require an airport operator to use only professional firefighters or limit the duties of personnel used to comply with this section. This section only requires certificate holders to use personnel to perform rescue and firefighting duties that have been trained in the subject areas specified in paragraph (i). Accordingly, the certificate holder could choose to train and use existing employees for ARFF duties, but each airport situation is unique. The FAA cannot make a general conclusion about the burdens imposed on any airport operator without more information.

*Comment:* Several commenters state that if they are required to comply with part 139 ARFF requirements, local laws would require them to hire professional firefighters.

*FAA Response:* The FAA agrees that local laws and ordinances may require the airport operator, in order to comply with part 139 requirements, to go beyond what the FAA requires. If local laws make compliance with part 139 requirements unreasonably costly, burdensome, or impractical, the certificate holder can petition the FAA for relief, as specified under § 139.111. In addition, holders of Class III Airport Operating Certificate may propose under § 139.315(e) an alternative means of compliance with ARFF requirements that may better address local laws and ordinances.

*Comment:* Several commenters note that the FAA and the U.S. Occupational Safety and Health Administration (OSHA) have different standards for the number of personnel required for ARFF. Specifically, commenters questioned the applicability of the "two-in/two-out" policy contained in the Respiratory Protection Standard (29 CFR 1910.134) to aircraft firefighting scenarios. This standard requires that firefighters engaged in fighting interior structural fires work in a buddy system that requires at least two workers in the structure and at least two workers outside in case a rescue of the firefighters is needed. Commenters state that this standard would require them to hire additional personnel.

*FAA Response:* The FAA disagrees. The OSHA Respiratory Protection Standard does not require certificate holders to hire more ARFF personnel than normally would be required to comply with part 139. In a legal memorandum developed jointly by the FAA and the OSHA (dated July 7, 1999) and placed in the docket, it was determined that the respiratory standard is applicable only to personnel fighting a fire within a structure and not an outside aircraft fire. As the primary purpose of ARFF personnel is to suppress the external aircraft fire and establish an escape route for the aircraft crew and passengers, the "two-in/two-out" rule does not apply to ARFF.

*Comment:* A commenter states that neither the FAA nor an airport operator has the authority to require a private company to provide ARFF services without compensation.

*FAA Response:* The commenter misunderstood the provision that allows an airport operator to use non-airport personnel to comply with the part 139, including ARFF requirements. The FAA gives an airport operator the discretion to use personnel other than its own employees to comply with part 139 requirements. Accordingly, an airport operator may decide that the best approach to complying with ARFF requirements is to arrange for such a service through a tenant or a contractor. This approach is not required under part 139, but it is an acceptable means of compliance as long as the tenant or contractor complies with the part 139 requirements. If compensation is required for such services, it is a matter for the airport operator to negotiate with the tenant or contractor.

*Comment:* Three commenters state that the requirement to have on-airport ARFF that must respond within a specified time period will be an unreasonable financial burden on a small town and would adversely affect the air carrier service into such communities. Depending on the location of the aircraft emergency, one commenter notes that off-airport emergency personnel might be in a better position to respond, especially if the incident is located off the airport.

*FAA Response:* The FAA disagrees. The requirement of paragraph (a) specifies that the certificate holder shall provide ARFF services on the airport during air carrier operations. This does not require the airport operator to ensure such services are on the airport at all times. Depending on the frequency of air carrier services, an airport operator may, and many do, arrange for ARFF services with the off-airport fire station. This type of arrangement is acceptable so long as off-airport ARFF services are on the airport 15 minutes prior to and 15 minutes after air carrier operations.

As noted in the proposal at 65 FR 38663, certain airport operators that have arranged for the local fire department to occasionally come to their facilities to cover infrequent large air carrier aircraft operations will have to arrange for additional ARFF coverage for small air carrier aircraft operations. Since small air carrier aircraft operations tend to be more frequent at such airports, ARFF services may be needed more often than the local fire department can provide.

If the certificate holder and the FAA cannot develop a reasonable alternative means of compliance, the certificate holder may ask the FAA to grant an exemption under § 139.111 or in the case of a Class III airport, propose an alternative means of compliance with ARFF requirements under § 139.315(e) that may eliminate the need for off-airport emergency to comply with a timed response.

*Comment:* A commenter states that part 139 airports should be required to have annual ARFF training at one of the regional training facilities funded by the FAA that use propane fire simulators. The commenter does not support airport operators using fossil fuel fires for such training because of the environmental impact and lack of repeatable training

scenarios needed to develop firefighting skills. The commenter also states that the cost of ARFF training for airports with less than 500,000 annual enplanements should be AIP eligible.

*FAA Response:* The FAA disagrees. Regional ARFF training centers are only one option available for complying with the fire training requirements of § 139.319(i)(3). Airport operators may have other alternatives to comply with this requirement that are less costly or more convenient.

Regarding the funding of ARFF training costs, Congress would have to amend the AIP authorizing statute before AIP funds may be used for ARFF training. As of the date of the publication of this final rule, ARFF equipment is AIP-eligible only if such equipment is required under part 139 or if the FAA has determined that it will contribute significantly to the safety or security of persons or property at an airport.

*Comment:* A commenter states that the amount of time to comply with the requirements of this section should be extended to allow airport operators to secure funds, hire personnel, purchase equipment, and build facilities.

*FAA Response:* The FAA agrees additional compliance time is warranted and has amended paragraph (m) to allow Class II, III, and IV airport operators an additional year to comply. These airport operators now have 3 years from the effective date of this rule to comply with this section or request an exemption under § 139.111(b). On a case-by-case basis, the FAA may consider granting additional time to those airport operators that petition under § 139.111(a) for additional time.

*Comment:* A Class III airport operator states that the cost of reconstructing the emergency access road required under § 139.319(k) would be unreasonable. This commenter explains that one section of the existing emergency access road surrounding the airfield is impassable for many months of the year due to washouts and drifted snow. The commenter states the cost of reconstructing the road so it can be maintained and plowed during winter months is estimated at $500,000.

*FAA Response:* The FAA agrees that it is possible the commenter may have to renovate its emergency access road to comply with the requirements of this section. If the FAA determines such renovation is necessary for the purposes of part 139, 90 percent of the cost would be eligible for AIP funds. Should AIP funds not be readily available, or the airport operator does not have matching funds, the certificate holder could ask for an exemption under § 139.111. In addition, the FAA has added language to § 139.315 that allows the holder of a Class III Airport Operating Certificate to comply with ARFF requirements by alternative means that may not require the commenter to maintain an emergency access road (see discussion under § 139.315(e), Aircraft Rescue and Firefighting: Index determination).

*Comment:* A commenter states that proposed training for emergency medical personnel is excessive. This commenter points out that such personnel in its State are only required to receive 40 hours of training every 3 years. The commenter questions the purpose of requiring more training than what is required by the local organization that regulates emergency medical personnel. The commenter requests that the recurrent training requirement be the same as required by the local organization.

*FAA Response:* The FAA agrees. The requirement for annual recurrent training for emergency medical personnel has been deleted from paragraph (i)(4). Language requiring such personnel to be trained and remain current in basic emergency medical services will remain the same. This will ensure emergency medical personnel receive recurrent training but at the same frequency required by the local regulating organization.

*Comment:* A Class I airport operator states that while it supports the continuous training of ARFF personnel, the proposal's statement regarding continuous training will affect how firefighters are trained at other certificated airports. This commenter explains that the current regulation could be interpreted to mean that an airport operator could comply with § 139.319(i) by training ARFF personnel only once a year. However, the proposal states that the FAA would not expect ARFF personnel to comply with training requirements with only a once-a-year training course. The commenter notes that it has a continuous training program for its ARFF personnel, but if continuous training is mandated, other airport operators may need more personnel and equipment.

*FAA Response:* The FAA disagrees. Continuous training is not required under § 139.319(i). The statement in the proposal (65 FR 38653) was intended only to encourage ongoing training. As long as ARFF personnel are trained on the subject areas specified under paragraph (i), the certificate holder has the discretion to provide this training in a manner that best suits its needs.

The FAA disagrees that in all instances continuous ARFF training will require additional personnel and equipment. Many airport operators find this approach provides better training results and is more cost effective. These airport operators use their existing airport personnel, or a combination of airport personnel and those of the local fire department, to conduct training sessions throughout the year. This minimizes travel costs often associated with one-time training courses, and since training sessions are shorter, it reduces the time personnel are unavailable for ARFF duties.

*Comment:* A commenter requests clarification on the relationship between the response requirements of § 139.319(h) and those proposed in § 139.321, ARFF: Exemptions. Referring to prearranged firefighting and basic emergency medical response required as a condition for an exemption under proposed § 139.321, this commenter questions how the FAA will inspect for the response requirements of paragraph (h) if the airport operator was granted an exemption from ARFF requirements under proposed § 139.321.

*FAA Response:* The FAA agrees. The requirements for requesting an ARFF exemption have been moved to § 139.111 and modifications made to the conditions under which the FAA will consider granting an exemption (see section-by-section analysis of § 139.111).

The FAA will not require a certificate holder to comply with a part 139 requirement if the airport operator has been granted an exemption from that requirement. In granting an exemption from ARFF requirements, the FAA requires the certificate holder to provide certain data. The exemption, plus any conditions, would be included in the ACM. During an inspection, the FAA will verify that the circumstances that required the exemption are still applicable and that the certificate holder is complying with any conditions required by the exemption.

*Comment:* A commenter states that many of the small communities that operate Class III airports rely on volunteer firefighters and the proposed requirements would require these communities to recall volunteers, or to supplement regular full-time airport employees, several times a day to cover air carrier flights. The commenter believes this would be "a significant burden with questionable benefit" for such airports. As an alternative, the commenter suggests modifying required ARFF response times for Class III airport operators to allow all required ARFF vehicles at such airports to utilize the secondary response time specified in paragraph (h)(2)(ii) as their primary response time.

*FAA Response:* The FAA disagrees. The ARFF performance times that the commenter refers to require at least one mandatory ARFF vehicle to respond to the midpoint of the farthest air carrier runway within 3 minutes of an alarm and within 4 minutes of an alarm for all other required vehicles. This secondary time is what the commenter suggests should be the standard for all responding ARFF vehicles at Class III airports.

The FAA believes that the requirement for at least one ARFF vehicle to respond within 3 minutes of an alarm will not be burdensome for Class III airport operators. These airports typically have simple pavement configurations that allow ARFF vehicles to reach the midpoint of the farthest runway within the required time from their standby positions. It is from this standby position that ARFF performance times are measured. Instead, Class III airport operators are more likely to have difficulty arranging for ARFF coverage to be available at a standby location 15 minutes before and after all covered air carrier operations.

As discussed previously, an airport operator that is unable to comply with any ARFF requirement, including vehicle readiness or performance times, may petition for an exemption from such requirements under § 139.111.

*Comment:* A commenter states that paragraph (i) that prescribes requirements for ARFF personnel contains vague language. This commenter recommends removing or clarifying this paragraph.

*FAA Response:* The FAA disagrees. The language of paragraph (i) ensures that ARFF personnel are trained in certain subjects and allows some flexibility to address the diversity of airports certificated under part 139. Training ARFF personnel at airports required to comply with Index E ARFF requirements may be more complex than training ARFF personnel at an airport that complies with Index A requirements. In addition. this flexibility allows the airport operator to incorporate training required by the state or local municipality.

However, the FAA will forward the commenter's concerns on ARFF training requirements to the ARAC. As discussed earlier, the ARAC has accepted the task to review part 139 ARFF standards.

*Section as Adopted:* This section is adopted with changes. For reasons discussed above, the requirement for annual recurrent training for emergency medical personnel has been deleted from proposed § 139.319(i)(4), and paragraph (m) has been modified to allow Class II, III, and IV airport operators an additional year to comply with the requirements of this section.

Several additional modifications were made to this section. A new requirement for a vehicle communication method has been added to paragraph (e) that requires personnel to have contact with the common traffic advisory frequency when an air traffic control tower is not in operation or when there is no tower. This change is consistent with other radio communication requirements contained in part 139. Minor changes also were made to paragraphs (e)(1) and (4) for clarity, and the redundant phrase "if it is located on the airport" was deleted from paragraph (e)(2).

Additionally, the reference to proposed § 139.341, Airport condition reporting, in paragraph (g)(3) has been revised to correspond to revisions made to the section numbering throughout subpart D.

Modifications also were made to training requirements contained in paragraph (i). Language has been added to paragraph (i)(2)(i) to clarify that airport familiarization training shall cover airport signs, marking, and lighting. Paragraph (i)(3) was revised to clarify that training involving an actual fire must be completed prior to initial performance of ARFF duties, and paragraph (i)(4) was changed to allow an individual other than the required ARFF personnel to provide basic emergency medical services.

Finally, a new sentence has been added to paragraph (j) noting that the certificate holder may contact the FAA's Regional Airports Division Manager about obtaining a copy of the "North American Emergency Response Guidebook." The FAA anticipates that this guidebook will be available in both hardcopy and electronic form.

*New Section 139.321 Handling and Storing of Hazardous Substances and Materials (Proposed § 139.323)*

*Proposal:* In the proposal, § 139.321, ARFF: Exemptions, contained procedures for requesting an exemption from ARFF requirements. As discussed earlier, proposed § 139.321 has been withdrawn and all requirements for petitions of exemption are now contained in § 139.111. Consequently, all following sections have been redesignated, and comments received on these sections are discussed under the new section numbers.

New § 139.321 (proposed § 139.323) contained existing requirements for certain airport operators to establish and implement procedures for the safe storage and handling of aviation fuel and, when the airport operator is acting as a cargo agent, of hazardous materials regulated under 49 CFR part 171. This section also required the certificate holder to conduct quarterly inspections of certain fueling agents. Generally, the proposal did not change these requirements, and all classes of airports were required to comply.

Several minor changes were proposed. The term "grounded" was deleted from paragraph (b)(1), eliminating the need for fueling agents to connect aircraft to a static wire during fueling operations. Paragraph (b)(6) was modified to delete an implementation date that has already passed. In its place, a new requirement was proposed requiring operators of proposed Class III airports to complete specified training within 1 year.

Existing requirements in paragraph (e) also were modified to include requirements for recurrency training for fueling agent supervisors and employees, and paragraph (h) was deleted to clarify that the requirements of § 139.321 are applicable to air carrier fuel storage areas located on the airport. Subsequently, existing paragraph (i) became new paragraph (h). In addition, the reference to a specific AC series number in existing paragraph (i) (new paragraph (h)) was revised.

*Comment:* A commenter states its support for the deletion of the grounding requirement. This commenter, the National Fire Protection Association (NFPA), notes this change was the result of changes made 10 years ago to NFPA 407, Standard for Aircraft Fuel Serving. The NFPA recommends the FAA require compliance with NFPA consensus standards through periodic rulemakings to avoid similar delays and provide state-of-the-art safety for the traveling public.

*FAA Response:* The FAA partly agrees. The FAA will continue to review the NFPA standards for possible use as national standards under part 139. However, the FAA cannot commit to the adoption of a particular NFPA (or other) standard in advance of that review. Not all local governments use the NFPA standards, and the FAA will continue to review each NFPA standard for suitability for Federal use.

*Comment:* A commenter disagrees with the FAA's characterization of the ARAC working group's majority opinion regarding compliance with this section.

*FAA Response:* The FAA disagrees that it has mischaracterized the ARAC majority opinion. The majority of the ARAC Commuter Airport Certification Working Group recommended that airports serving small air carrier aircraft not be required to comply with this section (see ARAC Commuter Airport Certification Working Group Final

Report, page IV–3). As noted in the proposal (65 FR 38655), the ARAC majority recommended that the FAA only require smaller facilities to meet local fire codes pertaining to storage and handling of hazardous substances and materials.

*Comment:* A commenter recommends deleting requirements for an airport operator to oversee fueling operations, unless the airport operator is the fueling agent. Fueling operations at this commenter's airport are provided by the FBO and the commenter states that the airport staff are not trained in the operation and maintenance of fueling facilities or in aircraft fueling operations. This commenter also notes that the proposal contained no justification for airport operators to inspect fueling operations, and the cost to comply outweighs the benefit.

*FAA Response:* The FAA disagrees. Airport operators certificated under part 139 already comply with the requirements of this section and have not reported it to be burdensome or costly. As discussed in the proposal (65 FR 38655), the requirements of this section are common safety measures and were developed as a result of a cooperative effort between the FAA, airport operators, and FBO's, and have been successfully used for many years by airport operators and aircraft fuelers nationwide.

It is not necessary for airport personnel who conduct inspections of tenant fueling operations to be trained in fueling operations or maintenance. Such personnel need only to be familiar with the airport operator's standards for fuel fire safety. Such standards tend to be common housekeeping practices that airport personnel should already be familiar with as they are required by local fire codes and are often required by liability insurance carriers. For example, such standards could require fuel storage areas to be kept clean of litter, vegetation, and other combustibles and fire extinguishers to be fully charged.

*Comment:* A commenter states that additional training costs will be incurred for FBO personnel if the FBO's existing training does not comply with proposed training requirements.

*FAA Response:* The FAA agrees that a few airport operators may have to reimburse their tenants for training costs. The responsibility for such training costs will depend on the lease agreement between the airport operator and the FBO. Such agreements typically contain provisions that the FBO will ensure its employees are trained.

Most FBOs already use training programs that are approved by the FAA. The FAA has evaluated available fuel safety training courses and publishes a list of approved courses. The FAA periodically evaluates these training courses to ensure they continue to meet certain teaching and testing criteria and, on request, will evaluate new training courses. Currently, 12 fuel safety training courses are acceptable to the FAA, including several courses sponsored by airport operators.

*Comment:* A commenter states that the industry should assist the FAA in developing guidance for recurrent training for fueling personnel to ensure such training does not become an unnecessary burden on fueling operations.

*FAA Response:* As noted in the proposal (65 FR 38655), fuel fire safety standards were developed as a result of a cooperative effort between the FAA, airport operators, and FBOs. If advisory material is needed during the implementation of new training requirements of this section, the FAA anticipates developing such materials in much the same manner.

However, the FAA does not anticipate that compliance with recurrent training requirements will be so complex as to require advisory materials. As required under paragraph (b), recurrent training need only cover the same subject areas as initial training. This would include any changes to fuel fire safety standards and procedures that have occurred since the individual's initial training.

*Comment:* A commenter requests the FAA change the requirement for recurrent training for employees who handle fueling operations to every 24 consecutive calendar months rather the 12-month requirement proposed. This commenter states that there is no justification for a more restrictive requirement than that imposed on the fueling supervisor and would be more consistent with other FAA requirements for private pilots and mechanics.

*FAA Response:* The FAA agrees and has amended paragraph (e)(2) to require recurrent training every 24 months rather than every 12 months.

*Comment:* A commenter recommends that the FAA amend the last sentence of paragraph (e)(1) to include the phrase "or enrolled in an authorized aviation fuel training course that will be completed within 90 days." The commenter states that the proposed supervisor training requirement would not allow for loss of a trained supervisor due to normal attrition. The commenter reasons this modification would allow fueling operations to continue uninterrupted until a new supervisor could be trained.

*FAA Response:* The FAA agrees and has amended paragraph (e) as suggested.

*Comment:* Two commenters state their support of changes made to this section, particularly changes to enhance safety of air carrier fuel storage areas. However, both commenters note that the FAA does not hold air carriers accountable for the safety of their fuel storage areas and recommend that the FAA require air carriers to inspect and maintain these areas.

*FAA Response:* The FAA agrees that air carrier fuel storage areas should be safe. Under this revised section, the FAA holds the airport certificate holder responsible through its relationship with its tenant air carriers, for protecting against fire and explosion in air carrier fuel storage facilities.

Rather than have separate fuel storage requirements for air carriers and airport operators, the FAA has determined that existing part 139 fuel storage safety and inspection standards can be applied at all such storage facilities located at part 139 airports. This approach will ensure that all fuel storage facilities at part 139 airports are inspected in the same manner and held to the same standards.

*Comment:* A commenter recommends that the FAA should consider compliance with local fire codes and NFPA standards by fuel service providers as an alternate method of compliance. This commenter also recommends that the FAA should consider the role of the local fire marshal in performing inspections.

*FAA Response:* The FAA agrees. The FAA already allows for these methods of compliance. Under paragraph (b), the airport operator is required to incorporate the local fire code in its standards for protecting against fuel fires. If local fire codes do not address the subject areas specified in paragraph (b), the airport operator will have to develop additional procedures. The airport operator may develop procedures unique to its facility or adopt industry standards, such as NFPA standards.

In addition, the airport operator has the discretion to use either its own personnel to conduct inspections or an independent organization or person, such as the fire marshal. At some part 139 airports, the local fire department is actively involved in aircraft fuel fire safety and has arranged for ARFF personnel to conduct fuel fire safety inspections and to provide fire safety training for fueling and airport personnel.

*Section as Adopted:* This section has been adopted with changes. As discussed earlier, proposed § 139.321 has been deleted and the proposed

§ 139.323 has been redesignated as § 139.321. In addition, paragraphs (e)(1) and (2) have been modified to allow additional time for training of fueling personnel. Fueling agent supervisors now have 90 days to complete initial training, and fueling personnel need only to complete recurrent training every 24 months rather than every 12 months.

To clarify that the requirements of this section pertain to aircraft fueling operations, the words "lubricants" and "oxygen" have been deleted from paragraph (b). In addition, a requirement for using an independent organization to perform inspections has been moved to § 139.303, Personnel, and a new sentence was added to paragraph (f). This new sentence clarifies how long the certificate holder is required to maintain fueling agents' training records.

*New Section 139.323 Traffic and Wind Direction Indicators (Proposed § 139.325)*

*Proposal:* This section prescribed conditions that require a certificate holder to provide a wind cone, a traffic pattern indicator, and the standards for these devices. While changes were proposed to these standards, a certificate holder was still required to provide traffic and wind indicators (such as windsocks) at specific locations on the airport and for certain night and uncontrolled traffic operations. Operators of all proposed airport classes were required to comply with this proposed section.

References to Class B airspace were deleted and replaced by language requiring all certificate holders to install supplemental wind cones adjacent to runway ends where the primary wind cone is not visible to a pilot on final approach or during takeoff. In addition, standards for segmented circles and supplemental wind cones were revised, as well as standards for traffic indicators at airports without a control tower. Changes also were proposed to clarify that airport operators must comply with the requirements of this section in a manner satisfactory to the FAA and that ACs contain methods of compliance that are acceptable to the Administrator. Finally, the section number was changed to new § 139.325 from proposed § 139.323.

*Comment:* Several commenters support the changes to this section. One of these commenters fully supports the proposal for supplemental wind cones to be installed at runway ends at all certificated airports, rather than just at airports located within Class B airspace.

*FAA Response:* The FAA agrees.

*Comment:* Two commenters note a discrepancy between this section's criteria that determine if a certificate holder must light a wind direction indicator and the requirements of proposed § 139.311, Marking, signs, and lighting, for a lighting system. These commenters state that proposed § 139.311 requires a lighting system for air carriers during times when the airport is open at night while proposed § 139.325, Traffic and wind direction indicators, requires the lighting of wind direction indicators during hours of darkness.

*FAA Response:* The FAA agrees. The term "night" will be used in both sections, as defined in 14 CFR part 1. Section 139.323(a) has been amended to specify that if the airport is open for air carrier operations at night, rather than during hours of darkness, then wind direction indicators must be lighted.

*Section as Adopted:* This section is adopted with changes, and the section number was changed back to § 139.323. For the reason discussed above, the phrase "during hours of darkness" has been replaced by the term "night." In addition, the first sentence of this paragraph has been reordered, and the phrase "available for air carrier use" has been included to clarify that the requirements of this paragraph are applicable only to runways used by air carriers. The term "maintain" also has been added to the first sentence of this section to ensure consistency with the wording of paragraph (c).

Further, paragraph (b) has been modified. The last sentence of this paragraph was proposed in an effort to align part 139 requirements with the existing FAA guidance provided to pilots on visual indicators at airports without control towers. However, this change would have inadvertently required some airport operators to move their primary windsock if it was not located at the end of a runway. This was not intended. To correct this error, the last sentence of paragraph (b) has been deleted and the phrase "around a wind cone" has been added to the first sentence. This addition will ensure the required landing strip and traffic pattern indicator will be located around a wind cone, wherever that wind cone may be located.

A change also has been made to paragraph (c). The term "standards" has been replaced by the term "procedures." This change corresponds to changes made throughout the regulation to adjust language referring to ACs.

*New Section 139.325 Airport Emergency Plan (Proposed § 139.327)*

*Proposal:* This section contained existing standards for the development, implementation, and testing of an airport emergency plan. Requirements for Class I airport operators remained relatively unchanged. New requirements were proposed for Class II, III, and IV airport operators that would be required for the first time to develop and test an airport emergency plan.

Changes were made to update emergency response requirements to include large fuel fires and hazardous materials incidents and to ensure that all response measures accommodate the largest air carrier aircraft serving an airport. In addition, an alternative for an emergency alarm system was proposed, and clarifications were made to requirements pertaining to water rescue situations and coordination with the air traffic control tower.

Testing requirements for Class I airport operators remained the same. New testing requirements were proposed for Class II, III, and IV airport operators that did not require a triennial emergency exercise.

A new requirement was also proposed to allow Class II, III, and IV airport operators 1 year from the effective date of the rule to submit their emergency plans to the FAA for approval. Additionally, the section number was changed to new § 139.325 from proposed § 139.327, and references to advisory circulars were revised.

On July 17, 2001, the FAA published a final rule revising 14 CFR part 107, Airport Security (66 FR 37274). This final rule became effective November 14, 2001. The part 107 final rule contained a minor revision to current § 139.325, Airport emergency plan.

The part 107 final rule added a new paragraph (h) to § 139.325 and the existing paragraph (h) was redesignated as paragraph (i). This revision ensures that emergency response procedures to hijack and sabotage incidents contained in the airport emergency plan are consistent with the approved airport security program required under part 107. Comments on this revision were addressed in the part 107 final rule (66 FR 37308). [**Note:** Part 107 has been transferred to Transportation Security Administration (TSA) regulations under 49 CFR 1500 *et seq.*]

*Comment:* Five commenters support changes made to this section, particularly revisions requiring a response to large fuel fires and hazardous materials incidents.

*FAA Response:* The FAA agrees.

*Comment:* An airport association comments that the flexibility offered in

this section allows smaller airports the opportunity to develop and maintain an airport emergency plan that will be appropriate to the type of air carrier operations served.

*FAA Response:* The FAA agrees.

*Comment:* A commenter states it is reasonable to require Class II, III, and IV airport operators to conduct only annual tabletop reviews of their airport emergency plans. This commenter notes that "many small airports with limited funding appreciate recognition by the FAA and Air Transport Association that the cost of conducting triennial a full-scale exercise can be unduly burdensome."

*FAA Response:* While the FAA agrees with the commenter's statement regarding annual tabletop reviews, it does not agree that triennial full-scale exercises are unduly burdensome for all small airport operators.

*Comment:* Four commenters request that all certificate holders be required to hold triennial full-scale emergency exercises. One of these commenters, the American Association of Airport Executives, states that "an emergency plan exercise every 36-months is a reasonable expectation in the testing of an airport emergency plan." Another commenter suggests that the FAA require Class II, III, and IV airports to conduct full-scale emergency exercises every 5 years and tabletop reviews every 2 years. This commenter states that annual reviews alone cannot satisfy emergency coordination and response.

*FAA Response:* The FAA agrees that triennial full-scale emergency exercises are beneficial, but disagrees that all certificate holders should be required to hold such exercises. The cost of such exercises for smaller airports, and the local community that participate in these exercises, must be considered in evaluating the benefit.

*Comment:* A Class I airport operator recommends that certificate holders should be required to include in their water rescue plans provisions for rescue vehicles that have a combined capacity for handling the maximum number of passengers on the largest aircraft serving the airport.

*FAA Response:* The FAA agrees. Paragraph (a)(3) was proposed to ensure that all emergency procedures, including water rescue, are appropriate to the largest air carrier aircraft the airport operator could be reasonably expected to serve. However, this paragraph will be revised to use ARFF Index as the criteria for determining emergency response capability rather than the largest aircraft that could be served. This change will ensure that emergency planning and response requirements are consistent throughout part 139.

*Comment:* One commenter states support for the ARAC Commuter Airport Certification Working Group recommendation that Class II, III, and IV airport operators include in their annual tabletop review discussions of staging areas and perimeter security that will be used during emergency situations and to conduct an airfield tour.

*FAA Response:* The FAA agrees that staging areas and perimeter security should be discussed during an annual tabletop review. In most instances, airport operators must designate a staging area and arrange for perimeter security in order to comply with the requirements to paragraph (c). Accordingly, these issues are reviewed during both the annual review and, as appropriate, the triennial full-scale emergency exercise.

Similarly, a field tour may be accomplished, although not specifically required, during an annual review. Paragraph (g)(4) requires the certificate holder to review its emergency plan with all involved parties to ensure they know their responsibilities under the plan. A field tour may be one means of compliance used by the certificate holder to ensure that certain parties who would be required in an emergency to drive on the airport or respond to a predesignated staging area understand their responsibilities.

*Comment:* Two commenters, both Class III airport operators, state that it may be difficult to comply with the requirements of this section. One of these commenters explains that the local community has an emergency preparedness plan, but the plan is not airport specific. If the requirements of this section and AC 150/5200–31, Airport Emergency Plan, require more than a modest update, this commenter estimates it would cost $3,000 to $5,000 to rewrite the plan. The other commenter states that without outside help or additional airport staff, the airport emergency plan required under this section and AC 150/5200–31 would be difficult to develop, maintain, and exercise.

*FAA Response:* The FAA partly agrees. Revising a local emergency preparedness plan may take some time, particularly to coordinate mutual aid agreements with local emergency and medical services. Likewise, staff time will be required to annually review the plan. How much time will, of course, vary from airport to airport and will depend on the availability of local emergency services. Such considerations were evaluated in the proposal's cost evaluation (see the Regulatory Evaluation). This evaluation also assumed that all Class II, III, and IV airport operators would have no existing emergency plan from which to develop their own emergency plan.

Building upon an existing emergency preparedness plan will considerably reduce the time it takes to create an airport emergency plan. Further, such a revised plan does not need to conform to AC 150/5200–31. This AC merely provides guidance on the development of an airport emergency plan using Federal Emergency Management Administration's guidelines for emergency preparedness. Neither is mandatory. As long as such a revised community plan meets the requirements of this section, the airport operator may develop its plan in any manner that it chooses.

Additionally, the FAA is not requiring an airport operator to use a consultant to develop its airport emergency plan. If an airport operator decides to develop its own emergency plan, FAA resources are available to simplify this process. The FAA airport certification and safety inspectors are available via telephone or e-mail to provide guidance on the development and testing of an airport emergency plan, and they have samples of approved plans. For many years, these inspectors have assisted Class I airport operators in the development and testing of their emergency plans and have often served as evaluators during triennial full-scale emergency exercises. In addition, many states and local municipalities have emergency coordinators that may be able to assist airport operators develop their plans.

*Section as Adopted:* This section is adopted with changes. As discussed above, § 139.325(a)(3) has been modified. The phrase "that the airport reasonably can be expected to serve" has been changed to "in the Index required under § 139.315." In addition, the time allowed for compliance in paragraph (j) has been extended from 12 months to 24 months. The section number also has been changed to new § 139.325 from proposed § 139.327, and several administrative edits have been made throughout the section.

As discussed earlier, a new paragraph has been added to incorporate an amendment made to part 139 in the final rule revising 14 CFR part 107, Airport Security (66 FR 37274). This new paragraph is designated as paragraph (i) and references in the amendment to paragraph (b) that refer to hijack and sabotage incidents have been updated to reflect the changes made to paragraph (b). Subsequent proposed paragraphs (i) and (j) have been redesignated as new paragraphs (j) and

(k). In addition, references to 14 CFR part 107 have been revised to reflect changes made to FAA security regulations and the creation of the Transportation Security Administration.

*New Section 139.327 Self-inspection Program (Proposed § 139.329)*

*Proposal:* This section contained existing requirements for certificate holders to conduct daily inspections of the movement area to ensure the airport remains in compliance with part 139. Changes were made to how the certificate holder notifies air carriers of field conditions and document inspections. In addition, training requirements for individuals conducting airport inspections were revised, and language was added to permit airport inspections to be conducted by individuals other than employees of the airport operator. The section number also was redesignated from § 139.327 to § 139.329, and language that was no longer applicable was deleted.

All proposed airport classes were required to comply with this revised section. Class I, II, and IV airport operators were required to update existing self-inspection programs, and operators of proposed Class III airports were required to develop and implement a self-inspection program.

*Comment:* Two commenters support training requirements for personnel conducting self-inspections.

*FAA Response:* The FAA agrees.

*Comment:* Two commenters support changes that will allow an airport operator to designate a third party to conduct inspections. One of these commenters notes that neither this section nor proposed § 139.303, Personnel, provides guidance on using a third party.

*FAA Response:* The FAA agrees. Since the certificate holder can use a third party to comply with most part 139 requirements, a new paragraph has been added to § 139.303 that details the requirements a certificate holder must meet in order to use a third party (see section-by-section analysis of § 139.303). This new paragraph contains a requirement, found in existing § 139.321, Handling and storage of hazardous substances and materials, paragraph (d), that specifies that the certificate holder can use an independent organization to conduct inspections of tenant fueling facilities. This paragraph has been moved to § 139.303 and has been modified so that it now applies to any part 139 requirement. Consequently, the term "designee" has been deleted from § 139.327(a).

This new paragraph in § 139.303 still requires that the FAA approve any such arrangement. In addition, the certificate holder is required to ensure that the third party's duties and responsibilities are included in the ACM and that records are maintained to document the third party's compliance with part 139 and the ACM, including training activities.

*Comment:* A commenter states that paragraph (b)(3) detailing training subject areas is too vague and requires clarification. Specifically, the commenter is unclear if this paragraph requires additional training for airport operations staff and recommends additional clarification of recurrent training standards.

*FAA Response:* The FAA agrees that some training required under this section is redundant to training required under § 139.303. This overlap is intentional so that all requirements for conducting self-inspections are contained in one section. Training completed to comply with § 139.303 can be used to meet this section's training requirements.

In addition, the FAA agrees that changes are needed to clarify the frequency of training. Modifications have been made to paragraph (b) to clarify that personnel must receive both initial and recurrent training in the specified subject areas and that recurrent training is required every 12 months.

*Comment:* A commenter notes that the recurrent training required for personnel conducting self-inspections is redundant for duties that its operations staff completes on a daily basis.

*FAA Response:* The FAA disagrees. As discussed in section-by-section analysis of § 139.303, the FAA believes personnel that perform their duties on a daily basis can benefit from recurrent training. Recurrent training helps ensure that all employees continue to perform their duties correctly and safely.

*Comment:* A commenter opposes new requirements for formalized training and recordkeeping, stating that these requirements are unnecessary and burdensome. This commenter states that the regulation already requires the certificate holder to ensure it remains compliant with the part 139 and the ACM. The commenter believes this requirement alone will ensure self-inspections are done correctly. In addition, this commenter believes that annual FAA inspections ensure compliance without the need for burdensome recordkeeping and recurrent training programs.

*FAA Response:* The FAA disagrees with the commenter that new self-inspection training and recordkeeping requirements will be burdensome and unnecessary. The FAA believes most certificate holders already comply with this section and need only document existing training procedures.

Also, similar to § 139.303, training required under this section does not have to be "formalized." Paragraph (b)(3) does not specify how training must be conducted. This is intended to allow the certificate holder some flexibility in complying with training requirements in a manner best suited for local circumstances. As long as training covers the subject areas specified in paragraph (b), it could consist of on-the-job training, formal classroom lectures, an industry training conference, or some combination thereof.

*Section as Adopted:* This section is adopted with changes. The section number has been changed back to § 139.327, and for the reasons discussed above, the term "designee" has been deleted from paragraph (a), and paragraph (b) has been modified to clarify that personnel must receive both initial training and annual recurrent training.

Several other changes were made throughout the section. Paragraph (b)(2) has been edited for clarity. Paragraph (b)(3)(iv) has been revised to reflect changes made to the title of § 139.329, and paragraphs (b)(3)(i) and (vi) have been combined. In addition, language deleted in the proposal was replaced in paragraph (b)(3). This language specifies that only qualified personnel can perform inspections and was unintentionally deleted.

Changes were made to paragraph (c). New language was added that requires the certificate holder to maintain records for 24 months of training required under paragraph (b)(3). While this requirement was not discussed in the proposal, other similar recordkeeping requirements were, and this addition to paragraph (c) mirrors these requirements and is a logical outgrowth of what was proposed. Further, the FAA has determined that records of self-inspections should be retained in the same manner as airport condition reports, as required under § 139.339. Therefore, the time airport operators must maintain self-inspection records has increased from 6 months to 12 months. Although not proposed, this change will ensure the recordkeeping requirements in the two sections are consistent.

In addition, the text "make available for inspection by the Administrator on request" has been deleted from paragraph (c). This requirement is redundant to the new recordkeeping

requirements of § 139.301 that specify the certificate holder shall furnish, upon request by the FAA, all records required to be maintained under this part.

*New Section 139.329 Pedestrians and Ground Vehicles (Proposed § 139.331)*

*Proposal:* This section contained requirements for the certificate holder to limit access to movement areas to those ground vehicles necessary for airport operations. This section also required the certificate holder to ensure that employees, tenants, or contractors who operate ground vehicles in the movement area are familiar with established ground vehicle operating procedures.

The requirements of this section remained relatively the same. Only minor modifications were proposed to clarify that the requirements of this section are implemented in a manner satisfactory to the FAA. All certificated airports serving scheduled air carrier operations (proposed Class I, II, and III airports) were required to comply with this section. The section number was changed from § 139.329 to proposed § 139.331.

*Comment:* A commenter supports the implementation of this section at smaller airports with the FAA's acknowledgement that existing § 139.329, Ground vehicles, paragraph (c) is only applicable at airports where an air traffic control tower is operational.

*FAA Response:* The FAA agrees that existing § 139.329(c) is applicable only at airports where an air traffic control tower is operational. This criteria is stated in the first sentence of paragraph (c) and did not change in the proposal.

However, the commenter's statement seems to imply that there is confusion regarding the requirements for two-way radio communications at airports without control towers or during times when the control tower in not operational. To clarify that in either instance prearranged signs or signals can be used in lieu of two-way radio communications, the first sentence of paragraph (d) has been modified to include the phrase "or there is no air traffic control." The phrase "two-way radio communications" also has been added to this paragraph to clarify that operators of such airports have the choice of using either two-way radios or prearranged signs or signals.

*Comment:* A commenter recommends revising paragraph (e) to require ground vehicle training that includes runway incursion prevention awareness. This commenter states that safe airside vehicle operations play a significant role in decreasing the hazards of runway incursions.

*FAA Response:* The FAA agrees. Data collected by the FAA on runway incursions show that ground vehicles and pedestrians in movement and safety areas continue to be a cause of both runway incursions and surface incidents. To heighten awareness of this important safety matter, the FAA supports the commenter's recommendation and has modified paragraphs (e) and (f) to specify training, rather than just familiarization, on procedures for the safe and orderly access to and operation in the movement area and to require records of such training. Additionally, this section has been expanded to included safety areas and pedestrian activity to ensure a comprehensive approach to preventing runway incursions and surface incidents.

*Section as Adopted:* This section is adopted with changes. The section number has been changed back to § 139.329, and for the reasons discussed above, paragraph (e) has been modified to specify training on procedures for the safe and orderly access to and operation in movement areas and safety areas. Correspondingly, paragraph (f) has been changed to require records of such training and that these records be maintained for 24 months.

As discussed previously, the words "pedestrian" and "safety area" have been added throughout the section and to the section title. This change now requires the certificate holder to establish and implement procedures for access to, and operation on, movement areas and safety areas by both pedestrians and ground vehicles.

To clarify requirements for vehicle and pedestrian control at airports without control towers, paragraph (d) also has been modified to include the phrase "or there is no air traffic control" and "two-way radio communications."

*New Section 139.331 Obstructions (Proposed § 139.333)*

*Proposal:* This section contained requirements for the lighting, marking, or removal of obstructions. Except for a change to the section number, the requirements of this section remained substantially the same. Certificate holders were still required to ensure that each object within its area of authority that penetrates imaginary surfaces, as provided in part 77, Objects Affecting Navigable Airspace, is removed, marked, or lighted.

Changes were proposed to clarify that the requirements of this section must be implemented in a manner satisfactory to the FAA and that ACs contain some methods of compliance that are acceptable to the Administrator. All certificated airports serving scheduled air carrier operations (proposed Class I, II, and III airports) were required to comply with this revised section. Also, a change to the section number, from § 139.331 to § 139.333, was proposed.

*Comment:* No comments were received on this section.

*Section as Adopted:* The section number has been changed to new § 139.331 from proposed § 139.333. In addition, references to the terms "imaginary surfaces" and "part 77" have been replaced by the phrase "determined by the FAA to be an obstruction." As noted in the proposal (65 FR 38650), references to 14 CFR part 77 should have been deleted throughout part 139 as part 77 is being revised and may be reorganized. Accordingly, references to part 77 in this section have been replaced with a general statement that the FAA will determine if an object is an obstruction. Also, the first and second sentence of this section have been combined for clarity.

*New Section 139.333 Protection of NAVAIDS (Proposed § 139.335)*

*Proposal:* This section contained standards for the protection of navigational aids (NAVAIDS). Except for a change to the section number, the requirements of this section remained substantially the same and required the certificate holder to protect against the derogation of electronic or visual navigational equipment and air traffic control facilities located on the airport. This included protection against vandalism, theft, and construction that may cause interference.

Changes were proposed to clarify that the requirements of this section must be implemented in a manner satisfactory to the FAA and that ACs contain some methods of compliance that are acceptable to the Administrator. All certificated airports serving scheduled air carrier operations (proposed Class I, II, and III airports) were required to comply with this revised section.

In addition, a change to the section number, from § 139.333 to § 139.335, was proposed.

*Comment:* No comments were received on this section.

*Section as Adopted:* The section number has been changed to new § 139.333 from § 139.335. Otherwise, the section is adopted as proposed.

*New Section 139.335 Public Protection (Proposed § 139.337)*

*Proposal:* This section contained existing requirements for a certificate holder to prevent the inadvertent entry

of persons or vehicles to the movement area and to provide reasonable protection of persons and property from aircraft blast. All certificated airports serving *scheduled* air carrier operations (Class I, II, and III airports) were required to comply with this section.

*Comment:* A commenter requests additional time for Class III airports to comply with this section. The commenter recommends that these airports be allowed 3 years after the effective date of the rule to comply because the cost of implementing this section will be high in small rural communities. No operational or financial data is provided to substantiate this claim.

*FAA Response:* The FAA disagrees. The requirements of the section are intended to prevent the *inadvertent* access by the public, which can be done quickly and for a relatively small cost. The FAA is unaware of any current certificate holders experiencing problems meeting this requirement, and the commenter did not provide any operational or cost data to suggest otherwise.

Elaborate fencing, automated access control points, closed-circuit cameras, guards, etc. are not required to comply with this section. Existing measures, used by airport operators for theft and liability purposes, to keep the public out of movement areas will usually suffice. For example, if a public road dead-ends at the airport, the certificate holder could use a sign and wood barricade to alert the public not to enter.

In addition, some airport operators that have accepted Federal funds may have obligations under their grant assurances to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. Grant assurances require "an owner of an airport developed with Federal assistance to provide adequate controls such as fencing and other facilities to keep motorist, cyclists, pedestrians, and animals from inadvertently wandering onto the landing area or areas designated for aircraft for aircraft maneuvering."

*Comment:* Several commenters disagree with the FAA's statement that there will be minimal or no incremental compliance cost for this section. One of these commenters states that it would cost $150,000 to comply with this section. This would include the cost to develop personnel identification media, provide personnel with security training, and install passenger-screening equipment in the terminal building.

Another commenter states that security is expensive and that fences, access gates, background checks, and law enforcement personnel all combine to increase cost. This commenter provides two pages of justification why the FAA should not require certificate holders, particularly at Class III airports, to comply with the requirements of 14 CFR part 107, Airport Security.

*FAA Response:* This section does not require the certificate holder to comply with part 107 nor does it require the certificate holder to use any physical or personnel security measures to protect against criminal and terrorist acts.

As noted above, this section only requires the certificate holder to have appropriated safeguards against inadvertent entry to movement areas by unauthorized persons or vehicles. These safeguards may consist of a combination of natural barriers, fencing, and warning signs, which suffice to deter personnel or vehicles from accidentally entering the movement area.

The reference to part 107 (new 49 CFR part 1542, Airport Security) in paragraph (b) may have caused confusion. This reference merely alerts the certificate holder that any fencing used to comply with part 107 will automatically meet the requirements of this section. This is because any fencing used to comply with part 107 far exceeds the public protection requirements of part 139.

*Comment:* One commenter requests the FAA examine the impact of this section on smaller airports. This commenter, the American Association of Airport Executives, states that the fencing requirement alone could be very expensive and one of its airport members claims it would have to install 18 linear miles of fence to comply with this section.

*FAA Response:* The FAA disagrees. It is difficult to respond to this comment, as the FAA is not familiar with the referenced airport operator's situation. However, based on experience with current certificate holders, the FAA does not agree that an airport operator would need to purchase new fencing to encompass the entire airport property in order to comply with this section. Most likely the airport operator's existing fencing or safeguards to keep the public out of movement areas will be acceptable.

Again, the reference to fencing meeting access control requirements of part 107 in paragraph (b) may have caused confusion. As noted above, paragraph (b) does not require fencing, but merely alerts the certificate holder that any fencing used to comply with part 107 will automatically meet the requirements of this section.

*Section as Adopted:* The section is adopted with minor editorial changes. The section number has been changed back to § 139.335, and paragraph (b) has been edited for clarity. In addition, references to 14 CFR part 107 have been revised to reflect changes made to FAA security regulations and the creation of the Transportation Security Administration.

*New Section 139.337 Wildlife Hazard Management (Proposed § 139.339)*

*Proposal:* This section contained existing requirements for the certificate holder to respond to wildlife hazards, including criteria for when a certificate holder is required to develop and implement a wildlife hazard management plan. The proposal made several changes to these requirements and clarified what is expected of the certificate holder when developing a wildlife hazard management plan. All operators of certificated airports serving scheduled air carrier operations were required to comply with this section.

Existing § 139.337 was redesignated as proposed § 139.339. Existing paragraph (f) was moved to the beginning of this section and became new paragraph (a). This paragraph required that an airport operator take immediate action to alleviate wildlife hazards. All other paragraph designations were changed accordingly.

Several changes were made to wildlife hazard assessment requirements. A new requirement was proposed specifying that a wildlife hazard assessment must be conducted by a wildlife damage management biologist who meets certain education and experience qualifications. Another new requirement was proposed mandating that any recommended actions for reducing the wildlife hazard made by the wildlife damage management biologist be included in the assessment. In addition, the existing requirement that an assessment include an analysis of the events prompting the assessment was modified to include an analysis of any circumstances that may have prompted the assessment as well.

Several modifications were made to the requirement to submit a wildlife hazard assessment for FAA approval. These changes included a new requirement for the FAA to take into consideration any actions recommended by the wildlife hazard assessment in determining the need for a certificate holder to have a wildlife hazard management plan. In addition, changes were made to requirements for the wildlife hazard management plan. A new requirement was added that directs the certificate holder to annually review the plan. Also, existing language from Subpart C, Airport Certification Manual,

was added to require that an approved wildlife hazard management plan be included in the airport operator's ACM.

Finally, specific references to AC series numbers were deleted, and several terms used throughout the section were revised, including the term "ecological study." A new paragraph was added to allow proposed Class II and III airports to implement less than full wildlife mitigation procedures if air carrier operations at these airports are so few or infrequent that any large expenditure would be unduly burdensome or costly.

*Comment:* Three commenters support the changes to this section. One of these commenters believes that such changes will reduce wildlife aircraft strikes at FAA-regulated airports.

*FAA Response:* The FAA agrees.

*Comment:* A commenter notes that the proposal did not mention the ARAC Commuter Airport Certification Working Group's majority view on wildlife hazard management. This commenter requests that the FAA review and consider these recommendations before issuing a final rule.

*FAA Response:* The FAA agrees that the proposal did not discuss the ARAC Commuter Airport Certification Working Group's majority view on wildlife hazard management. This omission was not intentional, and the FAA did consider both the working group's majority and minority views on this issue.

The working group's majority opinion stated that existing part 139 wildlife hazard management requirements would be economically burdensome for airports serving smaller air carrier operations. It recommended that such airport operators be required only to take immediate measures to alleviate wildlife hazards whenever detected and not be required to conduct an assessment and develop a wildlife hazard management plan.

The working group's majority stated the opinion that many airports serving small air carrier operations do not have complete perimeter fences or other measures to deter wildlife access to the movement area. Its opinion was that such airport operators do not have the financial resources to hire a consultant to study a potential wildlife hazard, and it would be too costly to require these airport operators to establish priorities for habitat modification. However, the ARAC majority did state that it is essential for the airport operator to have a plan to remove a wildlife hazard when detected.

In contrast, the working group's minority recommended that airports serving small air carrier aircraft comply with all requirements of this section. This minority position, submitted by the Air Line Pilots Association (ALPA), stated that airport personnel "often do not have the expertise to develop effective measures for mitigating wildlife hazards." ALPA noted that wildlife hazards to aviation are a difficult and growing issue that should be taken seriously by all small airport operators and by requiring small airport operators to comply with this section it would "help ensure that professional wildlife management techniques are utilized to control wildlife problems at affected airports."

The FAA partly agrees with the working group's minority position and determined that all airports serving scheduled operations (Class I, II, and III airports) will comply with revised wildlife hazard management requirements. At airports that only serve unscheduled air carrier operations (Class IV airports), the FAA believes that compliance with wildlife mitigation requirements would be unduly burdensome since these airports serve covered air carrier operations on an infrequent basis. Changes to paragraph (d)(3) also allow the FAA to consider frequency and size of air carrier aircraft served in determining the need for Class I, II, and III airport operators to comply with certain wildlife hazard management requirements.

*Comment:* A commenter supports the proposed change to replace the term "ecological study" in paragraph (b) with the term "wildlife hazard assessment."

*FAA Response:* The FAA agrees.

*Comment:* Two commenters recommend modifying the events described in paragraph (b) that trigger the requirement for a wildlife hazard assessment. These commenters suggest that the term "damaging bird strike" be added to paragraph (b)(1). One of these commenters notes that the current language of paragraph (b)(1) does not require a wildlife hazard assessment if an aircraft experiences a single bird strike. This commenter states that a single bird strike should trigger an assessment because a single bird strike can be just as hazardous as some of the minor aircraft strikes involving mammals.

*FAA Response:* The FAA agrees that language in paragraph (b) is unclear regarding aircraft strikes by a single bird or engine ingestion of wildlife other than birds. To clarify, proposed paragraph (b)(1) has been broken into two subparagraphs in the final rule that specify that a wildlife hazard assessment is required if an air carrier aircraft experiences either multiple bird strikes or an engine ingestion of wildlife.

To clarify what is required of the certificate holder if an air carrier aircraft experiences a strike by a single bird, paragraph (b)(2) also has been modified. In the proposal, this paragraph required the certificate holder to conduct a wildlife hazard assessment if an air carrier aircraft experiences a "damaging collision" with wildlife other than birds. This has been modified to require an assessment if an air carrier aircraft experiences substantial damage from striking any wildlife, and the term "substantial damage" has been defined. Consequently, the need for an assessment is now based on the type of damage sustained from a wildlife strike, rather than the type or numbers of wildlife strikes.

This change also mirrors how wildlife strikes are reported on FAA Form 5200–7, Bird/Other Wildlife Strike Report. This form is used by pilots and air traffic controllers to report wildlife strikes to the FAA. The information from Form 5200–7 is compiled into a national database to assist the FAA and other safety and wildlife organizations in learning more about the wildlife/aircraft strike problem. The database helps provide information about wildlife strike risk factors and possible risk reduction measures and to evaluate the effectiveness of these measures. The FAA and the U.S. Department of Agriculture (USDA) annually analyze this data and publish a report of their findings. This report, the national wildlife strike database, and FAA Form 5200–7 are available at the FAA's Internet site at *http://wildlife-mitigation.tc.faa.gov* or by calling (202) 267–3389.

*Comment:* A commenter recommends that proposed paragraph (f) be revised to require the certificate holder to include in its wildlife hazard management plan procedures for maintaining records of all reported wildlife strikes and all wildlife carcasses found within 200 feet of a runway. The commenter also suggests that the certificate holder use this information to periodically evaluate its wildlife hazard management plan and revise it if needed. The commenter notes that the maintenance of a local wildlife strike database is an essential part of the wildlife hazard management plan of any airport and that NTSB recommends that bird strike reporting be mandatory.

*FAA Response:* The FAA disagrees with the recommendation to require airport operators to document all wildlife strikes. Airport operators already are required to document wildlife hazards and strikes under self-

inspection requirements and to take appropriate action. Further, an airport operator may not know of all wildlife strike reports as such reports are typically made by pilots and air traffic controllers and sent directly to the FAA.

However, the FAA agrees in part that airport operators should use wildlife strike reports to periodically evaluate and revise their wildlife hazard management plan. Airport operators can access wildlife strike reports submitted to the FAA by calling the FAA at (202) 267–3389. Similarly, the FAA inspectors will use both the FAA wildlife strike database and an airport's self-inspection log to determine the need for a wildlife hazard assessment or to assess the effectiveness of an existing wildlife hazard management plan.

*Comment:* Several commenters express concerns over the potential cost for small airport operators to conduct a wildlife hazard assessment. These commenters state that the cost to conduct an assessment at a small airport could mean a significant long-term cost and an increase in personnel. One of these commenters remarks that the expense of a wildlife hazard assessment is not warranted unless there has been a strike or aircraft damage, as outlined in existing § 139.337. Another commenter, a Class III airport operator, states that it has received an estimate from an environmental contractor to conduct an assessment. Assuming no significant wildlife hazard, this contractor estimates the cost of an assessment at $8,000.

*FAA Response:* The FAA agrees that a wildlife hazard assessment is only required under the conditions specified in paragraph (b).

In addition, the FAA agrees that an assessment could mean a long-term cost for an airport operator. The cost for an assessment will vary depending on the wildlife concerns at each airport. Typically, a survey of the airport and its surroundings should reveal that the cause of the wildlife hazard may be relatively simple to fix, such as exposed rafters in an aircraft hangar or a poorly maintained perimeter fence. There may be airports where an assessment could take longer, particularly if a wildlife census is needed or migratory patterns must be monitored.

Based on the wildlife aircraft strike data received from FAA Form 5200–7, the FAA has determined that 40 percent of those airports required to comply with this section for the first time (Class II and Class III airports) will be required to conduct a wildlife hazard assessment. Biologists at the FAA and the USDA Wildlife Services estimate that half of these airports could readily complete a wildlife assessment within a few days for a nominal cost.

The services of the FAA, the USDA, and local sources are readily available, often free of charge, to airport operators initially seeking to mitigate wildlife issues. Wildlife biologists at both the FAA and the USDA offer free telephone consultations, guidance material and literature, on-site preliminary evaluations and suggested remedies. These experts work jointly to track airport wildlife problems and resolutions and serve as a clearing-house for such information. Further, they can direct airport operators to local help, including game wardens, animal control personnel, extension agencies, and college/university resources, as well as provide information on airport operators that have pooled their resources and share a wildlife biologist.

Most of the remaining airport operators required to conduct an assessment may need a few additional days to complete their wildlife assessments. These airports have more complex wildlife issues, and the FAA and the USDA estimate that in all but a few cases, assessments at these airports could be completed in 5 to 7 days. In such instances, the FAA and the USDA would probably require the airport operator to reimburse the cost of a biologist's wages, plus travel and expenses. If a consulting firm is used, the FAA estimates that the average cost for a consultant to conduct an assessment at such airports is approximately $3,500 (based on the average cost of $105 per staff hour).

In a few instances, an assessment would take longer than a week due to the magnitude or complexity of the wildlife problem. For example, a study of migratory birds may require a yearlong study. The average cost for a 1-year study involving monthly surveys is $50,000 and a 1-year study requiring quarterly surveys costs approximately $25,000. These fees usually include the cost to conduct a wildlife census, evaluate habitat, develop a wildlife hazard management plan, and train staff in wildlife control techniques.

While a wildlife hazard management plan may be eligible for AIP funding if it results in capital improvements to the airport, some airport operators may not be able to comply with this section if a complex assessment is required. In such cases, airport operators may petition for an exemption under § 139.111.

*Comment:* A commenter requests that Class III airports be allowed additional time to comply with this section. Specifically, the commenter requests that these airports be allowed 12 months to prepare a wildlife hazard assessment and an additional 6 months to prepare a wildlife hazard management plan.

*FAA Response:* The FAA disagrees. No compliance dates were proposed in this section because not all certificated airports have experienced the triggering events that require an assessment, and for those required to conduct an assessment, there are many variables involved.

At airports where a triggering event has occurred, the time to conduct an assessment will vary for each airport operator. The length of time needed to complete a wildlife hazard assessment will depend on the complexity of the wildlife hazard and the circumstances that triggered the assessment. An assessment also may reveal that a wildlife hazard management plan is not needed. Similarly, the time to complete a wildlife hazard management plan will be different for each airport operator.

If the FAA determines there is a need for a wildlife hazard assessment or management plan, it will consult with the airport operator to determine a reasonable completion date.

*Comment:* A commenter notes that there are several typographical errors in paragraphs (c), (d), and (f).

*FAA Response:* The FAA agrees. These errors have been corrected.

*Comment:* A commenter questions whether the phrase "near the airport" in paragraph (b) should be more narrowly defined.

*FAA Response:* The term "near the airport" is not defined in paragraph (b). The conditions attracting wildlife to an airport are so varied that it is difficult to assign a specified distance from the airport within which the presence of a wildlife hazard would require an airport operator to conduct an assessment. The only defined distances are those specified by statute for the siting of landfills near certain public airports. In addition, other recommended distances for wildlife attractants are contained in AC 150/5200–33, Hazardous Wildlife Attractants On or Near Airports.

As is currently the case, the FAA will work with each airport operator to determine if a wildlife hazard is close enough to aircraft traffic patterns and the airport to trigger a wildlife hazard assessment.

*Comment:* Four commenters express concerns over the proposed requirement to use a qualified wildlife damage management biologist. Some of these commenters state that the required use of such a biologist would be cost prohibitive because it would require many airport operators to hire additional personnel or overburden USDA with requests for a qualified biologist. Another commenter suggests

that this section be modified to allow an airport operator to conduct an assessment according to a methodology prepared by a wildlife damage management biologist. The commenter argues that this approach would permit airport operators in the same geographic area to reduce costs by jointly contracting for the services of a qualified biologist.

*FAA Response:* The FAA agrees in part. The language of paragraph (c) has been modified so that the qualifications for a wildlife damage management biologist are not as restrictive. While the wildlife hazard assessment still must be conducted by a wildlife damage management biologist, the requirement for this individual to have a Bachelor of Science degree has been deleted. The required biologist need only have professional training or experience in wildlife hazards at airports. This change will give airport operators greater flexibility in selecting a qualified biologist.

The FAA disagrees with the recommendation that an airport operator be allowed to conduct its assessment under the guidance of a qualified biologist. As discussed in the proposal (65 FR 38659), the FAA has determined that the potential for loss of life and equipment resulting from wildlife aircraft strikes requires persons who conduct wildlife hazard assessments to have the education, training, and experience in conducting such assessments. However, this section does not prohibit airport operators from pooling resources and jointly contracting for the services of a qualified biologist. In addition, airport personnel can be used to assist the qualified biologist in conducting the assessment.

Regarding commenters' concerns that USDA will not be able to comply with additional requests for a qualified biologist to conduct assessments, the FAA disagrees that the USDA will be overburdened to a point that it will not be able to provide such services. The FAA works closely with USDA to ensure biologists are available for part 139 wildlife hazard assessments and has coordinated this rulemaking with them. The FAA does not anticipate that its biologist, or USDA's biologists, will be overburdened due to the additional airport operators needing to conduct an assessment because of changes to part 139.

*Comment:* A commenter disagrees with proposed new paragraph (c)(5) that would require an airport operator to include in its wildlife hazard assessment recommendations made by a qualified biologist for reducing wildlife hazard. This commenter believes a biologist would be unfamiliar with airport operations and may make recommendations that would "not be feasible and therefore not necessary to include in the assessment."

*FAA Response:* The FAA disagrees. The specialized training and experience that is required of a qualified biologist under part 139 should result in wildlife hazard management recommendations that consider airport operations. Further, the FAA's review and approval of the assessment will determine the feasibility of such recommendations and ensure that they are appropriate for the type of air carrier operations served.

*Comment:* One commenter recommends that paragraph (f)(7) be changed to allow airport personnel to be trained by an individual other than the biologist required under paragraph (c). This commenter suggests that initial training of airport personnel be conducted by the required biologist using a "train-the-trainer" approach. The commenter believes this will allow airport personnel to conduct any subsequent training.

*FAA Response:* The FAA agrees. Paragraph (f)(7) does not prohibit the "train-the-trainer" approach so long as the required biologist conducts the initial training.

*Comment:* A commenter recommends that paragraph (c) be revised to include provisions to assist airport operators in contacting and working with USDA. This commenter noted that USDA's expertise and resources in assessing, monitoring, and mitigating wildlife hazards at airports is extensive and "constitutes the foundation upon which the FAA bases its expertise in the subject area." This commenter also suggests that the FAA "recognize the expertise and consider the resources of state wildlife agencies in meeting" the requirements of this section. The commenter believes this change would provide airport operators a cost-cutting alternative to hiring the services of a qualified wildlife damage management biologist.

*FAA Response:* The FAA disagrees that paragraph (c) should include information on using Federal or State wildlife services. The availability of State and local agencies varies from State to State, and information on these agencies would require frequent updates to keep it current. Therefore, it would be impractical to place this information in the regulation. As noted above, airport operators can contact the FAA for this information.

*Comment:* A commenter notes that there is no definition included in this section that accurately describes what "qualified" means when used in connection with the term "wildlife damage management biologist."

*FAA Response:* A qualified wildlife damage management biologist is a biologist that has qualifications specified under § 139.337(c), as adopted.

*Comment:* A commenter questions the deletion of the term "observed" from paragraph (b)(3). The commenter states that the change from "is observed to have access to any airport flight pattern or aircraft movement area" to "has access to any airport flight pattern or aircraft movement area" would require all airport operators to conduct a wildlife hazard assessment, rather than just those airport operators that observe wildlife of a size or in numbers capable of causing an aircraft strike or engine ingestion.

*FAA Response:* The FAA agrees the term "observed" should be replaced in paragraph (b)(3). The original text of paragraph (b)(3) has been restored.

*Comment:* A commenter states that paragraph (b)(3) "appears to be a catchall justification subject to the interpretation of an inspector not qualified in wildlife assessment." This commenter recommends a "low-cost, initial overview validation" conducted by a qualified individual to determine if a hazard exists and the need for an assessment.

*FAA Response:* As discussed above, the restoration of the original text of paragraph (b)(3) narrows its scope. However, the FAA does not agree with the recommended alternative to a wildlife hazard assessment. As previously noted, many wildlife hazard assessments are the low-cost initial overview recommended by the commenter. Further, FAA airport certification safety inspectors are qualified to determine if an assessment is needed. The FAA trains these inspectors to determine if a potential wildlife hazard exists. The FAA's wildlife biologist also consults regularly with these inspectors, as well as with airport operators.

*Comment:* A commenter recommends that paragraph (h) include the following sentence: "Certificate holders are encouraged to discuss potential use of new or innovative wildlife hazard management methods with the Administrator, and to share results of experimental methods, in the interest of increasing public safety and wildlife hazard management efficiency."

*FAA Response:* The FAA disagrees. Such discussion of new or innovative wildlife hazard management methods already occurs when the FAA reviews wildlife hazard assessments or wildlife

hazard management plans. Additionally, the FAA's staff wildlife biologist participates with other professional wildlife managers in developing and revising wildlife hazard management standards and finding resolutions to aviation wildlife problems. This ongoing effort is discussed on the FAA Internet site at *http://wildlife-mitigation.tc.faa.gov*.

*Comment:* Two commenters express concerns over proposed paragraph (f)(6), which would require an airport operator to annually review its wildlife hazard management plan. One commenter states that the annual review is excessive, especially since it could take more than a year to develop. The other commenter requests clarification on whether an airport operator is allowed to conduct its own annual review rather than the qualified biologist.

*FAA Response:* Paragraph (f)(6) requires that the wildlife hazard management plan include procedures for an annual review of the plan. These procedures will not become effective until the plan is completed and approved by the FAA. Accordingly, an annual review will not be necessary until 1 year after the FAA has approved the plan.

The annual review of the wildlife hazard management plan must be conducted in the manner specified in the plan and as approved by the FAA. Approved procedures to conduct this review will depend on the complexity of the wildlife hazard and mitigation measures. In most instances, the FAA would permit the airport operator to conduct its own review. However, a qualified biologist may be required to review and evaluate certain aspects of the wildlife hazard assessment.

*Section as Adopted:* This section is adopted with changes. For the reasons discussed above, the events triggering a wildlife hazard assessment in § 139.337(b) have been revised. Editorial changes have been made to paragraph (c), and some of the requirements for a wildlife damage management biologist have been deleted. Similarly, editorial changes have been made to paragraphs (d), (e), and (f).

In addition, paragraph (g) has been deleted and the stipulation that the FAA will consider the frequency and size of air carrier aircraft in determining the need for a wildlife hazard plan has been added to paragraph (d)(3) and now applies to all airport classes. Subsequently, paragraph (h) has been redesignated as paragraph (g). Finally, the section number has been changed to new § 139.337 from proposed § 139.339.

*New Section 139.339 Airport Condition Reporting (Proposed § 139.341)*

*Proposal:* This section contained existing requirements for reporting changed airfield conditions to air carriers. Except for a change to the section number, the requirements of this section remained substantially the same. Certificate holders were still required to collect and disseminate information on the conditions of the airport, including any construction or maintenance activities, weather or animal hazards, and nonfunctional equipment and services. All certificated airports were required to comply with this section.

While reporting requirements remained the same, a minor change was made to clarify that a certificate holder can use notification systems other than the FAA's pilot notification system, the Notices to Airmen (NOTAM) System. Also, the term "safety area" was added to paragraph (c)(2) to ensure that airport users are notified of irregularities in the safety area, in addition to those in the movement area, loading ramps, and parking areas.

References to other section numbers and the term "Airport Certification Specifications" were changed to reflect proposed certification changes. Minor clarifications were proposed to clarify that the requirements of this section must be met in a manner satisfactory to the FAA and that the ACs contain some methods of compliance that are acceptable to the Administrator. In addition, the section number was changed to proposed § 139.341 from § 139.339.

*Comment:* A commenter, a Class I airport operator, states that it supports the changes to this section.

*FAA Response:* The FAA agrees.

*Comment:* A commenter states that the wording of proposed § 139.341(c)(6) could be interpreted to mean that the certificate holder must issue a NOTAM for each individual runway and taxiway sign that is found inoperative. The commenter notes that this is unrealistic and would place a burden on the NOTAM System and air traffic control personnel.

*FAA Response:* The FAA agrees that the language of paragraph (c)(6) is unclear. It could be interpreted to mean the certificate holder must report either the malfunction of any sign required under § 139.311 or the malfunction of the entire sign system.

The reporting of the malfunction of any required sign would quickly overwhelm the notification system. The vast majority of signs required under § 139.311 are location and direction signs. These signs are periodically inoperative, mainly due to burned out lights. Because of their large number, particularly at Class I airports, a certificate holder frequently finds these signs inoperative during daily self-inspections and is required under § 139.311 to repair them promptly.

However, reporting a malfunctioning mandatory instruction sign to air carriers is another matter. These signs, holding position signs and ILS critical area signs, convey critical safety information, including where an aircraft should stop before entering an active runway and areas where an aircraft could block the transmission of navigational information to other aircraft. Accordingly, paragraph (c)(6) has been revised to require certificate holders to report to air carrier tenants the malfunction of holding position signs or ILS critical area signs. This change will ensure that air carriers are informed of either an individual or a systemic failure of these signs.

*Section as Adopted:* This section is adopted with changes. For the reasons discussed above, proposed § 139.341(c)(6) (new § 139.339(c)(6)) has been revised to limit the type of signs that a certificate holder must report if found malfunctioning. The word "sign" has been replaced by the terms "holding position signs" and "ILS critical area signs." The section number also has been changed to new § 139.339 from proposed § 139.341, and the reference to proposed § 139.321, ARFF: Exemptions, in paragraph (c)(8) has been deleted.

In addition, a new paragraph (d) has been added requiring certificate holders to maintain a record, for at least 12 consecutive months, of each airport condition report. While this requirement was not discussed in the proposal, other similar recordkeeping requirements were, and new paragraph (d) mirrors these requirements.

The FAA has determined that records of airport condition reports should be retained in the same manner as the records of self-inspections, as required under § 139.327. Although not proposed, this change is the logical outgrowth of similar recordkeeping requirements. Airport condition reports are typically the result of conditions found during a self-inspection, and this change will ensure the recordkeeping requirements in the two sections are consistent.

In accordance with AC 150/5200–28, Notices to Airmen (NOTAMS) for Airport Operators, most certificate holders already keep airport condition report records and have incorporated them into the follow-up process used to address discrepancies found during self-

inspections. Accordingly, the FAA already included the cost and hours to comply with this recordkeeping requirement in its estimate of initial and annual recordkeeping burden required under the Paperwork Reduction Act.

*New Section 139.341 Identifying, Marking, and Lighting Construction and Other Unserviceable Areas (Proposed § 139.343)*

*Proposal:* This section prescribed existing standards for the marking and lighting of construction and other unserviceable areas of the airfield. Except for a change to the section number, the requirements of this section remained the same. Certificate holders were still required to light and mark any construction or unserviceable areas and associated equipment that may create a hazard. All certificated airports serving scheduled air carrier operations (proposed Class I, II, and III airports) were required to comply with this section.

References to other section numbers and the term "Airport Certification Specifications" were changed to reflect proposed certification changes. Minor clarifications were proposed to clarify that the requirements of this section must be met in a manner satisfactory to the FAA and that ACs contain some methods of compliance that are acceptable to the Administrator. In addition, the section number was changed from § 139.341 to proposed § 139.343.

*Comment:* No comments were received on this section.

*Section as Adopted:* This section is adopted with two minor changes. The word "reporting" in the section title has been changed to "lighting" to more accurately reflect the requirements of this section. In addition, the section number was changed to new § 139.341 from proposed § 139.343.

*New Section 139.343 Noncomplying Conditions (Proposed § 139.345)*

*Proposal:* This section contained existing requirements for certificate holders to restrict air carrier operations in those areas of the airport that have become unsafe and no longer comply with the requirements of subpart D of part 139. Operators of all proposed airport classes were required to comply with this section. Except for a change to the section number, the requirements of this section remained the same. The section number was redesignated from § 139.343 to proposed § 139.345.

*Comment:* No comments were received on this section.

*Section as Adopted:* The section number has been changed to new § 139.343 from proposed § 139.345. Otherwise, the section is adopted as proposed.

**Final Rule Compliance**

This final rule becomes effective 120 days after its publication in the **Federal Register.**

*Section 121.590 Compliance*

In the conduct of operations at part 139 certificated airports, air carriers, and the pilots used by them, may continue to operate into part 139 airports until these airports have obtained new or revised AOCs, as required under new § 139.101, General requirements. However, at specified dates after the effective date of the rule, air carriers and their pilots can only use those airports that have been certificated under new part 139.

As specified in new § 121.590(a), air carriers and their pilots will be prohibited from operating at Class I airports 12 months after the effective date of the rule and at Class II, III, and IV airports 18 months after the effective date of the rule if the operators of these airports have not obtained a new or revised part 139 AOC. To assist air carriers in determining which airports have obtained a new or revised AOC, the FAA's Airport Safety and Operations Division (AAS–300) will provide information on the certification status of part 139 airports on its Web site at *http://www.faa.gov/arp/.*

*Part 139 Compliance*

Any airport operator that desires to serve applicable air carrier operations must comply with the requirements of this final rule. The action required by an airport operator to comply will vary depending on the type of air carrier operations served and whether the airport operator currently holds a part 139 AOC, as well as the individual airport's ACM.

Operators of currently certificated airports are not required to reapply for an AOC. The FAA will issue new part 139 AOCs to all current certificate holders, as appropriate. For most current certificate holders, this will involve updating their existing ACM to incorporate several new elements. The remaining certificate holders may be required to comply with certain requirements for the first time or to extend existing part 139 services to cover additional air carrier operations.

The final rule requires all covered airport operators to submit an ACM tailored to each airport for the FAA's approval. The ACM is a written document that details how the airport operator will comply with the requirements of part 139. Airport operators that currently hold an AOC already have an ACM. Airport operators that currently hold a limited AOC have a modified version of an ACM, known as an airport certification specification (ACS). Under the final rule, all ACSs must be converted to ACMs.

Depending on existing operational procedures and emergency services, every ACM/ACS will be in varying stages of compliance with the final rule. Some airport operators may need only to document existing operational procedures to comply with the new requirements. This is the case for many Class I airport operators. Newly certificated airport operators (Class III) may also have to develop and document new operational and emergency procedures to comply with the new requirements. Class II and IV airport operators may be required to do both.

Once an airport operator submits its revised or new ACM, the FAA will work with the airport operator to tailor the document to ensure compliance with the final rule and may conduct an inspection of the airport to verify that the ACM reflects actual airport conditions. The FAA also may request changes to the ACM and any procedures it describes.

Airport operators may continue to serve air carrier operations as they currently do until the deadline for submitting new or revised ACM's to the FAA. After this date, airport operators that have not submitted their ACM for approval will no longer be able to serve applicable air carrier operations. Airport operators that have submitted either a new ACM or an update will be contacted by the FAA to determine if additional action is needed and to what extent they can continue to serve air carrier operations until a new certificate is issued.

*Currently Certificated Airports*

All airport operators that hold an existing AOC will be reclassified as Class I airports (airports serving scheduled operations of large air carrier aircraft). These airport operators have 6 months from the effective date of this final rule to submit revisions to their ACM's for FAA approval.

All airport operators that hold an existing Limited Airport Operating Certificate will be reclassified either as Class II airports (airports serving scheduled operations of small air carrier aircraft and unscheduled operations of large air carrier aircraft) or Class IV airports (airports serving unscheduled operations of large air carrier aircraft). The operators of these airports will have to convert their existing ACS into an

ACM. They will have 12 months from the effective date of this final rule to submit the revised document to the FAA for approval. In addition, operators of Class II and IV airports have additional time to comply with new sign, ARFF, and emergency planning requirements and may request additional compliance time.

*Uncertificated Airports*

Airports serving scheduled operations of small air carrier aircraft will be newly certificated as the result of this final rule. Operators of these airports, designated as Class III airports, that want to continue to serve such air carrier operations are now required to have an AOC and must initiate the application process as prescribed in § 139.103. This process is explained in more depth in the proposal (65 FR 38637). Operators of Class III airports have 12 months from the effective date of this final rule to submit their new ACM to the FAA for approval. Similar to Class II and IV airport operators, Class III airport operators have additional time to comply with new sign, ARFF, and emergency planning requirements and may request additional compliance time.

*Airports Located in the State of Alaska*

The statutory authority covering the certification of airports that serve scheduled operations of small air carrier aircraft is not applicable to Alaskan airports. As noted in the proposal (65 FR 38639), airports in the State of Alaska that serve large air carrier operations will continue to be certificated under part 139 as Class I or IV airports. Accordingly, the compliance dates in the final rule for these airport classifications will apply. Otherwise, there are no part 139 applications for those airports in the State of Alaska that only serve scheduled operations of small air carrier aircraft.

*Airports Operated by the U.S. Government*

Airports operated by the U.S. Government will no longer be certificated under part 139. However, they may still continue to serve air carriers operations, as set out in § 121.590. As stated in the proposal (65 FR 38641), the FAA does not have the statutory authority to regulate airports operated by U.S. Government agencies, and corresponding changes to § 121.590 will now permit air carriers to use U.S. Government operated airports that are not certificated under part 139.

**Paperwork Reduction Act**

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted a copy of these sections to the Office of Management and Budget for its review. The collection of information was approved and assigned OMB Control Number 2120–0675.

This final rule revises current airport certification requirements in 14 CFR part 139 and establishes certification requirements for airports serving scheduled air carrier operations in aircraft with more than 9 passenger seats but less than 31 passenger seats. The final rule also clarifies existing requirements, incorporates existing industry practices, and responds to an outstanding petition for rulemaking and certain NTSB recommendations.

Similar to how the FAA currently certificates airports, this final rule requires airport operators that choose to be certificated under part 139 to document and implement procedures for complying with part 139 safety and operational requirements. To accommodate variations in airport layout, operations, air carrier service, and other local considerations, compliance procedures will be tailored to each airport operator when complying with more burdensome requirements.

Several sections of the proposal had recordkeeping and reporting requirements. Comments received on these requirements are addressed previously in the appropriate section-by-section analysis. Several modifications were made to recordkeeping and reporting requirements in the final rule as the result of comments received. As a result, the annual and recurring recordkeeping and reporting burdens have been adjusted accordingly.

The NPRM estimate of respondents has changed slightly from 606 airport operators to 603 airport operators. The likely respondents to recordkeeping and reporting requirements contained in the final rule are those civilian U.S. airport certificate holders who operate airports that serve scheduled and unscheduled operations of air carrier aircraft with more than 30 passenger seats (approximately 566 airports). These airport operators already hold a part 139 AOC and comply with most of the information collection requirements required in the final rule. Certain airport operators not currently certificated by the FAA also will be required to apply for a certificate under this rule if they want to continue to serve certain air carriers. These airports, approximately 37 airports, serve scheduled operations of air carrier aircraft designed for more than 9 passenger seats but less than 30 passenger seats.

While many part 139 reporting and recordkeeping requirements remain substantially unchanged, additional information collections have been adopted in this final rule. Both existing and new requirements are necessary to allow the FAA to verify compliance with proposed part 139 safety and operational requirements.

This final rule constitutes a recordkeeping and reporting burden for operators of airports certificated under part 139 because the FAA will continue to require operators of certificated airports to comply with certain safety requirements prior to serving certain air carrier aircraft. When an airport satisfactorily complies with these requirements, the FAA issues to that facility an AOC that permits an airport to serve large air carriers. The FAA periodically inspects these airports to ensure continued compliance safety requirements, including the maintenance of specified records. Both the application for an AOC and compliance inspections (typically conducted on an annual basis) require regulated airport operators to collect and report certain operational information.

In addition, this final rule requires operators of certificated airports to develop and comply with a FAA-approved ACM, in manner similar to what was previously required. The ACM details how an airport complies with the requirements of part 139 and includes other instructions and procedures to assist airport personnel in performing their duties and responsibilities.

Under this rule, the FAA continues to require that the AOC remain in effect as long as the need exists and the operator complies with the terms of the AOC and the ACM. Certain changes in the operation of the airport must be reported to the FAA for information or approval. If the airport operator believes that an exemption is needed to commence airport operations, justification for and the FAA's approval of the exemption is required for issuance of the AOC. The operator may request the FAA's approval of changes to the AOC or ACM, or an exemption from part 139 requirements, by submitting justification and documentation. Also, the FAA Administrator may propose changes to the AOC or ACM, and the airport operator may submit contrary evidence of argument concerning the proposed changes.

The frequency of collection would vary depending on the type of information collected, the size of the respondent's airport, and the type of air carrier operations served.

The FAA refined its NPRM estimate of initial and annual hourly burden to respondents, as detailed in the following table. Burden hours are listed separately for airports that currently hold a part 139 AOC and for those airports that will be newly certificated:

| New part 139 sections | Initial reporting hours | | Initial recordkeeping hours | | Annual reporting hours | | Annual recordkeeping hours | |
|---|---|---|---|---|---|---|---|---|
| | Currently certificated | Newly certificated | Currently certificated | Newly certificated | Currently Certificated | Newly certificated | Currently certificated | Newly certificated |
| 139.103 | 0 | 296 | 0 | 0 | 0 | 16 | 0 | 0 |
| 139.111 | 0 | 0 | 0 | 0 | 0 | 32 | 0 | 0 |
| 139.113 | 0 | 0 | 0 | 0 | 0 | 5 | 0 | 0 |
| 139.201 | 0 | 0 | 0 | 0 | 0 | 592 | 0 | 592 |
| 139.203 | 0 | 1,480 | 0 | 0 | 0 | 0 | 0 | 0 |
| 139.205 | 22,640 | 0 | 0 | 0 | 0 | 1,184 | 0 | 0 |
| 139.303 | 0 | 0 | 9,056 | 592 | 0 | 0 | 13,569 | 340 |
| 139.313 | 1,560 | 648 | 0 | 0 | 0 | 0 | 520 | 216 |
| 139.317 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2,035 |
| 139.319 | 0 | 0 | 0 | 888 | 0 | 0 | 0 | 555 |
| 139.321 | 0 | 0 | 260 | 296 | 0 | 0 | 2,264 | 148 |
| 139.325 | 0 | 0 | 5,200 | 1,480 | 0 | 0 | 3,120 | 888 |
| 139.327 | 0 | 0 | 2,080 | 592 | 0 | 0 | 13,520 | 3,848 |
| 139.329 | 0 | 0 | 8,960 | 2,960 | 0 | 0 | 560 | 185 |
| 139.337 | 0 | 0 | 0 | 0 | 16 | 16 | 3,424 | 1,173 |
| 139.339 | 0 | 0 | 520 | 148 | 0 | 0 | 3,250 | 925 |
| Subtotal | 24,200 | 2,424 | 26,076 | 6,956 | 16 | 1,845 | 40,227 | 10,905 |
| Totals | 26,624 | | 33,032 | | 1,861 | | 51,132 | |
| | 59,656 | | | | 52,993 | | | |

The estimate of the total initial reporting and recordkeeping hourly burden for the final rule is 59,656 (an increase of 15,296 hours from the NPRM estimate). The annual hourly burden is 52,993 (an increase of 223 hours from the NPRM estimate). Burden hours are estimated as the number of reports and records made by each respondent. This figure varies yearly, as does the average time per response. These variations are largely due to disparities in airport size and aircraft operations served. The labor burden is estimated on an annual basis.

Operations/maintenance labor accounts for an estimated 70 percent of the hours, and clerical labor makes up the other 30 percent. Cost per hour is estimated at $26 for operations/maintenance labor and $14 for clerical labor. Other expenses, such as general and administrative costs, overhead costs, and other indirect costs are estimated at approximately 15 percent of the direct labor costs. The estimate of the total initial reporting and recordkeeping cost burden for the final rule is $1,536,738 (an increase of $394,025 from the NPRM estimate). The annual cost burden is $1,356,098 (an increase of $5,743 from the NPRM estimate).

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**International Compatibility**

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is the FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

The Joint Aviation Authorities, an associated body of the European Civil Aviation Conference, develop Joint Aviation Requirements (JAR) in aircraft design, manufacture, maintenance, and operations for adoption by participating member civil aviation authorities. The JAR does not address airport certification.

**Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, Federalism, and Unfunded Mandates Assessment**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980, as amended, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

In conducting these analyses, the FAA has determined that the economic impact of this rule will generate benefits that justify its costs, does meet the standards for a "significant regulatory action" as defined in the Executive Order, and is significant as defined by the Department of Transportation's Regulatory Policies and Procedures. The rule, therefore, is subject to review by OMB. The FAA has determined that this rule will not constitute a barrier to

international trade and does not contain a significant intergovernmental or private sector mandate. The agency has concluded that the rule will have a significant impact on a substantial number of small entities and has prepared a final regulatory flexibility analysis. These analyses, available in the docket, are summarized below.

In 1995, the FAA issued regulations aimed at ensuring safety in scheduled air carrier operations in aircraft with 10 or more passenger seats. Since then, Congress has authorized the FAA to certificate airports serving scheduled air carrier operations, conducted in small aircraft. In 2000, the FAA issued an NPRM to revise the airport certification process and to establish certification requirements for these airports.

Under this revised certification process, certificated airports will be reclassified into four new classes, Class I–IV, based on the type of air carrier operations served. Class I, II, and IV airports will be those airports that currently hold AOCs, and Class III airports will be those airports being newly certificated. As specified in the authorizing statute, airport certification requirements will not be applicable to airports located in the State of Alaska that only serve scheduled operation of small air carrier aircraft.

Similar to how the FAA currently certificates airports, the rule requires airport operators choosing to be certificated under part 139 to document and implement procedures for complying with part 139 safety and operational requirements. To accommodate variations in airport layout, operations, air carrier service, and other local considerations, the rule requires that compliance procedures be tailored to each airport operator when complying with the more burdensome requirements.

**Benefits**

The expected benefits of this rule include reducing fatalities, injuries, and property damage at airports with certain scheduled and unscheduled air carrier operations. This is expected to be particularly true at airports serving scheduled air carrier operations conducted in common carrier aircraft designed for more than 9 passenger seats but less than 31 passenger seats (smaller aircraft).

This rule affects all currently certificated airports and an estimated 37 additional airports that are currently uncertificated. Accordingly, benefits are expected to accrue at all four classes of certificated airports created under this rule. Several different types of safety improvements are expected. These involve the:

(1) Prevention of accidents or collisions because of nonstandard or inadequate signs, markings, and lighting and traffic and wind direction indicators;

(2) Mitigation of accident damages by improving runway safety areas at certain airports;

(3) Mitigation of accidents as a result of expanding ARFF coverage to additional air carrier operations;

(4) Prevention and mitigation of fires at airport fuel farms;

(5) Prevention and mitigation of accidents caused by snow and ice accumulation; and

(6) Prevention and mitigation of wildlife problems as a result of improved procedures for wildlife hazard management.

A brief discussion of benefits is included below. A more extensive discussion is contained in the full regulatory evaluation in the docket.

*Runway Safety Areas*

This rule will require that Class III airports meet safety area requirements for the first time. These airports have been encouraged to install safety areas for over 10 years, and many have done so through Federal airport funding programs. Although the rule will not require immediate installation of these safety facilities at any class of airports, over time the eventual installation of safety areas at certificated airports will result in more safety in air transportation.

The following is a good example of the potential benefits from runway safety areas. On May 8, 1999, a SAAB 340 aircraft overran a runway at New York's John F. Kennedy International Airport. The airport had recently installed arresting material in compliance with part 139 safety area requirements that resulted in the airplane stopping 50 feet short of Thurston Bay. The incident resulted in very little damage to the aircraft and one minor passenger injury. In sharp contrast, an accident occurred on the same runway in 1984, before the arresting material was installed, resulted in an SAS DC–10 aircraft running into the bay. This accident resulted in multiple passenger injuries and extensive airplane damage.

*Emergency Response Services and Equipment*

An important safety benefit of this final rule is more widespread availability of emergency response services and equipment. These services are used to respond to airport emergencies, including aircraft accidents, medical emergencies in the terminal building and aircraft fueling fires or spills.

Part 139 accident mitigation requirements provide a comprehensive response to aircraft accidents, and other emergencies. For example, required alarm and communication systems ensure that both ARFF and airport personnel are notified promptly of an accident, and alert other necessary emergency service providers in the local community (*i.e.*, paramedic, police, ambulance service and hospitals). Similarly, accident mitigation measures ensure other needed emergency services are provided, including security and crowd control, removal of disabled aircraft and other debris from movement areas, transportation and facilities for uninjured and injured persons, and storage of deceased persons. All of these measures contribute to a comprehensive emergency response that mitigates the loss of passenger lives and property, prevents injury to responding personnel, and protects air carrier aircraft and the public from unsafe conditions.

There is ample evidence that part 139 accident mitigation requirements can save lives and reduce injuries. Perhaps the clearest example of that was an accident that occurred at Los Angeles International Airport on February 1, 1991. This tragedy involved the collision of a U.S. AIR 737–300 and a Skywest Metro on Runway 24L. The crew and 10 passengers on the Metro were killed, as were some of the crew and 20 passengers on the 737–300. However, the NTSB credited the part 139-required emergency response for saving lives.

A major safety provision of the final rule is that it will extend the required availability of emergency response services and equipment at every landing and takeoff of scheduled air carrier aircraft with 10 to 30 seats. This capability is required now for air carrier operators with more than 30 seats, and, as discussed earlier, there is evidence that lives have been saved and injuries prevented or reduced as a result. In some cases, this protection may not currently be available for small aircraft operations at airports served by large air carrier aircraft. For example, an accident that occurred at Quincy, Illinois (a Class I airport) on November 19, 1996 might have been mitigated had ARFF been on site during the departure of a small air carrier aircraft.

This accident involved the collision of a United Express Beech 1900C (a small aircraft) and a Beech King Air (a general aviation aircraft) during the

ground operations of the two aircraft. These aircraft collided at the intersection of two runways. At the time of the accident, there were no large air carrier aircraft operations in progress or imminent, and, consequently, the airport operator was not required to provide emergency response services, and these services were not on the site. When required, emergency response services, including ARFF, were provided by the fire department, whose personnel would come to the airport from an offsite location to staff emergency equipment during the operations of large air carrier aircraft. All 10 passengers and 2 crew members aboard the United Express Beech 1900C and the two occupants aboard the King Air were killed as a result of post crash fires.

The NTSB found that the speed with which the fire enveloped the King Air, and the intensity of the fire, precluded the survivability of the occupants. However, the occupants of the Beech 1900C did have the opportunity to escape, but could not open external doors. The NTSB concluded, "if on-airport ARFF protection had been required for this operation at Quincy Airport, lives might have been saved." (NTSB Aircraft Accident Report—Runway Collision United Express Flight 5925 and Beechcraft King Air A90—Quincy Municipal Airport, Illinois—November 19, 1996—NTSB AAR–97/04, P.51.)

Based on this accident history, a risk assessment provides a reasonable quantified estimate of the potential value of part 139 emergency response requirements. The final rule will extend these emergency services to passengers traveling in air carrier aircraft with 10 to 30 passenger seats. For an accident in a 30 passenger seat aircraft occupied at 60 percent of capacity (the industry average), the expected benefits equal $63 million based on 21 potentially prevented fatalities (18 passengers and three crew members) multiplied by $3 million per prevented fatality. While $63 million is the expected benefit over a ten year horizon, using the Poisson distribution with a mean of one accident over a ten-year period, there is a 26 percent chance of two or more such accidents with a value in excess of $100 million.

*Fuel Storage Fires*

Another expected benefit of this rule is prevention/mitigation of fuel storage fires. The rule requires all classes of airports to address fuel storage fires in their disaster plans. This will better prepare airports to prevent and/or extinguish the kind of fire that occurred at the Stapleton International Airport in Denver, CO, on November 25, 1990. That fire erupted on a fuel farm about 1.8 miles from the main terminal and burned for 48 hours, destroying about 3 million gallons of fuel. Flight operations of a major air carrier were disrupted due to the lack of fuel, and the air carrier estimated total damage to have reached between $15 and $20 million.

The NTSB concluded that the City and County of Denver (the airport certificate holder) and the fire department, in particular, apparently had not considered the possibility of a fire of this type since no procedures or contingency plans were in place. The FAA has determined that contingency plans that cover the possibility of a major fuel farm fire could result in similar fires being extinguished much sooner, perhaps resulting in considerably less damage.

*Snow and Ice Control*

Another safety benefit is expected from improved snow and ice control, which will reduce the potential for snow- and ice-related accidents. On March 17, 1993, a BAC–BA-Jetstream 3101 aircraft was making a night instrument approach to Raleigh County Memorial Airport in Beckley, WV. Because the runway was not properly plowed, and berms of snow concealed the runway lights at ground level, the captain lost control after touchdown, and the airplane sustained substantial damage.

This rule will require Class II and III airports to develop tailored snow and ice control plans. Class I airports are already required to have such plans, and Class IV airports are not required to have such plans. Although many of these classes of airports already have procedures for snow and ice removal, this rule will formalize consistent plans across all airports with scheduled air carrier services. The FAA concludes that this low-cost requirement to standardize responses to snow and ice conditions at certificated airports will significantly help prevent the kind of accident discussed above.

*Wildlife Hazard Management*

The expected benefit of this section of this final rule is the reduction of wildlife hazards to air carrier operations. Airports not currently certificated by the FAA are not required to meet part 139 wildlife hazard management requirements. At some of these airports, wildlife hazards already exist that under the final rule will require the airport operator to conduct a wildlife assessment and possibly the implementation of a wildlife hazard management plan. The expansion of wildlife hazard management requirements to these airports is intended to ensure that all airport certificate holders serving scheduled air carriers address wildlife hazards in a consistent and effective manner. Accordingly, the FAA expects to reduce the number of wildlife strikes that will otherwise occur.

At Class III airports between 1991 and 1997, there were 10 reported wildlife strikes involving 19-passenger seat Beech-1900 aircraft (22 potential total occupants). The FAA values each prevented fatality to be $3 million. FAA cost estimates for injuries range from $38,500 for a minor injury to $521,800 for a serious injury. It is likely that without mitigation the past 10 or more wildlife strikes to aircraft will reoccur at Class III airports, affecting 10 to 130 aircraft occupants. It is not unreasonable to expect that 10 percent of these occupants will incur minor to serious injury and that several may die as result of a wildlife strike. The FAA estimates that the minimum potential averted cost is several hundred thousand dollars; yet just one fatal accident raises the preventable cost to $3 million.

With the structured approach of the final rule to resolving wildlife strikes to aircraft, it is very reasonable to expect that each airport solution will be one where the benefits exceed the costs, and in some cases, the net benefit may be substantial. Airport improvements to reduce wildlife hazards will ultimately provide a safer environment for all civil aircraft operations. Given the growing population of certain wildlife, the increasing number of aircraft operations and the history of reported wildlife strikes, potential benefits for just the newly certificated airports (37 Class III airports) range from a low of several million dollars (from damage and injuries avoided) to an estimate in excess of $10 million.

The benefits of the wildlife strike provision of the final rule extend beyond all Class III airports to all certificated airports. However, the wide range of possible compliance methods forestall a reasonable range estimate of net benefits. It is very reasonable to expect that wildlife preventative action at each certificated airport will have benefits in excess of costs with system-wide benefits in the millions.

**Costs**

Some of the requirements of this rule that will impose costs—such as improved snow and ice control; marking, signs, and lighting; and wildlife hazard management—are intended to prevent accidents. Other

requirements, such as emergency planning and improved emergency response capability, are intended to mitigate accidents should they occur.

When the FAA published the NPRM the agency estimated that the present value of the 10-year costs of the proposed rule was about $46 million. Based on the comments received, the FAA increased the estimated costs for the final rule, primarily to allow for ARFF costs at airports that will be newly certificated as a result of this rule.

The major items of this rule that are expected to impose costs are summarized below:

| Major cost items | Initial/capital costs | Annual recurring costs |
|---|---|---|
| Risk Reduction Items (Subpart D—Operations): Personnel; Records; Marking, Signs, and Lighting; Snow and Ice Control; Handling and Storing of Hazardous Substances and Materials; Traffic and Wind Direction Indicators; Self-Inspection Program; Access to Movement Areas and Safety Areas; Wildlife Hazard Management | $1,495,316 | $1,447,215 |
| Mitigation Items (ARFF, Airport Emergency Plan) | 2,719,242 | 8,405,105 |
| Program Total—Current Dollars | $4,214,558 | $9,852,320 |

The FAA estimates that the present value of the 10-year cost of this rule is $73.4 million. A more detailed description of how these costs were estimated is contained in the full regulatory evaluation.

The FAA has made an effort not to underestimate costs. As a result, the estimated costs of this rule may be high because it is largely based on assumed average costs being applicable to all airports in each class, when in actuality each airport will have requirements tailored to its individual situation. In the application of this rule, each airport (particularly the new Class III airports) may have already complied with this rule, or may receive relief from certain aspects of this rule under the exemption provisions.

**Benefit-Cost Comparison**

The estimated benefits and costs herein assume that the average airport incurs the full compliance cost and that the traveling public and society receives the associated benefit. Much of the difficulty to accurately assess the expected benefit and cost of this regulation is the complex nature of compliance with part 139 requirements. Each airport is unique with potentially different methods used by the airport operator to comply with part 139 requirements. Further, there are very significant Federal policies in place to mitigate the economic impact of the final rule. These policies are discussed in length in a separate Report to Congress. This Report discusses the economic impact of the final rule on air service to Class III airports.

As discussed in the Report to Congress, several factors may help to mitigate part 139 compliance costs. First, Congress has directed the FAA to set aside $15 million of AIP funds for certain capital expenditures that may be required by the final rule for four fiscal years. Second, the FAA will assist airport operators to obtain additional Federal funds, as appropriate. Third, at approximately two-thirds of these newly certificated airports (Class III airports), air carriers also receive federal EAS subsidies, so the Federal government will probably absorb most, if not all of the cost of the rule through increased subsidies to air carriers. Fourth, if Federal, state and local funding is not adequate, the FAA will seek alternative means of compliance with part 139 requirements or will use its statutory authority to grant exemptions from requirements that would be too costly, burdensome, or impractical.

The FAA estimates that one or more accidents that will be mitigated by compliance with emergency response requirements of the final rule will result in an estimated benefit ranging from $63 million to well in excess of $100 million. The FAA is not providing a single dollar value for the total benefits of the final rule because the range of the possible compliance methods is too great and complying with risk reduction and accident mitigation requirements may require multiple actions. The FAA does note that the benefits estimate is conservative and the potential error in assessing the benefits will be to underestimate total benefits.

The FAA estimates that the present value of the 10-year cost of this final rule is about $73.4 million. This estimate is likely to be high because it is based on assumed average costs across all airports in each airport class. In the application of this rule, each airport may already be in compliance with all or certain requirements of this final rule, or may receive relief from certain aspects of the rule through alternate means of compliance or the exemption process.

Thus, the FAA believes that numerous safety benefits will result from the multiple provisions in the final rule. These benefits will reduce the risk of future accidents and mitigate loss if another accident occurs. As noted above, the total cost estimate is conservative and does not include a host of policies and available funding designed to reduce the compliance cost of the final rule. Consequently, in view of the moderate costs and potential benefits, the FAA concludes that the benefits of the final rule justify the costs.

**Final Regulatory Flexibility Analysis (FRFA)**

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to consider the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will have such an impact, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a proposed, or final, rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this

determination, and the reasoning should be clear.

This rule will affect publicly owned airports. When the population of a public airport-owning entity is less than 50,000, it is considered a small entity. Based upon the above review, the FAA concludes that this final rule will have a significant economic impact on a substantial number of small entities. Accordingly, the following final regulatory flexibility assessment was prepared as required by the RFA.

*Issues To Be Addressed in a Final Regulatory Flexibility Analysis*

The central focus of a final regulatory flexibility analysis, like the initial regulatory flexibility analysis (IRFA), is the requirement that agencies evaluate the impact of a rule on small entities and analyze regulatory alternatives that minimize the impact when there will be a significant economic impact on a substantial number of small entities.

The five requirements, outlined in section 604(a)(1–5) of the 1980 RFA, are listed and discussed below:

(1) *A succinct statement of the need for, and objectives of, the rule.* Before 1996, the FAA's statutory authority to certificate airports was limited to those airports serving air carrier operations using aircraft with more than 30 passenger seats. However, this authority (49 U.S.C. 44706) was broadened by the Federal Aviation Administration Reauthorization Act of 1996 to allow the FAA to certificate airports, with the exception of those located in the State of Alaska, that serve any scheduled passenger operation of an air carrier operating aircraft designed for more than 9 passenger seats but less than 31 passenger seats. The FAA's existing authority to certificate airports serving air carrier operations conducted in aircraft with more than 30 seats remained unchanged.

With this rule, the FAA intends to extend airport certification standards to airports serving scheduled air carrier operations conducted in aircraft designed for more than 9 passenger seats but less than 31 passenger seats.

The primary objective of this final rule is to ensure safety in air transportation by regulating the operation and maintenance of airports serving certain scheduled air carrier operations. The rule is necessary to prevent future accidents similar to those that have recently occurred and to mitigate fatalities and injuries when accidents do occur.

(2) *A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.* There were a substantial number of comments received from operators of airports serving small air carrier operations concerned about the financial burden that the proposed rule would place on them. In particular these commenters are concerned about personnel costs to comply with proposed ARFF requirements.

In response to public comments, several changes were made to the final rule. A primary change is that the sections of the proposed rule that dealt with obtaining an exemption from the ARFF requirements have been clarified for the final rule. The final rule is more explicit in describing how to apply for an exemption. The FAA believes that the exemption provision will result in actual compliance costs that are substantially less than those estimated in the final regulatory evaluation. The agency was not able to quantify the reduction in compliance costs resulting from possible exemptions. However, it should be noted that all requirements of part 139 will be tailored to each airport through the ACM. In addition, the time period to accomplish some requirements, such as the preparation of the ACM, was extended, especially for the smaller airports.

(3) *A description of, and an estimate of the number of, small entities to which the rule will apply or an explanation of why no such estimate is available.* The Small Business Administration (SBA) classifies all airports that are operated under the airport ownership of a public entity with a population of 50,000 or less as small entities. Using the SBA's definition of a "small" public entity, there are more than 200 small entity airports that will be affected by this rule. Most of the small entities are expected to be Class I airports (more than 100 are small entities), which are already certificated under part 139. The largest economic impact is expected to occur to the Class III airports (approximately 25 are small entities), which would be newly certificated under the final rule.

(4) *A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* The final rule will create additional reporting or recordkeeping requirements beyond those already specified in existing part 139. For each airport, the preparation of this documentation may involve the airport manager, operations and maintenance personnel, and clerical staff. For each small entity, the FAA estimates the average initial hours required to set up a recordkeeping system will be 70 hours and expects a continuing additional paperwork requirement of about 90 hours annually.

(5) *A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule, and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.* The FAA extensively considered several alternatives, described in the IRFA, and determined that the alternative chosen for the NPRM was the only alternative that was relatively affordable and achieved the safety objectives of the proposed rule. This initial alternative was subjected to public scrutiny during the comment period of the NPRM process. The comments received were responded to, as described above, and this final rule is the selected alternative.

*Extended Discussion of the Rule Comments on Affordability and Safety*

The last major revision of part 139 occurred in November 1987. Since then, industry practices and technology have changed significantly. Subsequently, the FAA monitored the effectiveness of part 139 and has taken this opportunity to update part 139 requirements.

The FAA initiated this rulemaking to ensure safety in air transportation at airports serving small air carrier operations, fully appreciating the financial limitations of these airports. In 1996, Congress authorized the FAA to certificate airports serving small air carrier operations to ensure further safety at airports providing scheduled air service. This was the same year that all occupants died in a collision of a United Express Beech 1900C (under 30 seat air carrier aircraft) and a Beech King Air (a general aviation aircraft). The NTSB concluded that "* * * if on-airport ARFF protection had been required for this operation at Quincy Regional Airport, lives might have been saved."

An industry/FAA evaluation of possible regulatory alternatives for the certification of airports serving small air carrier aircraft concluded that there exists a need to require at least some minimum level of both risk reduction and accident mitigation measures at airports during operations of smaller air carrier airplanes.

The FAA recognizes the need to provide some flexibility in the implementation of certain safety measures at airports with infrequent air carrier service or where local resources are severely limited. Airports in smaller communities do not always have the resources to support their airports at the same level as large metropolitan areas without adversely affecting other community services and infrastructure.

There are other mitigating factors. The FAA permits alternate means of compliance to accommodate local conditions and uses its statutory authority to grant exemptions from part 139 requirements, as appropriate. This statutory authority requires the FAA to ensure that an airport it certificates provides for the operation and maintenance of adequate safety equipment.

There are several methods available to small-entity airports to mitigate the economic impact of this rule. One is that the Airport Improvement Program (AIP) funding (often supplemented by state grants) is available for certain capital expenditures that may be required by the rule such as firefighting equipment, airport marking and signs. Another avenue is the Essential Air Service (EAS) Program. For Class III airports that are owned by small communities, serve a limited number of passengers, and operate at a loss, it is likely that much of the final actual costs to the airport would be passed on to the air carriers. At airports where carriers receive EAS subsidies (approximately two-thirds of all Class III airports) the Federal Government will probably absorb most, if not all, of the cost of the rule through increased subsidies.

By tailoring compliance to accommodate local conditions, and/or making use of the statutory exemption, the FAA will maintain the necessary oversight of ARFF, while ensuring that the ARFF requirements are appropriate for the airport size and type of air carrier operations. There will not be a blanket exemption for airports with infrequent or smaller air carrier operations, nor will the agency relieve an airport from the obligation to provide some level of ARFF coverage.

*Summary*

After considering the alternatives for the certification of airports serving small air carrier operations and alternatives for updating part 139 (as specified in the IFRA), the FAA determined that this rule is necessary to ensure safety in air transportation. However, to accommodate variations in airport size and operation, the FAA may allow alternative means of compliance with part 139 requirements. This will allow the most cost effective and flexible method of ensuring safety to be employed at all covered airports while providing for the special needs of small entities.

**International Trade Impact Assessment**

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

In accordance with the above statute, the FAA has assessed the potential effect of this final rule and has determined that it will have only a domestic impact and therefore create no obstacles to the foreign commerce of the United States.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532–1538) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure of $100 million or more (adjusted annually for inflation in any one year) by State, local, and tribal governments (in the aggregate) or by the private sector. Such a mandate is deemed to be a "significant regulatory action."

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

**Executive Order 3132, Federalism**

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. Most airports subject to this rule are owned, operated, or regulated by a local governmental body (such as a city or county government), which is either incorporated by or part of a State. In a few cases, the airports are operated directly by the States. The FAA has determined that this rule would have minimal direct effect on the States and would not alter the relationship established by law between the airport certificate holders and the FAA. The FAA considers the annual costs of compliance with this rule low compared with the resources available to the airports. Before issuing the NPRM leading to this rule, the FAA consulted with representatives of the airports through its ARAC. The FAA also consulted with the States through various national associations of state and local governments. In consulting with state governments, the FAA provided the opportunity for them to comment on the NPRM leading to this rule.

After due consideration of comments received, the FAA has determined that this action would not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the FAA has determined that this action does not have federalism implications.

**Environmental Analysis**

FAA Order 1050.1D defines the FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

**Regulations That Significantly Affect Energy Supply, Distribution, or Use**

The FAA has analyzed this NPRM under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because it is not a "significant regulatory action" under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

**List of Subjects**

*14 CFR Part 121*

Air carriers, Aircraft, Aviation safety, Charter flights, Safety, Transportation.

*14 CFR Part 139*

Air carriers, Airports, Aviation safety, Reporting and recordkeeping requirements.

**The Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations as follows:

## PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

■ 2. Revise § 121.590 to read as follows:

**§ 121.590 Use of certificated land airports in the United States.**

(a) Except as provided in paragraphs (b) or (c) of this section, or unless authorized by the Administrator under 49 U.S.C. 44706(c), no air carrier and no pilot being used by an air carrier may operate, in the conduct of a domestic type operation, flag type operation, or supplemental type operation, an airplane at a land airport in any State of the United States, the District of Columbia, or any territory or possession of the United States unless that airport is certificated under part 139 of this chapter. Further, after June 9, 2005 for Class I airports and after December 9, 2005 for Class II, III, and IV airports, when an air carrier and a pilot being used by the air carrier are required to operate at an airport certificated under part 139 of this chapter, the air carrier and the pilot may only operate at that airport if the airport is classified under part 139 to serve the type airplane to be operated and the type of operation to be conducted.

(b) An air carrier and a pilot being used by the air carrier in the conduct of a domestic type operation, flag type operation, or supplemental type operation may designate and use as a required alternate airport for departure or destination an airport that is not certificated under part 139 of this chapter.

(c) An air carrier and a pilot used by the air carrier in conducting a domestic type operation, flag type operation, or supplemental type operation may operate an airplane at an airport operated by the U.S. Government that is not certificated under part 139 of this chapter, only if that airport meets the equivalent—

(1) Safety standards for airports certificated under part 139 of this chapter; and

(2) Airport classification requirements under part 139 to serve the type airplane to be operated and the type of operation to be conducted.

(d) An air carrier, a commercial operator, and a pilot being used by the air carrier or the commercial operator—when conducting a passenger-carrying airplane operation under this part that is not a domestic type operation, a flag type operation, or a supplemental type operation—may operate at a land airport not certificated under part 139 of this chapter only when the following conditions are met:

(1) The airport is adequate for the proposed operation, considering such items as size, surface, obstructions, and lighting.

(2) For an airplane carrying passengers at night, the pilot may not take off from, or land at, an airport unless—

(i) The pilot has determined the wind direction from an illuminated wind direction indicator or local ground communications or, in the case of takeoff, that pilot's personal observations; and

(ii) The limits of the area to be used for landing or takeoff are clearly shown by boundary or runway marker lights. If the area to be used for takeoff or landing is marked by flare pots or lanterns, their use must be authorized by the Administrator.

(e) A commercial operator and a pilot used by the commercial operator in conducting a domestic type operation, flag type operation, or supplemental type operation may operate an airplane at an airport operated by the U.S. Government that is not certificated under part 139 of this chapter only if that airport meets the equivalent—

(1) Safety standards for airports certificated under part 139 of this chapter; and

(2) Airport classification requirements under part 139 of this chapter to serve the type airplane to be operated and the type of operation to be conducted.

(f) For the purpose of this section, the terms—

*Domestic type operation* means any domestic operation conducted with—

(1) An airplane designed for at least 31 passenger seats (as determined by the aircraft type certificate issued by a competent civil aviation authority) at any land airport in any State of the United States, the District of Columbia, or any territory or possession of the United States; or

(2) An airplane designed for more than 9 passenger seats but less than 31 passenger seats (as determined by the aircraft type certificate issued by a competent civil aviation authority) at any land airport in any State of the United States (except Alaska), the District of Columbia, or any territory or possession of the United States.

*Flag type operation* means any flag operation conducted with—

(1) An airplane designed for at least 31 passenger seats (as determined by the aircraft type certificate issued by a competent civil aviation authority) at any land airport in any State of the United States, the District of Columbia, or any territory or possession of the United States; or

(2) An airplane designed for more than 9 passenger seats but less than 31 passenger seats (as determined by the aircraft type certificate issued by a competent civil aviation authority) at any land airport in any State of the United States (except Alaska), the District of Columbia, or any territory or possession of the United States.

*Supplemental type operation* means any supplemental operation (except an all-cargo operation) conducted with an airplane designed for at least 31 passenger seats (as determined by the aircraft type certificate issued by a competent civil aviation authority) at any land airport in any State of the United States, the District of Columbia, or any territory or possession of the United States.

*United States* means the States of the United States, the District of Columbia, and the territories and possessions of the United States.

**Note:** Special Statutory Requirement to Operate to or From a Part 139 Airport. Each air carrier that provides—in an aircraft (*e.g.*, airplane, rotorcraft, etc.) designed for more than 9 passenger seats—regularly scheduled charter air transportation for which the public is provided in advance a schedule containing the departure location, departure time, and arrival location of the flight must operate to and from an airport certificated under part 139 of this chapter in accordance with 49 U.S.C. 41104(b). That statutory provision contains stand-alone requirements for such air carriers and special exceptions for operations in Alaska and outside the United States. Nothing in § 121.590 exempts the air carriers described in this note from the requirements of 49 U.S.C. 41104(b). Certain operations by air carriers that conduct public charter operations under 14 CFR part 380 are covered by the statutory requirements to operate to and from part 139 airports. *See* 49 U.S.C. 41104(b).

■ 3. Revise part 139 to read as follows:

## PART 139—CERTIFICATION OF AIRPORTS

### Subpart A—General



### Subpart B—Certification

**Authority:** 49 U.S.C. 106(g), 40113, 44701–44706, 44709, 44719

## Subpart A—General

### § 139.1 Applicability.

(a) This part prescribes rules governing the certification and operation of airports in any State of the United States, the District of Columbia, or any territory or possession of the United States serving any—

(1) Scheduled passenger-carrying operations of an air carrier operating aircraft designed for more than 9 passenger seats, as determined by the aircraft type certificate issued by a competent civil aviation authority; and

(2) Unscheduled passenger-carrying operations of an air carrier operating aircraft designed for at least 31 passenger seats, as determined by the aircraft type certificate issued by a competent civil aviation authority.

(b) This part applies to those portions of a joint-use or shared-use airport that are within the authority of a person serving passenger-carrying operations defined in paragraphs (a)(1) and (a)(2) of this section.

(c) This part does not apply to—

(1) Airports serving scheduled air carrier operations only by reason of being designated as an alternate airport;

(2) Airports operated by the United States;

(3) Airports located in the State of Alaska that only serve scheduled operations of small air carrier aircraft and do not serve scheduled or unscheduled operations of large air carrier aircraft;

(4) Airports located in the State of Alaska during periods of time when not serving operations of large air carrier aircraft; or

(5) Heliports.

### § 139.3 Delegation of authority.

The authority of the Administrator to issue, deny, and revoke Airport Operating Certificates is delegated to the Associate Administrator for Airports, Director of Airport Safety and Standards, and Regional Airports Division Managers.

### § 139.5 Definitions.

The following are definitions of terms used in this part:

*AFFF* means aqueous film forming foam agent.

*Air carrier aircraft* means an aircraft that is being operated by an air carrier and is categorized as either a large air carrier aircraft if designed for at least 31 passenger seats or a small air carrier aircraft if designed for more than 9 passenger seats but less than 31 passenger seats, as determined by the aircraft type certificate issued by a competent civil aviation authority.

*Air carrier operation* means the takeoff or landing of an air carrier aircraft and includes the period of time from 15 minutes before until 15 minutes after the takeoff or landing.

*Airport* means an area of land or other hard surface, excluding water, that is used or intended to be used for the landing and takeoff of aircraft, including any buildings and facilities.

*Airport Operating Certificate* means a certificate, issued under this part, for operation of a Class I, II, III, or IV airport.

*Average daily departures* means the average number of scheduled departures per day of air carrier aircraft computed on the basis of the busiest 3 consecutive calendar months of the immediately preceding 12 consecutive calendar months. However, if the average daily departures are expected to increase, then "average daily departures" may be determined by planned rather than current activity, in a manner authorized by the Administrator.

*Certificate holder* means the holder of an Airport Operating Certificate issued under this part.

*Class I airport* means an airport certificated to serve scheduled operations of large air carrier aircraft that can also serve unscheduled passenger operations of large air carrier aircraft and/or scheduled operations of small air carrier aircraft.

*Class II airport* means an airport certificated to serve scheduled operations of small air carrier aircraft and the unscheduled passenger operations of large air carrier aircraft. A Class II airport cannot serve scheduled large air carrier aircraft.

*Class III airport* means an airport certificated to serve scheduled operations of small air carrier aircraft. A Class III airport cannot serve scheduled or unscheduled large air carrier aircraft.

*Class IV airport* means an airport certificated to serve unscheduled passenger operations of large air carrier aircraft. A Class IV airport cannot serve scheduled large or small air carrier aircraft.

*Clean agent* means an electrically nonconducting volatile or gaseous fire extinguishing agent that does not leave a residue upon evaporation and has been shown to provide extinguishing action equivalent to halon 1211 under test protocols of FAA Technical Report DOT/FAA/AR–95/87.

*Heliport* means an airport, or an area of an airport, used or intended to be used for the landing and takeoff of helicopters.

*Index* means the type of aircraft rescue and firefighting equipment and quantity of fire extinguishing agent that the certificate holder must provide in accordance with § 139.315.

*Joint-use airport* means an airport owned by the United States that leases a portion of the airport to a person operating an airport specified under § 139.1(a).

*Movement area* means the runways, taxiways, and other areas of an airport that are used for taxiing, takeoff, and landing of aircraft, exclusive of loading ramps and aircraft parking areas.

*Regional Airports Division Manager* means the airports division manager for the FAA region in which the airport is located.

*Safety area* means a defined area comprised of either a runway or taxiway and the surrounding surfaces that is prepared or suitable for reducing the risk of damage to aircraft in the event of an undershoot, overshoot, or excursion from a runway or the unintentional departure from a taxiway.

*Scheduled operation* means any common carriage passenger-carrying operation for compensation or hire conducted by an air carrier for which the air carrier or its representatives offers in advance the departure location, departure time, and arrival location. It

does not include any operation that is conducted as a supplemental operation under 14 CFR part 121 or public charter operations under 14 CFR part 380.

*Shared-use airport* means a U.S. Government-owned airport that is co-located with an airport specified under § 139.1(a) and at which portions of the movement areas and safety areas are shared by both parties.

*Unscheduled operation* means any common carriage passenger-carrying operation for compensation or hire, using aircraft designed for at least 31 passenger seats, conducted by an air carrier for which the departure time, departure location, and arrival location are specifically negotiated with the customer or the customer's representative. It includes any passenger-carrying supplemental operation conducted under 14 CFR part 121 and any passenger-carrying public charter operation conducted under 14 CFR part 380.

*Wildlife hazard* means a potential for a damaging aircraft collision with wildlife on or near an airport. As used in this part, "wildlife" includes feral animals and domestic animals out of the control of their owners.

**Note:** *Special Statutory Requirement To Operate to or From a Part 139 Airport.* Each air carrier that provides—in an aircraft designed for more than 9 passenger seats—regularly scheduled charter air transportation for which the public is provided in advance a schedule containing the departure location, departure time, and arrival location of the flight must operate to and from an airport certificated under part 139 of this chapter in accordance with 49 U.S.C. 41104(b). That statutory provision contains stand-alone requirements for such air carriers and special exceptions for operations in Alaska and outside the United States. Certain operations by air carriers that conduct public charter operations under 14 CFR part 380 are covered by the statutory requirements to operate to and from part 139 airports. See 49 U.S.C. 41104(b).

### § 139.7 Methods and procedures for compliance.

Certificate holders shall comply with requirements prescribed by subparts C and D of this part in a manner authorized by the Administrator. FAA Advisory Circulars contain methods and procedures for compliance with this part that are acceptable to the Administrator.

## Subpart B—Certification

### § 139.101 General requirements.

(a) Except as otherwise authorized by the Administrator, no person may operate an airport specified under § 139.1 of this part without an Airport Operating Certificate or in violation of that certificate, the applicable provisions, or the approved Airport Certification Manual.

(b) Each certificate holder shall adopt and comply with an Airport Certification Manual as required under § 139.203.

(c) Persons required to have an Airport Operating Certificate under this part shall submit their Airport Certification Manual to the FAA for approval, in accordance with the following schedule:

(1) Class I airports—6 months after June 9, 2004.

(2) Class II, III, and IV airports—12 months after June 9, 2004.

### § 139.103 Application for certificate.

Each applicant for an Airport Operating Certificate shall—

(a) Prepare and submit an application, in a form and in the manner prescribed by the Administrator, to the Regional Airports Division Manager.

(b) Submit with the application, two copies of an Airport Certification Manual prepared in accordance with subpart C of this part.

### § 139.105 Inspection authority.

Each applicant for, or holder of, an Airport Operating Certificate shall allow the Administrator to make any inspections, including unannounced inspections, or tests to determine compliance with 49 U.S.C. 44706 and the requirements of this part.

### § 139.107 Issuance of certificate.

An applicant for an Airport Operating Certificate is entitled to a certificate if—

(a) The applicant provides written documentation that air carrier service will begin on a date certain.

(b) The applicant meets the provisions of § 139.103.

(c) The Administrator, after investigation, finds the applicant is properly and adequately equipped and able to provide a safe airport operating environment in accordance with—

(1) Any limitation that the Administrator finds necessary to ensure safety in air transportation.

(2) The requirements of the Airport Certification Manual, as specified under § 139.203.

(3) Any other provisions of this part that the Administrator finds necessary to ensure safety in air transportation.

(d) The Administrator approves the Airport Certification Manual.

### § 139.109 Duration of certificate.

An Airport Operating Certificate issued under this part is effective until the certificate holder surrenders it or the certificate is suspended or revoked by the Administrator.

### § 139.111 Exemptions.

(a) An applicant or a certificate holder may petition the Administrator under 14 CFR part 11, General Rulemaking Procedures, of this chapter for an exemption from any requirement of this part.

(b) Under 49 U.S.C. 44706(c), the Administrator may exempt an applicant or a certificate holder that enplanes annually less than one-quarter of 1 percent of the total number of passengers enplaned at all air carrier airports from all, or part, of the aircraft rescue and firefighting equipment requirements of this part on the grounds that compliance with those requirements is, or would be, unreasonably costly, burdensome, or impractical.

(1) Each petition filed under this paragraph must—

(i) Be submitted in writing at least 120 days before the proposed effective date of the exemption;

(ii) Set forth the text of §§ 139.317 or 139.319 from which the exemption is sought;

(iii) Explain the interest of the certificate holder in the action requested, including the nature and extent of relief sought; and

(iv) Contain information, views, or arguments that demonstrate that the requirements of §§ 139.317 or 139.319 would be unreasonably costly, burdensome, or impractical.

(2) Information, views, or arguments provided under paragraph (b)(1) of this section shall include the following information pertaining to the airport for which the Airport Operating Certificate is held:

(i) An itemized cost to comply with the requirement from which the exemption is sought;

(ii) Current staffing levels;

(iii) The current annual financial report, such as a single audit report or FAA Form 5100–127, Operating and Financial Summary;

(iv) Annual passenger enplanement data for the previous 12 calendar months;

(v) The type and frequency of air carrier operations served;

(vi) A history of air carrier service;

(vii) Anticipated changes to air carrier service;

(c) Each petition filed under this section must be submitted in duplicate to the—

(1) Regional Airports Division Manager and

(2) U.S. Department of Transportation's Docket Management System, as specified under 14 CFR part 11.

**§ 139.113 Deviations.**

In emergency conditions requiring immediate action for the protection of life or property, the certificate holder may deviate from any requirement of subpart D of this part, or the Airport Certification Manual, to the extent required to meet that emergency. Each certificate holder who deviates from a requirement under this section shall, within 14 days after the emergency, notify the Regional Airports Division Manager of the nature, extent, and duration of the deviation. When requested by the Regional Airports Division Manager, the certificate holder shall provide this notification in writing.

## Subpart C—Airport Certification Manual

**§ 139.201 General requirements.**

(a) No person may operate an airport subject to this part unless that person adopts and complies with an Airport Certification Manual, as required under this part, that—

(1) Has been approved by the Administrator;

(2) Contains only those items authorized by the Administrator;

(3) Is in printed form and signed by the certificate holder acknowledging the certificate holder's responsibility to operate the airport in compliance with the Airport Certification Manual approved by the Administrator; and

(4) Is in a form that is easy to revise and organized in a manner helpful to the preparation, review, and approval processes, including a revision log. In addition, each page or attachment must include the date of the Administrator's initial approval or approval of the latest revision.

(b) Each holder of an Airport Operating Certificate shall—

(1) Keep its Airport Certification Manual current at all times;

(2) Maintain at least one complete and current copy of its approved Airport Certification Manual on the airport, which will be available for inspection by the Administrator; and

(3) Furnish the applicable portions of the approved Airport Certification Manual to airport personnel responsible for its implementation.

(c) Each certificate holder shall ensure that the Regional Airports Division Manager is provided a complete copy of its most current approved Airport Certification Manual, as specified under paragraph (b)(2) of this section, including any amendments approved under § 139.205.

(d) FAA Advisory Circulars contain methods and procedures for the development of Airport Certification Manuals that are acceptable to the Administrator.

**§ 139.203 Contents of Airport Certification Manual.**

(a) Except as otherwise authorized by the Administrator, each certificate holder shall include in the Airport Certification Manual a description of operating procedures, facilities and equipment, responsibility assignments, and any other information needed by personnel concerned with operating the airport in order to comply with applicable provisions of subpart D of this part and paragraph (b) of this section.

(b) Except as otherwise authorized by the Administrator, the certificate holder shall include in the Airport Certification Manual the following elements, as appropriate for its class:

REQUIRED AIRPORT CERTIFICATION MANUAL ELEMENTS

| Manual elements | Airport certificate class | | | |
|---|---|---|---|---|
| | Class I | Class II | Class III | Class IV |
| 1. Lines of succession of airport operational responsibility | X | X | X | X |
| 2. Each current exemption issued to the airport from the requirements of this part | X | X | X | X |
| 3. Any limitations imposed by the Administrator | X | X | X | X |
| 4. A grid map or other means of identifying locations and terrain features on and around the airport that are significant to emergency operations | X | X | X | X |
| 5. The location of each obstruction required to be lighted or marked within the airport's area of authority | X | X | X | X |
| 6. A description of each movement area available for air carriers and its safety areas, and each road described in § 139.319(k) that serves it | X | X | X | X |
| 7. Procedures for avoidance of interruption or failure during construction work of utilities serving facilities or NAVAIDS that support air carrier operations | X | X | X | |
| 8. A description of the system for maintaining records, as required under § 139.301 | X | X | X | X |
| 9. A description of personnel training, as required under § 139.303 | X | X | X | X |
| 10. Procedures for maintaining the paved areas, as required under § 139.305 | X | X | X | X |
| 11. Procedures for maintaining the unpaved areas, as required under § 139.307 | X | X | X | X |
| 12. Procedures for maintaining the safety areas, as required under § 139.309 | X | X | X | X |
| 13. A plan showing the runway and taxiway identification system, including the location and inscription of signs, runway markings, and holding position markings, as required under § 139.311 | X | X | X | X |
| 14. A description of, and procedures for maintaining, the marking, signs, and lighting systems, as required under § 139.311 | X | X | X | X |
| 15. A snow and ice control plan, as required under § 139.313 | X | X | X | |
| 16. A description of the facilities, equipment, personnel, and procedures for meeting the aircraft rescue and firefighting requirements, in accordance with §§ 139.315, 139.317 and 139.319 | X | X | X | X |
| 17. A description of any approved exemption to aircraft rescue and firefighting requirements, as authorized under § 139.111 | X | X | X | X |

REQUIRED AIRPORT CERTIFICATION MANUAL ELEMENTS—Continued

| Manual elements | Airport certificate class | | | |
|---|---|---|---|---|
| | Class I | Class II | Class III | Class IV |
| 18. Procedures for protecting persons and property during the storing, dispensing, and handling of fuel and other hazardous substances and materials, as required under § 139.321 | X | X | X | X |
| 19. A description of, and procedures for maintaining, the traffic and wind direction indicators, as required under § 139.323 | X | X | X | X |
| 20. An emergency plan as required under § 139.325 | X | X | X | X |
| 21. Procedures for conducting the self-inspection program, as required under § 139.327 | X | X | X | X |
| 22. Procedures for controlling pedestrians and ground vehicles in movement areas and safety areas, as required under § 139.329 | X | X | X | |
| 23. Procedures for obstruction removal, marking, or lighting, as required under § 139.331 | X | X | X | |
| 24. Procedures for protection of NAVAIDS, as required under § 139.333 | X | X | X | |
| 25. A description of public protection, as required under § 139.335 | X | X | X | |
| 26. Procedures for wildlife hazard management, as required under § 139.337 | X | X | X | |
| 27. Procedures for airport condition reporting, as required under § 139.339 | X | X | X | X |
| 28. Procedures for identifying, marking, and lighting construction and other unserviceable areas, as required under § 139.341 | X | X | X | |
| 29. Any other item that the Administrator finds is necessary to ensure safety in air transportation | X | X | X | X |

**§ 139.205 Amendment of Airport Certification Manual.**

(a) Under § 139.3, the Regional Airports Division Manager may amend any Airport Certification Manual approved under this part, either—

(1) Upon application by the certificate holder or

(2) On the Regional Airports Division Manager's own initiative, if the Regional Airports Division Manager determines that safety in air transportation requires the amendment.

(b) A certificate holder shall submit in writing a proposed amendment to its Airport Certification Manual to the Regional Airports Division Manager at least 30 days before the proposed effective date of the amendment, unless a shorter filing period is allowed by the Regional Airports Division Manager.

(c) At any time within 30 days after receiving a notice of refusal to approve the application for amendment, the certificate holder may petition the Associate Administrator for Airports to reconsider the refusal to amend.

(d) In the case of amendments initiated by the FAA, the Regional Airports Division Manager notifies the certificate holder of the proposed amendment, in writing, fixing a reasonable period (but not less than 7 days) within which the certificate holder may submit written information, views, and arguments on the amendment. After considering all relevant material presented, the Regional Airports Division Manager notifies the certificate holder within 30 days of any amendment adopted or rescinds the notice. The amendment becomes effective not less than 30 days after the certificate holder receives notice of it, except that, prior to the effective date, the certificate holder may petition the Associate Administrator for Airports to reconsider the amendment, in which case its effective date is stayed pending a decision by the Associate Administrator for Airports.

(e) Notwithstanding the provisions of paragraph (d) of this section, if the Regional Airports Division Manager finds there is an emergency requiring immediate action with respect to safety in air transportation, the Regional Airports Division Manager may issue an amendment, effective without stay on the date the certificate holder receives notice of it. In such a case, the Regional Airports Division Manager incorporates the finding of the emergency and a brief statement of the reasons for the finding in the notice of the amendment. Within 30 days after the issuance of such an emergency amendment, the certificate holder may petition the Associate Administrator for Airports to reconsider either the finding of an emergency, the amendment itself, or both. This petition does not automatically stay the effectiveness of the emergency amendment.

## Subpart D—Operations

**§ 139.301 Records.**

In a manner authorized by the Administrator, each certificate holder shall—

(a) Furnish upon request by the Administrator all records required to be maintained under this part.

(b) Maintain records required under this part as follows:

(1) *Personnel training.* Twenty-four consecutive calendar months for personnel training records, as required under §§ 139.303 and 139.327.

(2) *Emergency personnel training.* Twenty-four consecutive calendar months for aircraft rescue and firefighting and emergency medical service personnel training records, as required under § 139.319.

(3) *Airport fueling agent inspection.* Twelve consecutive calendar months for records of inspection of airport fueling agents, as required under § 139.321.

(4) *Fueling personnel training.* Twelve consecutive calendar months for training records of fueling personnel, as required under § 139.321.

(5) *Self-inspection.* Twelve consecutive calendar months for self-inspection records, as required under § 139.327.

(6) *Movement areas and safety areas training.* Twenty-four consecutive calendar months for records of training given to pedestrians and ground vehicle operators with access to movement areas and safety areas, as required under § 139.329.

(7) *Accident and incident.* Twelve consecutive calendar months for each accident or incident in movement areas and safety areas involving an air carrier aircraft and/or ground vehicle, as required under § 139.329.

(8) *Airport condition.* Twelve consecutive calendar months for records of airport condition information dissemination, as required under § 139.339.

(c) Make and maintain any additional records required by the Administrator, this part, and the Airport Certification Manual.

**§ 139.303 Personnel.**

In a manner authorized by the Administrator, each certificate holder shall—

(a) Provide sufficient and qualified personnel to comply with the requirements of its Airport Certification Manual and the requirements of this part.

(b) Equip personnel with sufficient resources needed to comply with the requirements of this part.

(c) Train all personnel who access movement areas and safety areas and perform duties in compliance with the requirements of the Airport Certification Manual and the requirements of this part. This training shall be completed prior to the initial performance of such duties and at least once every 12 consecutive calendar months. The curriculum for initial and recurrent training shall include at least the following areas:

(1) Airport familiarization, including airport marking, lighting, and signs system.

(2) Procedures for access to, and operation in, movement areas and safety areas, as specified under § 139.329.

(3) Airport communications, including radio communication between the air traffic control tower and personnel, use of the common traffic advisory frequency if there is no air traffic control tower or the tower is not in operation, and procedures for reporting unsafe airport conditions.

(4) Duties required under the Airport Certification Manual and the requirements of this part.

(5) Any additional subject areas required under §§ 139.319, 139.321, 139.327, 139.329, 139.337, and 139.339, as appropriate.

(d) Make a record of all training completed after June 9, 2004 by each individual in compliance with this section that includes, at a minimum, a description and date of training received. Such records shall be maintained for 24 consecutive calendar months after completion of training.

(e) As appropriate, comply with the following training requirements of this part:

(i) § 139.319, Aircraft rescue and firefighting: Operational requirements;

(ii) § 139.321, Handling and storage of hazardous substances and materials;

(iii) § 139.327, Self-inspection program;

(iv) § 139.329, Pedestrians and Ground Vehicles;

(v) § 139.337, Wildlife hazard management; and

(vi) § 139.339, Airport condition reporting.

(f) Use an independent organization, or designee, to comply with the requirements of its Airport Certification Manual and the requirements of this part only if—

(1) Such an arrangement is authorized by the Administrator;

(2) A description of responsibilities and duties that will be assumed by an independent organization or designee is specified in the Airport Certification Manual; and

(3) The independent organization or designee prepares records required under this part in sufficient detail to assure the certificate holder and the Administrator of adequate compliance with the Airport Certification Manual and the requirements of this part.

**§ 139.305 Paved areas.**

(a) In a manner authorized by the Administrator, each certificate holder shall maintain, and promptly repair the pavement of, each runway, taxiway, loading ramp, and parking area on the airport that is available for air carrier use as follows:

(1) The pavement edges shall not exceed 3 inches difference in elevation between abutting pavement sections and between pavement and abutting areas.

(2) The pavement shall have no hole exceeding 3 inches in depth nor any hole the slope of which from any point in the hole to the nearest point at the lip of the hole is 45 degrees or greater, as measured from the pavement surface plane, unless, in either case, the entire area of the hole can be covered by a 5-inch diameter circle.

(3) The pavement shall be free of cracks and surface variations that could impair directional control of air carrier aircraft. Any pavement crack or surface deterioration that produces loose aggregate or other contaminants shall be immediately repaired.

(4) Except as provided in paragraph (b) of this section, mud, dirt, sand, loose aggregate, debris, foreign objects, rubber deposits, and other contaminants shall be removed promptly and as completely as practicable.

(5) Except as provided in paragraph (b) of this section, any chemical solvent that is used to clean any pavement area shall be removed as soon as possible, consistent with the instructions of the manufacturer of the solvent.

(6) The pavement shall be sufficiently drained and free of depressions to prevent ponding that obscures markings or impairs safe aircraft operations.

(b) Paragraphs (a)(4) and (a)(5) of this section do not apply to snow and ice accumulations and their control, including the associated use of materials, such as sand and deicing solutions.

(c) FAA Advisory Circulars contain methods and procedures for the maintenance and configuration of paved areas that are acceptable to the Administrator.

**§ 139.307 Unpaved areas.**

(a) In a manner authorized by the Administrator, each certificate holder shall maintain and promptly repair the surface of each gravel, turf, or other unpaved runway, taxiway, or loading ramp and parking area on the airport that is available for air carrier use as follows:

(1) No slope from the edge of the full-strength surfaces downward to the existing terrain shall be steeper than 2:1.

(2) The full-strength surfaces shall have adequate crown or grade to assure sufficient drainage to prevent ponding.

(3) The full-strength surfaces shall be adequately compacted and sufficiently stable to prevent rutting by aircraft or the loosening or build-up of surface material, which could impair directional control of aircraft or drainage.

(4) The full-strength surfaces must have no holes or depressions that exceed 3 inches in depth and are of a breadth capable of impairing directional control or causing damage to an aircraft.

(5) Debris and foreign objects shall be promptly removed from the surface.

(b) FAA Advisory Circulars contain methods and procedures for the maintenance and configuration of unpaved areas that are acceptable to the Administrator.

**§ 139.309 Safety areas.**

(a) In a manner authorized by the Administrator, each certificate holder shall provide and maintain, for each runway and taxiway that is available for air carrier use, a safety area of at least the dimensions that—

(1) Existed on December 31, 1987, if the runway or taxiway had a safety area on December 31, 1987, and if no reconstruction or significant expansion of the runway or taxiway was begun on or after January 1, 1988; or

(2) Are authorized by the Administrator at the time the construction, reconstruction, or expansion began if construction, reconstruction, or significant expansion of the runway or taxiway began on or after January 1, 1988.

(b) Each certificate holder shall maintain its safety areas as follows:

(1) Each safety area shall be cleared and graded and have no potentially

hazardous ruts, humps, depressions, or other surface variations.

(2) Each safety area shall be drained by grading or storm sewers to prevent water accumulation.

(3) Each safety area shall be capable under dry conditions of supporting snow removal and aircraft rescue and firefighting equipment and of supporting the occasional passage of aircraft without causing major damage to the aircraft.

(4) No objects may be located in any safety area, except for objects that need to be located in a safety area because of their function. These objects shall be constructed, to the extent practical, on frangibly mounted structures of the lowest practical height, with the frangible point no higher than 3 inches above grade.

(c) FAA Advisory Circulars contain methods and procedures for the configuration and maintenance of safety areas acceptable to the Administrator.

**§ 139.311 Marking, signs, and lighting.**

(a) *Marking.* Each certificate holder shall provide and maintain marking systems for air carrier operations on the airport that are authorized by the Administrator and consist of at least the following:

(1) Runway markings meeting the specifications for takeoff and landing minimums for each runway.

(2) A taxiway centerline.

(3) Taxiway edge markings, as appropriate.

(4) Holding position markings.

(5) Instrument landing system (ILS) critical area markings.

(b) *Signs.* (1) Each certificate holder shall provide and maintain sign systems for air carrier operations on the airport that are authorized by the Administrator and consist of at least the following:

(i) Signs identifying taxiing routes on the movement area.

(ii) Holding position signs.

(iii) Instrument landing system (ILS) critical area signs.

(2) Unless otherwise authorized by the Administrator, the signs required by paragraph (b)(1) of this section shall be internally illuminated at each Class I, II, and IV airport.

(3) Unless otherwise authorized by the Administrator, the signs required by paragraphs (b)(1)(ii) and (b)(1)(iii) of this section shall be internally illuminated at each Class III airport.

(c) *Lighting.* Each certificate holder shall provide and maintain lighting systems for air carrier operations when the airport is open at night, during conditions below visual flight rules (VFR) minimums, or in Alaska, during periods in which a prominent unlighted object cannot be seen from a distance of 3 statute miles or the sun is more than six degrees below the horizon. These lighting systems shall be authorized by the Administrator and consist of at least the following:

(1) Runway lighting that meets the specifications for takeoff and landing minimums, as authorized by the Administrator, for each runway.

(2) One of the following taxiway lighting systems:

(i) Centerline lights.

(ii) Centerline reflectors.

(iii) Edge lights.

(iv) Edge reflectors.

(3) An airport beacon.

(4) Approach lighting that meets the specifications for takeoff and landing minimums, as authorized by the Administrator, for each runway, unless provided and/or maintained by an entity other than the certificate holder.

(5) Obstruction marking and lighting, as appropriate, on each object within its authority that has been determined by the FAA to be an obstruction.

(d) *Maintenance.* Each certificate holder shall properly maintain each marking, sign, or lighting system installed and operated on the airport. As used in this section, to "properly maintain" includes cleaning, replacing, or repairing any faded, missing, or nonfunctional item; keeping each item unobscured and clearly visible; and ensuring that each item provides an accurate reference to the user.

(e) *Lighting interference.* Each certificate holder shall ensure that all lighting on the airport, including that for aprons, vehicle parking areas, roadways, fuel storage areas, and buildings, is adequately adjusted or shielded to prevent interference with air traffic control and aircraft operations.

(f) *Standards.* FAA Advisory Circulars contain methods and procedures for the equipment, material, installation, and maintenance of marking, sign, and lighting systems listed in this section that are acceptable to the Administrator.

(g) *Implementation.* The sign systems required under paragraph (b)(3) of this section shall be implemented by each holder of a Class III Airport Operating Certificate not later than 36 consecutive calendar months after June 9, 2004.

**§ 139.313 Snow and ice control.**

(a) As determined by the Administrator, each certificate holder whose airport is located where snow and icing conditions occur shall prepare, maintain, and carry out a snow and ice control plan in a manner authorized by the Administrator.

(b) The snow and ice control plan required by this section shall include, at a minimum, instructions and procedures for—

(1) Prompt removal or control, as completely as practical, of snow, ice, and slush on each movement area;

(2) Positioning snow off the movement area surfaces so all air carrier aircraft propellers, engine pods, rotors, and wing tips will clear any snowdrift and snowbank as the aircraft's landing gear traverses any portion of the movement area;

(3) Selection and application of authorized materials for snow and ice control to ensure that they adhere to snow and ice sufficiently to minimize engine ingestion;

(4) Timely commencement of snow and ice control operations; and

(5) Prompt notification, in accordance with § 139.339, of all air carriers using the airport when any portion of the movement area normally available to them is less than satisfactorily cleared for safe operation by their aircraft.

(c) FAA Advisory Circulars contain methods and procedures for snow and ice control equipment, materials, and removal that are acceptable to the Administrator.

**§ 139.315 Aircraft rescue and firefighting: Index determination.**

(a) An index is required by paragraph (c) of this section for each certificate holder. The Index is determined by a combination of—

(1) The length of air carrier aircraft and

(2) Average daily departures of air carrier aircraft.

(b) For the purpose of Index determination, air carrier aircraft lengths are grouped as follows:

(1) Index A includes aircraft less than 90 feet in length.

(2) Index B includes aircraft at least 90 feet but less than 126 feet in length.

(3) Index C includes aircraft at least 126 feet but less than 159 feet in length.

(4) Index D includes aircraft at least 159 feet but less than 200 feet in length.

(5) Index E includes aircraft at least 200 feet in length.

(c) Except as provided in § 139.319(c), if there are five or more average daily departures of air carrier aircraft in a single Index group serving that airport, the longest aircraft with an average of five or more daily departures determines the Index required for the airport. When there are fewer than five average daily departures of the longest air carrier aircraft serving the airport, the Index required for the airport will be the next lower Index group than the Index group prescribed for the longest aircraft.

(d) The minimum designated index shall be Index A.

(e) A holder of a Class III Airport Operating Certificate may comply with this section by providing a level of safety comparable to Index A that is approved by the Administrator. Such alternate compliance must be described in the ACM and must include:

(i) Pre-arranged firefighting and emergency medical response procedures, including agreements with responding services.

(ii) Means for alerting firefighting and emergency medical response personnel.

(iii) Type of rescue and firefighting equipment to be provided.

(iv) Training of responding firefighting and emergency medical personnel on airport familiarization and communications.

**§ 139.317 Aircraft rescue and firefighting: Equipment and agents.**

Unless otherwise authorized by the Administrator, the following rescue and firefighting equipment and agents are the minimum required for the Indexes referred to in § 139.315:

(a) *Index A.* One vehicle carrying at least—

(1) 500 pounds of sodium-based dry chemical, halon 1211, or clean agent; or

(2) 450 pounds of potassium-based dry chemical and water with a commensurate quantity of AFFF to total 100 gallons for simultaneous dry chemical and AFFF application.

(b) *Index B.* Either of the following:

(1) One vehicle carrying at least 500 pounds of sodium-based dry chemical, halon 1211, or clean agent and 1,500 gallons of water and the commensurate quantity of AFFF for foam production.

(2) Two vehicles—

(i) One vehicle carrying the extinguishing agents as specified in paragraphs (a)(1) or (a)(2) of this section; and

(ii) One vehicle carrying an amount of water and the commensurate quantity of AFFF so the total quantity of water for foam production carried by both vehicles is at least 1,500 gallons.

(c) *Index C.* Either of the following:

(1) Three vehicles—

(i) One vehicle carrying the extinguishing agents as specified in paragraph (a)(1) or (a)(2) of this section; and

(ii) Two vehicles carrying an amount of water and the commensurate quantity of AFFF so the total quantity of water for foam production carried by all three vehicles is at least 3,000 gallons.

(2) Two vehicles—

(i) One vehicle carrying the extinguishing agents as specified in paragraph (b)(1) of this section; and

(ii) One vehicle carrying water and the commensurate quantity of AFFF so the total quantity of water for foam production carried by both vehicles is at least 3,000 gallons.

(d) *Index D.* Three vehicles—

(1) One vehicle carrying the extinguishing agents as specified in paragraphs (a)(1) or (a)(2) of this section; and

(2) Two vehicles carrying an amount of water and the commensurate quantity of AFFF so the total quantity of water for foam production carried by all three vehicles is at least 4,000 gallons.

(e) *Index E.* Three vehicles—

(1) One vehicle carrying the extinguishing agents as specified in paragraphs (a)(1) or (a)(2) of this section; and

(2) Two vehicles carrying an amount of water and the commensurate quantity of AFFF so the total quantity of water for foam production carried by all three vehicles is at least 6,000 gallons.

(f) *Foam discharge capacity.* Each aircraft rescue and firefighting vehicle used to comply with Index B, C, D, or E requirements with a capacity of at least 500 gallons of water for foam production shall be equipped with a turret. Vehicle turret discharge capacity shall be as follows:

(1) Each vehicle with a minimum-rated vehicle water tank capacity of at least 500 gallons, but less than 2,000 gallons, shall have a turret discharge rate of at least 500 gallons per minute, but not more than 1,000 gallons per minute.

(2) Each vehicle with a minimum-rated vehicle water tank capacity of at least 2,000 gallons shall have a turret discharge rate of at least 600 gallons per minute, but not more than 1,200 gallons per minute.

(g) *Agent discharge capacity.* Each aircraft rescue and firefighting vehicle that is required to carry dry chemical, halon 1211, or clean agent for compliance with the Index requirements of this section must meet one of the following minimum discharge rates for the equipment installed:

(1) Dry chemical, halon 1211, or clean agent through a hand line—5 pounds per second.

(2) Dry chemical, halon 1211, or clean agent through a turret—16 pounds per second.

(h) *Extinguishing agent substitutions.* Other extinguishing agent substitutions authorized by the Administrator may be made in amounts that provide equivalent firefighting capability.

(i) *AFFF quantity requirements.* In addition to the quantity of water required, each vehicle required to carry AFFF shall carry AFFF in an appropriate amount to mix with twice the water required to be carried by the vehicle.

(j) *Methods and procedures.* FAA Advisory Circulars contain methods and procedures for ARFF equipment and extinguishing agents that are acceptable to the Administrator.

(k) *Implementation.* Each holder of a Class II, III, or IV Airport Operating Certificate shall implement the requirements of this section no later than 36 consecutive calendar months after .

**§ 139.319 Aircraft rescue and firefighting: Operational requirements.**

(a) *Rescue and firefighting capability.* Except as provided in paragraph (c) of this section, each certificate holder shall provide on the airport, during air carrier operations at the airport, at least the rescue and firefighting capability specified for the Index required by § 139.317 in a manner authorized by the Administrator.

(b) *Increase in Index.* Except as provided in paragraph (c) of this section, if an increase in the average daily departures or the length of air carrier aircraft results in an increase in the Index required by paragraph (a) of this section, the certificate holder shall comply with the increased requirements.

(c) *Reduction in rescue and firefighting.* During air carrier operations with only aircraft shorter than the Index aircraft group required by paragraph (a) of this section, the certificate holder may reduce the rescue and firefighting to a lower level corresponding to the Index group of the longest air carrier aircraft being operated.

(d) *Procedures for reduction in capability.* Any reduction in the rescue and firefighting capability from the Index required by paragraph (a) of this section, in accordance with paragraph (c) of this section, shall be subject to the following conditions:

(1) Procedures for, and the persons having the authority to implement, the reductions must be included in the Airport Certification Manual.

(2) A system and procedures for recall of the full aircraft rescue and firefighting capability must be included in the Airport Certification Manual.

(3) The reductions may not be implemented unless notification to air carriers is provided in the Airport/Facility Directory or Notices to Airmen (NOTAM), as appropriate, and by direct notification of local air carriers.

(e) *Vehicle communications.* Each vehicle required under § 139.317 shall be equipped with two-way voice radio communications that provide for contact with at least—

(1) All other required emergency vehicles;

(2) The air traffic control tower;

(3) The common traffic advisory frequency when an air traffic control tower is not in operation or there is no air traffic control tower, and

(4) Fire stations, as specified in the airport emergency plan.

(f) *Vehicle marking and lighting.* Each vehicle required under § 139.317 shall—

(1) Have a flashing or rotating beacon and

(2) Be painted or marked in colors to enhance contrast with the background environment and optimize daytime and nighttime visibility and identification.

(g) *Vehicle readiness.* Each vehicle required under § 139.317 shall be maintained as follows:

(1) The vehicle and its systems shall be maintained so as to be operationally capable of performing the functions required by this subpart during all air carrier operations.

(2) If the airport is located in a geographical area subject to prolonged temperatures below 33 degrees Fahrenheit, the vehicles shall be provided with cover or other means to ensure equipment operation and discharge under freezing conditions.

(3) Any required vehicle that becomes inoperative to the extent that it cannot perform as required by paragraph (h)(1) of this section shall be replaced immediately with equipment having at least equal capabilities. If replacement equipment is not available immediately, the certificate holder shall so notify the Regional Airports Division Manager and each air carrier using the airport in accordance with § 139.339. If the required Index level of capability is not restored within 48 hours, the airport operator, unless otherwise authorized by the Administrator, shall limit air carrier operations on the airport to those compatible with the Index corresponding to the remaining operative rescue and firefighting equipment.

(h) *Response requirements.* (1) With the aircraft rescue and firefighting equipment required under this part and the number of trained personnel that will assure an effective operation, each certificate holder shall—

(i) Respond to each emergency during periods of air carrier operations; and

(ii) When requested by the Administrator, demonstrate compliance with the response requirements specified in this section.

(2) The response required by paragraph (h)(1)(ii) of this section shall achieve the following performance criteria:

(i) Within 3 minutes from the time of the alarm, at least one required aircraft rescue and firefighting vehicle shall reach the midpoint of the farthest runway serving air carrier aircraft from its assigned post or reach any other specified point of comparable distance on the movement area that is available to air carriers, and begin application of extinguishing agent.

(ii) Within 4 minutes from the time of alarm, all other required vehicles shall reach the point specified in paragraph (h)(2)(i) of this section from their assigned posts and begin application of an extinguishing agent.

(i) *Personnel.* Each certificate holder shall ensure the following:

(1) All rescue and firefighting personnel are equipped in a manner authorized by the Administrator with protective clothing and equipment needed to perform their duties.

(2) All rescue and firefighting personnel are properly trained to perform their duties in a manner authorized by the Administrator. Such personnel shall be trained prior to initial performance of rescue and firefighting duties and receive recurrent instruction every 12 consecutive calendar months. The curriculum for initial and recurrent training shall include at least the following areas:

(i) Airport familiarization, including airport signs, marking, and lighting.

(ii) Aircraft familiarization.

(iii) Rescue and firefighting personnel safety.

(iv) Emergency communications systems on the airport, including fire alarms.

(v) Use of the fire hoses, nozzles, turrets, and other appliances required for compliance with this part.

(vi) Application of the types of extinguishing agents required for compliance with this part.

(vii) Emergency aircraft evacuation assistance.

(viii) Firefighting operations.

(ix) Adapting and using structural rescue and firefighting equipment for aircraft rescue and firefighting.

(x) Aircraft cargo hazards, including hazardous materials/dangerous goods incidents.

(xi) Familiarization with firefighters' duties under the airport emergency plan.

(3) All rescue and firefighting personnel shall participate in at least one live-fire drill prior to initial performance of rescue and firefighting duties and every 12 consecutive calendar months thereafter.

(4) At least one individual, who has been trained and is current in basic emergency medical services, is available during air carrier operations. This individual shall be trained prior to initial performance of emergency medical services. Training shall be at a minimum 40 hours in length and cover the following topics:

(i) Bleeding.

(ii) Cardiopulmonary resuscitation.

(iii) Shock.

(iv) Primary patient survey.

(v) Injuries to the skull, spine, chest, and extremities.

(vi) Internal injuries.

(vii) Moving patients.

(viii) Burns.

(ix) Triage.

(5) A record is maintained of all training given to each individual under this section for 24 consecutive calendar months after completion of training. Such records shall include, at a minimum, a description and date of training received.

(6) Sufficient rescue and firefighting personnel are available during all air carrier operations to operate the vehicles, meet the response times, and meet the minimum agent discharge rates required by this part.

(7) Procedures and equipment are established and maintained for alerting rescue and firefighting personnel by siren, alarm, or other means authorized by the Administrator to any existing or impending emergency requiring their assistance.

(j) *Hazardous materials guidance.* Each aircraft rescue and firefighting vehicle responding to an emergency on the airport shall be equipped with, or have available through a direct communications link, the "North American Emergency Response Guidebook" published by the U.S. Department of Transportation or similar response guidance to hazardous materials/dangerous goods incidents. Information on obtaining the "North American Emergency Response Guidebook" is available from the Regional Airports Division Manager.

(k) *Emergency access roads.* Each certificate holder shall ensure that roads designated for use as emergency access roads for aircraft rescue and firefighting vehicles are maintained in a condition that will support those vehicles during all-weather conditions.

(l) *Methods and procedures.* FAA Advisory Circulars contain methods and procedures for aircraft rescue and firefighting and emergency medical equipment and training that are acceptable to the Administrator.

(m) *Implementation.* Each holder of a Class II, III, or IV Airport Operating Certificate shall implement the requirements of this section no later than 36 consecutive calendar months after June 9, 2004.

**§ 139.321 Handling and storing of hazardous substances and materials.**

(a) Each certificate holder who acts as a cargo handling agent shall establish and maintain procedures for the protection of persons and property on the airport during the handling and storing of any material regulated by the Hazardous Materials Regulations (49 CFR 171 through 180) that is, or is intended to be, transported by air. These procedures shall provide for at least the following:

(1) Designated personnel to receive and handle hazardous substances and materials.

(2) Assurance from the shipper that the cargo can be handled safely, including any special handling procedures required for safety.

(3) Special areas for storage of hazardous materials while on the airport.

(b) Each certificate holder shall establish and maintain standards authorized by the Administrator for protecting against fire and explosions in storing, dispensing, and otherwise handling fuel (other than articles and materials that are, or are intended to be, aircraft cargo) on the airport. These standards shall cover facilities, procedures, and personnel training and shall address at least the following:

(1) Bonding.

(2) Public protection.

(3) Control of access to storage areas.

(4) Fire safety in fuel farm and storage areas.

(5) Fire safety in mobile fuelers, fueling pits, and fueling cabinets.

(6) Training of fueling personnel in fire safety in accordance with paragraph (e) of this section. Such training at Class III airports must be completed within 12 consecutive calendar months after June 9, 2004.

(7) The fire code of the public body having jurisdiction over the airport.

(c) Each certificate holder shall, as a fueling agent, comply with, and require all other fueling agents operating on the airport to comply with, the standards established under paragraph (b) of this section and shall perform reasonable surveillance of all fueling activities on the airport with respect to those standards.

(d) Each certificate holder shall inspect the physical facilities of each airport tenant fueling agent at least once every 3 consecutive months for compliance with paragraph (b) of this section and maintain a record of that inspection for at least 12 consecutive calendar months.

(e) The training required in paragraph (b)(6) of this section shall include at least the following:

(1) At least one supervisor with each fueling agent shall have completed an aviation fuel training course in fire safety that is authorized by the Administrator. Such an individual shall be trained prior to initial performance of duties, or enrolled in an authorized aviation fuel training course that will be completed within 90 days of initiating duties, and receive recurrent instruction at least every 24 consecutive calendar months.

(2) All other employees who fuel aircraft, accept fuel shipments, or otherwise handle fuel shall receive at least initial on-the-job training and recurrent instruction every 24 consecutive calendar months in fire safety from the supervisor trained in accordance with paragraph (e)(1) of this section.

(f) Each certificate holder shall obtain a written confirmation once every 12 consecutive calendar months from each airport tenant fueling agent that the training required by paragraph (e) of this section has been accomplished. This written confirmation shall be maintained for 12 consecutive calendar months.

(g) Unless otherwise authorized by the Administrator, each certificate holder shall require each tenant fueling agent to take immediate corrective action whenever the certificate holder becomes aware of noncompliance with a standard required by paragraph (b) of this section. The certificate holder shall notify the appropriate FAA Regional Airports Division Manager immediately when noncompliance is discovered and corrective action cannot be accomplished within a reasonable period of time.

(h) FAA Advisory Circulars contain methods and procedures for the handling and storage of hazardous substances and materials that are acceptable to the Administrator.

**§ 139.323 Traffic and wind direction indicators.**

In a manner authorized by the Administrator, each certificate holder shall provide and maintain the following on its airport:

(a) A wind cone that visually provides surface wind direction information to pilots. For each runway available for air carrier use, a supplemental wind cone must be installed at the end of the runway or at least at one point visible to the pilot while on final approach and prior to takeoff. If the airport is open for air carrier operations at night, the wind direction indicators, including the required supplemental indicators, must be lighted.

(b) For airports serving any air carrier operation when there is no control tower operating, a segmented circle, a landing strip indicator and a traffic pattern indicator must be installed around a wind cone for each runway with a right-hand traffic pattern.

(c) FAA Advisory Circulars contain methods and procedures for the installation, lighting, and maintenance of traffic and wind indicators that are acceptable to the Administrator.

**§ 139.325 Airport emergency plan.**

(a) In a manner authorized by the Administrator, each certificate holder shall develop and maintain an airport emergency plan designed to minimize the possibility and extent of personal injury and property damage on the airport in an emergency. The plan shall—

(1) Include procedures for prompt response to all emergencies listed in paragraph (b) of this section, including a communications network;

(2) Contain sufficient detail to provide adequate guidance to each person who must implement these procedures; and

(3) To the extent practicable, provide for an emergency response for the largest air carrier aircraft in the Index group required under § 139.315.

(b) The plan required by this section must contain instructions for response to—

(1) Aircraft incidents and accidents;

(2) Bomb incidents, including designation of parking areas for the aircraft involved;

(3) Structural fires;

(4) Fires at fuel farms or fuel storage areas;

(5) Natural disaster;

(6) Hazardous materials/dangerous goods incidents;

(7) Sabotage, hijack incidents, and other unlawful interference with operations;

(8) Failure of power for movement area lighting; and

(9) Water rescue situations, as appropriate.

(c) The plan required by this section must address or include—

(1) To the extent practicable, provisions for medical services, including transportation and medical assistance for the maximum number of persons that can be carried on the largest air carrier aircraft that the airport reasonably can be expected to serve;

(2) The name, location, telephone number, and emergency capability of each hospital and other medical facility and the business address and telephone number of medical personnel on the airport or in the communities it serves who have agreed to provide medical assistance or transportation;

(3) The name, location, and telephone number of each rescue squad, ambulance service, military installation, and government agency on the airport or in the communities it serves that agrees to provide medical assistance or transportation;

(4) An inventory of surface vehicles and aircraft that the facilities, agencies, and personnel included in the plan under paragraphs (c)(2) and (3) of this section will provide to transport injured and deceased persons to locations on the airport and in the communities it serves;

(5) A list of each hangar or other building on the airport or in the communities it serves that will be used to accommodate uninjured, injured, and deceased persons;

(6) Plans for crowd control, including the name and location of each safety or security agency that agrees to provide assistance for the control of crowds in the event of an emergency on the airport; and

(7) Procedures for removing disabled aircraft, including, to the extent practical, the name, location, and telephone numbers of agencies with aircraft removal responsibilities or capabilities.

(d) The plan required by this section must provide for—

(1) The marshalling, transportation, and care of ambulatory injured and uninjured accident survivors;

(2) The removal of disabled aircraft;

(3) Emergency alarm or notification systems; and

(4) Coordination of airport and control tower functions relating to emergency actions, as appropriate.

(e) The plan required by this section shall contain procedures for notifying the facilities, agencies, and personnel who have responsibilities under the plan of the location of an aircraft accident, the number of persons involved in that accident, or any other information necessary to carry out their responsibilities, as soon as that information becomes available.

(f) The plan required by this section shall contain provisions, to the extent practicable, for the rescue of aircraft accident victims from significant bodies of water or marsh lands adjacent to the airport that are crossed by the approach and departure flight paths of air carriers. A body of water or marshland is significant if the area exceeds one-quarter square mile and cannot be traversed by conventional land rescue vehicles. To the extent practicable, the plan shall provide for rescue vehicles with a combined capacity for handling the maximum number of persons that can be carried on board the largest air carrier aircraft in the Index group required under § 139.315.

(g) Each certificate holder shall—

(1) Coordinate the plan with law enforcement agencies, rescue and firefighting agencies, medical personnel and organizations, the principal tenants at the airport, and all other persons who have responsibilities under the plan;

(2) To the extent practicable, provide for participation by all facilities, agencies, and personnel specified in paragraph (g)(1) of this section in the development of the plan;

(3) Ensure that all airport personnel having duties and responsibilities under the plan are familiar with their assignments and are properly trained; and

(4) At least once every 12 consecutive calendar months, review the plan with all of the parties with whom the plan is coordinated, as specified in paragraph (g)(1) of this section, to ensure that all parties know their responsibilities and that all of the information in the plan is current.

(h) Each holder of a Class I Airport Operating Certificate shall hold a full-scale airport emergency plan exercise at least once every 36 consecutive calendar months.

(i) Each airport subject to applicable FAA and Transportation Security Administration security regulations shall ensure that instructions for response to paragraphs (b)(2) and (b)(7) of this section in the airport emergency plan are consistent with its approved airport security program.

(j) FAA Advisory Circulars contain methods and procedures for the development of an airport emergency plan that are acceptable to the Administrator.

(k) The emergency plan required by this section shall be submitted by each holder of a Class II, III, or IV Airport Operating Certificate no later than 24 consecutive calendar months after June 9, 2004.

### § 139.327 Self-inspection program.

(a) In a manner authorized by the Administrator, each certificate holder shall inspect the airport to assure compliance with this subpart according to the following schedule:

(1) Daily, except as otherwise required by the Airport Certification Manual;

(2) When required by any unusual condition, such as construction activities or meteorological conditions, that may affect safe air carrier operations; and

(3) Immediately after an accident or incident.

(b) Each certificate holder shall provide the following:

(1) Equipment for use in conducting safety inspections of the airport;

(2) Procedures, facilities, and equipment for reliable and rapid dissemination of information between the certificate holder's personnel and air carriers; and

(3) Procedures to ensure qualified personnel perform the inspections. Such procedures shall ensure personnel are trained, as specified under § 139.303, and receive initial and recurrent instruction every 12 consecutive calendar months in at least the following areas:

(i) Airport familiarization, including airport signs, marking and lighting.

(ii) Airport emergency plan.

(iii) Notice to Airmen (NOTAM) notification procedures.

(iv) Procedures for pedestrians and ground vehicles in movement areas and safety areas.

(v) Discrepancy reporting procedures; and

(4) A reporting system to ensure prompt correction of unsafe airport conditions noted during the inspection, including wildlife strikes.

(c) Each certificate holder shall—

(1) Prepare, and maintain for at least 12 consecutive calendar months, a record of each inspection prescribed by this section, showing the conditions found and all corrective actions taken.

(2) Prepare records of all training given after June 9, 2004 to each individual in compliance with this section that includes, at a minimum, a description and date of training received. Such records shall be maintained for 24 consecutive calendar months after completion of training.

(d) FAA Advisory Circulars contain methods and procedures for the conduct of airport self-inspections that are acceptable to the Administrator.

### § 139.329 Pedestrians and ground vehicles.

In a manner authorized by the Administrator, each certificate holder shall—

(a) Limit access to movement areas and safety areas only to those pedestrians and ground vehicles necessary for airport operations;

(b) Establish and implement procedures for the safe and orderly access to, and operation in, movement areas and safety areas by pedestrians and ground vehicles, including provisions identifying the consequences of noncompliance with the procedures by an employee, tenant, or contractor;

(c) When an air traffic control tower is in operation, ensure that each pedestrian and ground vehicle in movement areas or safety areas is controlled by one of the following:

(1) Two-way radio communications between each pedestrian or vehicle and the tower;

(2) An escort with two-way radio communications with the tower accompanying any pedestrian or vehicle without a radio; or

(3) Measures authorized by the Administrator for controlling pedestrians and vehicles, such as signs, signals, or guards, when it is not operationally practical to have two-way radio communications between the tower and the pedestrian, vehicle, or escort;

(d) When an air traffic control tower is not in operation, or there is no air traffic control tower, provide adequate procedures to control pedestrians and ground vehicles in movement areas or safety areas through two-way radio communications or prearranged signs or signals;

(e) Ensure that each employee, tenant, or contractor is trained on procedures required under paragraph (b) of this section, including consequences of noncompliance, prior to moving on foot, or operating a ground vehicle, in movement areas or safety areas; and

(f) Maintain the following records:

(1) A description and date of training completed after June 9, 2004 by each individual in compliance with this section. A record for each individual shall be maintained for 24 consecutive months after the termination of an individual's access to movement areas and safety areas.

(2) A description and date of any accidents or incidents in the movement areas and safety areas involving air carrier aircraft, a ground vehicle or a pedestrian. Records of each accident or incident occurring after the June 9, 2004 shall be maintained for 12 consecutive calendar months from the date of the accident or incident.

**§ 139.331 Obstructions.**

In a manner authorized by the Administrator, each certificate holder shall ensure that each object in each area within its authority that has been determined by the FAA to be an obstruction is removed, marked, or lighted, unless determined to be unnecessary by an FAA aeronautical study. FAA Advisory Circulars contain methods and procedures for the lighting of obstructions that are acceptable to the Administrator.

**§ 139.333 Protection of NAVAIDS.**

In a manner authorized by the Administrator, each certificate holder shall—

(a) Prevent the construction of facilities on its airport that, as determined by the Administrator, would derogate the operation of an electronic or visual NAVAID and air traffic control facilities on the airport;

(b) Protect—or if the owner is other than the certificate holder, assist in protecting—all NAVAIDS on its airport against vandalism and theft; and

(c) Prevent, insofar as it is within the airport's authority, interruption of visual and electronic signals of NAVAIDS.

**§ 139.335 Public protection.**

(a) In a manner authorized by the Administrator, each certificate holder shall provide—

(1) Safeguards to prevent inadvertent entry to the movement area by unauthorized persons or vehicles; and

(2) Reasonable protection of persons and property from aircraft blast.

(b) Fencing that meets the requirements of applicable FAA and Transportation Security Administration security regulations in areas subject to these regulations is acceptable for meeting the requirements of paragraph (a)(1) of this section.

**§ 139.337 Wildlife hazard management.**

(a) In accordance with its Airport Certification Manual and the requirements of this section, each certificate holder shall take immediate action to alleviate wildlife hazards whenever they are detected.

(b) In a manner authorized by the Administrator, each certificate holder shall ensure that a wildlife hazard assessment is conducted when any of the following events occurs on or near the airport:

(1) An air carrier aircraft experiences multiple wildlife strikes;

(2) An air carrier aircraft experiences substantial damage from striking wildlife. As used in this paragraph, substantial damage means damage or structural failure incurred by an aircraft that adversely affects the structural strength, performance, or flight characteristics of the aircraft and that would normally require major repair or replacement of the affected component;

(3) An air carrier aircraft experiences an engine ingestion of wildlife; or

(4) Wildlife of a size, or in numbers, capable of causing an event described in paragraphs (b)(1), (b)(2), or (b)(3) of this section is observed to have access to any airport flight pattern or aircraft movement area.

(c) The wildlife hazard assessment required in paragraph (b) of this section shall be conducted by a wildlife damage management biologist who has professional training and/or experience in wildlife hazard management at airports or an individual working under direct supervision of such an individual. The wildlife hazard assessment shall contain at least the following:

(1) An analysis of the events or circumstances that prompted the assessment.

(2) Identification of the wildlife species observed and their numbers, locations, local movements, and daily and seasonal occurrences.

(3) Identification and location of features on and near the airport that attract wildlife.

(4) A description of wildlife hazards to air carrier operations.

(5) Recommended actions for reducing identified wildlife hazards to air carrier operations.

(d) The wildlife hazard assessment required under paragraph (b) of this section shall be submitted to the Administrator for approval and determination of the need for a wildlife hazard management plan. In reaching this determination, the Administrator will consider—

(1) The wildlife hazard assessment;

(2) Actions recommended in the wildlife hazard assessment to reduce wildlife hazards;

(3) The aeronautical activity at the airport, including the frequency and size of air carrier aircraft;

(4) The views of the certificate holder;

(5) The views of the airport users; and

(6) Any other known factors relating to the wildlife hazard of which the Administrator is aware.

(e) When the Administrator determines that a wildlife hazard management plan is needed, the certificate holder shall formulate and implement a plan using the wildlife hazard assessment as a basis. The plan shall—

(1) Provide measures to alleviate or eliminate wildlife hazards to air carrier operations;

(2) Be submitted to, and approved by, the Administrator prior to implementation; and

(3) As authorized by the Administrator, become a part of the Airport Certification Manual.

(f) The plan shall include at least the following:

(1) A list of the individuals having authority and responsibility for implementing each aspect of the plan.

(2) A list prioritizing the following actions identified in the wildlife hazard assessment and target dates for their initiation and completion:

(i) Wildlife population management;

(ii) Habitat modification; and

(iii) Land use changes.

(3) Requirements for and, where applicable, copies of local, State, and Federal wildlife control permits.

(4) Identification of resources that the certificate holder will provide to implement the plan.

(5) Procedures to be followed during air carrier operations that at a minimum includes—

(i) Designation of personnel responsible for implementing the procedures;

(ii) Provisions to conduct physical inspections of the aircraft movement areas and other areas critical to successfully manage known wildlife hazards before air carrier operations begin;

(iii) Wildlife hazard control measures; and

(iv) Ways to communicate effectively between personnel conducting wildlife control or observing wildlife hazards and the air traffic control tower.

(6) Procedures to review and evaluate the wildlife hazard management plan every 12 consecutive months or following an event described in paragraphs (b)(1), (b)(2), and (b)(3) of this section, including:

(i) The plan's effectiveness in dealing with known wildlife hazards on and in the airport's vicinity and

(ii) Aspects of the wildlife hazards described in the wildlife hazard assessment that should be reevaluated.

(7) A training program conducted by a qualified wildlife damage management biologist to provide airport personnel with the knowledge and skills needed to successfully carry out the wildlife hazard management plan required by paragraph (d) of this section.

(g) FAA Advisory Circulars contain methods and procedures for wildlife hazard management at airports that are acceptable to the Administrator.

**§ 139.339 Airport condition reporting.**

In a manner authorized by the Administrator, each certificate holder shall—

(a) Provide for the collection and dissemination of airport condition information to air carriers.

(b) In complying with paragraph (a) of this section, use the NOTAM system, as appropriate, and other systems and procedures authorized by the Administrator.

(c) In complying with paragraph (a) of this section, provide information on the following airport conditions that may affect the safe operations of air carriers:

(1) Construction or maintenance activity on movement areas, safety areas, or loading ramps and parking areas.

(2) Surface irregularities on movement areas, safety areas, or loading ramps and parking areas.

(3) Snow, ice, slush, or water on the movement area or loading ramps and parking areas.

(4) Snow piled or drifted on or near movement areas contrary to § 139.313.

(5) Objects on the movement area or safety areas contrary to § 139.309.

(6) Malfunction of any lighting system, holding position signs, or ILS critical area signs required by § 139.311.

(7) Unresolved wildlife hazards as identified in accordance with § 139.337.

(8) Nonavailability of any rescue and firefighting capability required in §§ 139.317 or 139.319.

(9) Any other condition as specified in the Airport Certification Manual or that may otherwise adversely affect the safe operations of air carriers.

(d) Each certificate holder shall prepare and keep, for at least 12 consecutive calendar months, a record of each dissemination of airport condition information to air carriers prescribed by this section.

(e) FAA Advisory Circulars contain methods and procedures for using the NOTAM system and the dissemination of airport information that are acceptable to the Administrator.

**§ 139.341 Identifying, marking, and lighting construction and other unserviceable areas.**

(a) In a manner authorized by the Administrator, each certificate holder shall—

(1) Mark and, if appropriate, light in a manner authorized by the Administrator—

(i) Each construction area and unserviceable area that is on or adjacent to any movement area or any other area of the airport on which air carrier aircraft may be operated;

(ii) Each item of construction equipment and each construction roadway, which may affect the safe movement of aircraft on the airport; and

(iii) Any area adjacent to a NAVAID that, if traversed, could cause derogation of the signal or the failure of the NAVAID; and

(2) Provide procedures, such as a review of all appropriate utility plans prior to construction, for avoiding damage to existing utilities, cables, wires, conduits, pipelines, or other underground facilities.

(b) FAA Advisory Circulars contain methods and procedures for identifying and marking construction areas that are acceptable to the Administrator.

**§ 139.343 Noncomplying conditions.**

Unless otherwise authorized by the Administrator, whenever the requirements of subpart D of this part cannot be met to the extent that uncorrected unsafe conditions exist on the airport, the certificate holder shall limit air carrier operations to those portions of the airport not rendered unsafe by those conditions.

Issued in Washington, DC on January 28, 2004.

**Marion C. Blakey,**

*Administrator.*

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Part III

# Securities and Exchange Commission

17 CFR Parts 239, 240, and 274

**Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds; Proposed Rule**

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 239, 240 and 274**

**[Release Nos. 33–8358; 34–49148; IC–26341; File No. S7–06–04]**

**RIN 3235–AJ11; 3235–AJ12; 3235–AJ13; 3235–AJ14**

# Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission is proposing two new rules and rule amendments under the Securities Exchange Act of 1934 that are designed to enhance the information broker-dealers provide to their customers in connection with transactions in certain types of securities. The two new rules would require broker-dealers to provide their customers with targeted information, at the point of sale and in transaction confirmations, regarding the costs and conflicts of interest that arise from the distribution of mutual fund shares, unit investment trust interests (including insurance securities), and municipal fund securities used for education savings. The Commission is also proposing conforming amendments to its general confirmation rule, as well as amendments to that rule to provide investors with additional information about call features of debt securities and preferred stock. Finally, the Commission is proposing amendments to Form N–1A, the registration form for mutual funds, to improve disclosure of sales loads and revenue sharing.

**DATES:** Comments must be submitted on or before April 12, 2004.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, 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 comment letters should refer to File No. S7–06–04; this file number should be included on the subject line if E-mail is used. Comment letters will be available for inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov*).[1]

**FOR FURTHER INFORMATION CONTACT:** With respect to Securities Exchange Act rules 10b–10, 15c2–2, and 15c2–3, contact Catherine McGuire, Chief Counsel, Paula R. Jenson, Deputy Chief Counsel, Joshua S. Kans, Special Counsel, or David W. Blass, Attorney, at 202/942–0073, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–1001.

With respect to Form N–1A, contact Tara L. Royal, Senior Counsel, Office of Disclosure Regulation, at 202/942–0721, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0506.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission ("SEC" or "Commission") is publishing for comment proposed rules 15c2–2 and 15c2–3, as well as amendments to rule 10b–10 under the Securities Exchange Act of 1934 ("Exchange Act") and proposed amendments to Form N–1A under the Securities Act of 1933 ("Securities Act") and the Investment Company Act of 1940 ("Investment Company Act").

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## I. Executive Summary

The Commission is publishing for comment two proposed new rules and rule amendments under the Exchange Act. The proposed new rules seek to improve investor access to material information about investments in open-end management investment company securities, unit investment trust interests, and municipal fund securities used for education savings. The proposals would accomplish that by requiring brokers, dealers and municipal securities dealers[2] to make additional disclosures, beyond those currently required, in transaction confirmations that they provide to customers at the time of a transaction, and also by requiring point of sale disclosure of material information prior to the transaction.

The proposed new confirmation rules would require brokers, dealers and municipal securities dealers to provide customers with information about distribution-related costs that investors incur when they purchase those types of securities. The confirmation rule proposals would also require disclosure of distribution-related arrangements involving those types of securities that pose conflicts of interest for brokers, dealers and municipal securities dealers, as well as their associated persons. These disclosures would promote more informed decision-making by investors in securities issued by open-end management investment companies (also referred to here as "mutual funds" or "funds"), interests issued by unit investment trusts or "UITs" (including insurance company separate accounts that offer variable annuity contracts and variable life insurance policies) and securities issued by education savings "529" plans.

The proposed new point of sale disclosure rule would require brokers, dealers and municipal securities dealers to provide point of sale disclosure to customers about costs and conflicts of interest. In contrast to confirmation disclosure, which a customer will not receive in writing until after a transaction has been effected, point of sale disclosure would specifically require that investors be provided with information that they can use as they determine whether to enter into a transaction to purchase one of those types of securities.

The proposed new point of sale disclosure and confirmation rules and rule amendments also would clarify that the rules do not provide safe harbors for activity that would violate the antifraud provisions of the federal securities laws or other legal requirements.

[1] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

[2] These proposed rules would apply to banks that act as municipal securities dealers in transactions involving municipal fund securities.

We are also proposing amendments to the Commission's general confirmation rule to require broker-dealers to provide customers with additional information in connection with transactions in callable preferred stock and debt securities, and to make additional conforming and technical changes to the rule.

Finally, we are proposing to amend Form N–1A, the registration form used by mutual funds to register under the Investment Company Act and to offer their securities under the Securities Act, to require improved disclosure regarding sales loads and revenue sharing arrangements.

In proposing this rule, we have requested comments on a variety of issues. We wish to emphasize that we particularly hope to receive comments from investors. As part of this proposed rulemaking, we have also proposed new forms for confirmation disclosure and point of sale disclosure. We want to know whether the forms clearly communicate the information that investors need to make investment decisions, and whether the forms will provide investors with the information they need, at the time they need it.

## II. Introduction

The Commission is proposing new rule 15c2–2 under the Exchange Act, which would govern the obligations of brokers (including municipal securities brokers),[3] dealers and municipal securities dealers to disclose transaction-related information in confirmations or other documents when customers buy or sell certain investment company securities and municipal fund securities.[4] The Commission also is proposing new rule 15c2–3 under the Exchange Act, which would govern the obligation of brokers, dealers and municipal securities dealers to disclose information to investors prior to effecting transactions in those securities.

The proposed new rules respond to concerns that investors in mutual fund shares, UIT interests (including certain insurance company separate accounts that issue variable insurance products) and municipal fund securities used for education savings lack adequate information about certain distribution-related costs, as well as certain distribution arrangements, that create conflicts of interest for brokers, dealers, municipal securities dealers, and their associated persons. Those costs and other distribution arrangements have evolved substantially since 1977, when the Commission adopted its general confirmation rule, rule 10b–10.[5] We believe that disclosure of information about those costs and conflicts can help investors make better informed investment decisions.

Proposed rule 15c2–2 would require specific confirmation disclosure of information about front-end and deferred sales fees ("loads") and other distribution-related costs that directly impact the returns earned by investors in mutual fund shares, UIT interests and 529 plan securities. It also would require brokers, dealers and municipal securities dealers to disclose their compensation for selling those securities, and to disclose information about revenue sharing arrangements and portfolio brokerage arrangements that create conflicts of interest for them. Moreover, the proposed rule would require brokers, dealers and municipal securities dealers to inform customers about whether their salespersons or other associated persons receive extra compensation for selling certain fund shares or fund share classes.

As part of this rulemaking process, the Commission intends to withdraw a no-action letter that the Commission's Division of Market Regulation granted to the Investment Company Institute ("ICI") in 1979, related to confirmation disclosure of mutual fund sales loads and related fees.[6] The relief granted by that letter is inconsistent with proposed rule 15c2–2, which would mandate specific disclosure of load information on customer confirmations.

To avoid redundancy with proposed new rule 15c2–2, we are also proposing to modify rule 10b–10 to exclude certain transactions in mutual fund shares and UIT interests from the rule's scope, and to make other changes consistent with proposed rule 15c2–2.[7] In addition, we are proposing to modify rule 10b–10 to clarify, consistent with proposed rule 15c2–2, that the rule does not provide a safe harbor for activity that would violate the antifraud provisions of the federal securities laws or other legal requirements.

Because confirmation disclosure does not provide information to investors prior to transactions in securities—*i.e.*, at the time they make investment decisions—we also are proposing new rule 15c2–3 to require brokers, dealers and municipal securities dealers to provide point of sale disclosure to customers prior to effecting transactions in mutual fund shares, UIT interests and 529 plan securities. The proposed rule would enable investors to see transaction-specific information about distribution-related costs, and about remuneration arrangements that lead to conflicts of interest for their brokers, dealers or municipal securities dealers. That information would enable investors to better understand the costs and conflicts associated with investments in those securities prior to entering into transactions, which should promote better informed investment decision-making. The Commission also proposes to amend Form N–1A[8] to require improved disclosure by mutual funds regarding sales loads and revenue sharing arrangements.

In addition, the Commission also proposes to amend rule 10b–10 to require broker-dealers to disclose whenever preferred stock can be called by the issuer. Rule 10b–10 requires similar disclosure for transactions in debt securities that are callable by the issuer. The Commission further proposes to amend rule 10b–10 to require disclosure of the date of first call for certain transactions in callable debt securities.

[3] The term "broker" as used in this release also includes municipal securities brokers.

[4] The existing confirmation rule, Exchange Act rule 10b–10, would continue to govern broker-dealers' confirmation obligations for transactions in other securities.

[5] Rule 10b–10 was adopted in 1977, and it became effective the next year following amendments. *See* rule 10b–10 Adopting Release, Exchange Act Release No. 13508 (May 5, 1977), 42 FR 25318 (May 17, 1977); Exchange Act Release No. 15219 (October 6, 1978), 43 FR 47495 (October 16, 1978) (amendment related to odd-lot differentials, mark-ups and mark-downs in certain riskless principal transactions, market maker status and procedures for periodic disclosure). Rule 10b–10 replaced the Commission's previous confirmation rule, rule 15c1–4, which had been limited to transactions conducted over-the-counter. Prior to the adoption of rule 10b–10, transactions on national securities exchanges were confirmed pursuant to self-regulatory organization rules. *See* New York Stock Exchange ("NYSE") rule 409(c) (rescinded on October 6, 1978 upon effectiveness of rule 10b–10).

Rule 10b–10 subsequently has been amended several times. *See* Exchange Act Release No. 19687 (April 18, 1983), 48 FR 17583 (April 25, 1983) (related to yield, call and redemption information for debt securities, and monthly statements for transaction in money market fund shares); Exchange Act Release No. 22397 (September 11, 1985), 50 FR 37648 (September 17, 1985) (related to price and mark-up information for principal transactions in reported securities); Exchange Act Release No. 34902 (October 27, 1994), 59 FR 55006 (November 2, 1994) (related to disclosure of receipt of payment for order flow); Exchange Act Release No. 34962 (November 10, 1994), 59 FR 59612 (November 17, 1994) (related to unrated securities, price and mark-up information for principal transactions in Nasdaq small-cap and regional stock exchange-listed securities, non-SIPC broker-dealers, and factors that affect yield for asset-backed securities); Exchange Act Release No. 46471 (September 6, 2002), 67 FR 58302 (September 13, 2002) (related to securities futures products in futures accounts).

[6] *See* Letter regarding Investment Company Institute (March 19, 1979, available April 18, 1979).

[7] Rule 10b–10 does not apply to transactions in municipal securities.

[8] 17 CFR 239.15A and 274.11A.

## III. Special Request for Comments From Investors

Brokers may have conflicts of interest when they sell mutual funds and other investments. For instance, your broker may get paid more if you purchase one fund over another, or the broker may receive other fees or payments from a fund for selling its shares.

We have proposed two new forms that would require brokers to tell you how much you must pay when you buy a particular fund and how much your broker and the firm will receive for selling that fund. These two forms are designed to provide you with information at two points in time—either orally or in writing immediately before your broker places the order (which is also called the "point-of-sale") and in a written confirmation statement after the transaction occurs. The purpose of the forms is to give you enough information so that you can understand what conflicts your broker and the firm have. That way, when a broker recommends a particular fund, you can assess with full knowledge whether the investment is better for you or for your broker.

We want to know whether the forms clearly communicate the information you need to make your investment decisions. If not, why not? We further want to know whether the forms will provide you with the information you need at the time you need to receive it. If not, when would you want to receive the information? Finally, we would like to know what improvements, if any, you would make to the forms.

## IV. Improved Confirmation Disclosure for Transactions in Mutual Fund Shares, Unit Investment Trust Interests and 529 Plan Interests

### *A. Investors Need Better Disclosure About Distribution-Related Costs and Conflicts*

#### 1. Types of Distribution-Related Costs and Conflicts

This proposal is intended to improve investors' ability to obtain information about costs and conflicts arising from transactions in mutual fund shares, UIT interests, and municipal fund securities used for education savings.[9] Open-end management investment company shares and UIT interests are securities issued by investment companies that are registered with the Commission under the Investment Company Act.[10] Municipal fund securities—which are popularly known as "529" plans after the section of the Internal Revenue Code that governs the federal tax treatment of those securities—are issued by tuition programs that are sponsored by state governments to provide investment vehicles that parents and others can use to save for educational expenses.[11] While 529 plan securities differ from mutual fund shares because the states that issue those securities are not registered under the Investment Company Act, municipal fund securities can provide investors with investment alternatives that are similar to those provided by mutual fund shares. Moreover, the assets that underlie municipal fund securities may be invested in shares of registered investment companies.[12]

a. *Distribution-related costs.* Mutual fund investors may, directly or indirectly, incur distribution-related costs that can reduce their investment returns. The type and amount of those costs often vary among funds and among share classes issued by the same fund.[13] Some mutual funds issue share classes that impose sales fees, or loads, on investors when they purchase the fund shares ("front-end" sales loads). Mutual funds may also sell share classes with sales loads that investors must pay when they redeem fund shares ("deferred" or "back-end" sales loads).[14] The amount of the deferred sales load, generally calculated as the lesser of a percentage of the value of the initial investment or the account's value upon redemption, typically declines each year that the investor holds the shares, and eventually disappears entirely. Some mutual funds also use their assets to pay distribution-related expenses, including compensation of broker-dealers in connection with distributing fund shares, under plans adopted pursuant to rule 12b–1 under the Investment Company Act ("12b–1 fees").[15] Sales loads and asset-based sales charges and service fees reduce the returns that investors earn on their mutual fund investments. Not all mutual funds are sold subject to front-end or deferred sales loads or impose asset-based sales charges and service fees.

b. *Conflicts-of-interest.* As discussed in detail below, broker-dealers that sell mutual fund shares to customers may participate in distribution arrangements that create conflicts of interest for the broker-dealers as well as their personnel. Those arrangements can give broker-dealers a heightened financial incentive to sell particular funds or share classes, and therefore may lead a broker-dealer to provide some groups of funds with heightened visibility and access to the broker-dealer's sales force, or otherwise influence the way that broker-dealers and their associated persons market those funds or share classes to customers. Those arrangements therefore pose special confirmation disclosure issues. Moreover, some of those arrangements may violate NASD rules, and the failure to disclose relevant information about those arrangements—regardless of whether disclosure specifically is required by the confirmation rules—also may violate the antifraud provisions of the federal securities laws.

As part of those distribution arrangements, broker-dealers that sell mutual fund shares generally earn sales fees from the fund's principal

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[9] These proposed rules are written to exclude transactions in exchange-traded funds ("ETFs"), even though ETFs technically are open-end investment companies or unit investment trusts. ETF transactions would remain subject to the confirmation requirements of rule 10b–10.

[10] Open-end management investment companies are defined in Section 5(a)(1) of the Investment Company Act, and unit investment trusts are defined in Section 4(2) of that Act.

[11] The definition of "municipal fund security" under the rules of the Municipal Securities Rulemaking Board ("MSRB") also encompasses interests in local government investment pools. This proposal, however, would not apply to broker-dealer transactions involving interests in those investment pools. *See* Proposed paragraph (f)(12) of rule 15c2–2.

[12] Commission rules and rules of National Association of Securities Dealers, Inc. ("NASD") address broker-dealer practices for distributing mutual funds. Commission rules and rules of the MSRB address broker-dealer (including municipal securities dealer) practices for distributing municipal fund securities.

[13] See Investment Company Act Section 18(f) and rule 18f–3 thereunder (relating to multiple share classes of open-end investment companies).

[14] Based upon information filed publicly with the Commission on Form N–SAR, the Commission staff estimates that for the one year period between September 2002 and August 2003, investors in open-end investment companies paid more than $6.7 billion in aggregate sales loads, consisting of approximately $4.9 billion in front-end sales loads and $1.8 billion in deferred sales loads. In addition, funds and their affiliates paid about $13 billion in marketing and distribution payments pursuant to 12b–1 plans.

[15] Rule 12b–1 permits a fund's board of directors to adopt a plan to use fund assets to finance activities that primarily are intended to result in the sale of the fund's shares. NASD rule 2830 bars member broker-dealers from offering or selling securities of investment companies other than variable contracts if annual asset-based sales charges exceed 0.75% of net asset value, or if annual service fees for "personal service and/or maintenance of shareholder accounts" exceed 0.25% of net asset value. *See* NASD rule 2830(b)(8), (b)(9), (d)(2)(E), and (d)(5). That rule also restricts NASD members from distributing shares of funds that have excessive front-end or deferred sales loads. *See* NASD rule 2830(d).

Mutual fund principal underwriters use deferred sales loads in conjunction with rule 12b–1 fees. Usually, the deferred sales load is intended to recover amounts that the principal underwriter advances to a selling broker-dealer to compensate it for mutual fund share transactions if the customer redeems its shares before the underwriter can recover such amounts through the rule 12b–1 fee.

underwriter at the time of sale. Alternatively, the principal underwriter may pay the selling broker-dealer sales fees attributable to a particular sales transaction over time, for as long as the customer holds the shares purchased.[16] The amount of those sales fees is not uniform, however, and a broker-dealer may receive a higher fee for selling a particular dollar amount of shares issued by one fund rather than shares issued by another fund, or for selling one share class rather than other share classes issued by the same fund and available to the customer.

Broker-dealers also may be paid in other ways for distributing fund shares, such as through revenue sharing payments from a fund's investment adviser.[17] In some cases, a broker-dealer may receive payments from a fund or a fund's affiliates that are characterized as service fees, recordkeeping and transfer fees, seminar sponsorships or other types of payments that ostensibly compensate the broker-dealer for costs that it incurs as part of its mutual fund distribution activities.[18] Broker-dealers may also be compensated for distribution through receiving commissions for portfolio transactions executed on behalf of the fund or affiliated funds, even though the broker-dealer may not necessarily execute those transactions.[19]

These types of distribution-related arrangements may give broker-dealers heightened incentives to market the shares of particular mutual funds, or particular classes of fund shares. Those incentives may be reflected in a broker-dealer's use of "preferred lists" that explicitly favor the distribution of certain funds, or they may be reflected in other ways, including incentives or instructions that the broker-dealer provides to its managers or its salespersons.[20] Such incentives create conflicts between broker-dealers' financial interests and their agency duties to customers.[21]

In addition to conflicts of interest at the firm level, associated persons of broker-dealers face conflicts arising from financial incentives that promote the sale of some shares or share classes—or differential compensation." Associated persons may receive higher commissions when they sell shares of a particular fund than they would if they sold the same dollar amount of the shares of another fund.[22] They may also receive higher commissions when they sell a particular class of shares within a fund than they would if they sold the same dollar amount of another share class within that same fund.[23] Other forms of differential compensation may include a broker-dealer waiving certain fees or reimbursement of certain expenses ordinarily borne by an associated person, when the associated person sells the shares of particular mutual funds. Broker-dealers may also sponsor sales contests that provide cash compensation to representatives and managers for meeting certain sales goals.[24] Associated persons, moreover,

[16] Spreading the payment of sales fees over time is the customary method for compensating selling broker-dealers for sales of class C mutual fund shares.

[17] Revenue sharing arrangements may encompass multiple revenue streams. For example, an adviser within a fund complex may give a broker-dealer one set of payments that is linked to the broker-dealer's recent sales of shares issued by that fund complex (which would give the broker-dealer an incentive to sell more shares of that fund complex), together with another set of payments that is linked to the asset-based fees that the adviser earns in connection with shares of a fund complex held by customers of a broker-dealer (which would give the broker-dealer an incentive to keep its customers invested in that fund complex).

We understand that fund investment advisers typically make revenue-sharing payments to selling broker-dealers at the rate of between 0.20% and 0.25% of the annual gross sales of shares of a fund complex made by a broker-dealer, and between 0.01% and 0.05% of the net asset value of shares of a fund complex held by customers of a broker-dealer.

[18] The payments may be made either to the broker-dealer or to its affiliates. At times those payments may compensate the broker-dealer for work that it performs on behalf of the fund, and that the broker-dealer otherwise would not be required to perform, such as mailing certain documents (other than the prospectus) to customers. At other times, those payments may offset the broker-dealer's expenses in connection with activities that it would be required to perform in any event, such as educating personnel and maintaining records.

[19] The amount of commissions that a broker-dealer earns through portfolio brokerage arrangements often is based on its total sales of all funds issued by that mutual fund complex. Payments of portfolio brokerage commissions, however, are not invariably linked to distribution. Some mutual funds may direct portfolio transactions to a particular broker-dealer for execution without reference to the broker-dealer's success in distributing fund shares.

Broker-dealers, at times, may also execute portfolio securities transactions on a principal basis. In those cases, the firms would be compensated through mark-ups rather than through commissions.

[20] We recently took action against Morgan Stanley DW Inc. in connection with several of those practices, for violations of rule 10b–10 and the antifraud provisions of Section 17(a)(2) of the Securities Act. Morgan Stanley entered into special marketing arrangements with several funds, and was compensated in part through revenue sharing payments and portfolio brokerage commissions. In return, Morgan Stanley placed participating funds on preferred lists and otherwise specially promoted them through its sales system. Morgan Stanley also specially promoted proprietary, or affiliated, funds. Moreover, in calculating manager compensation, which it based in part on branch profitability, Morgan Stanley allocated lower overhead costs in connection with the sale of proprietary or other favored funds than it allocated in connection with the sale of less favored funds. As discussed below, Morgan Stanley also paid special incentives to registered representatives in connection with the sale of proprietary and other favored funds. Morgan Stanley's failure to disclose those practices to customers violated rule 10b–10 and Section 17(a)(2). *See In the Matter of Morgan Stanley DW Inc.*, Securities Act Release No. 8339 (November 17, 2003).

At the same time, the Commission sanctioned Morgan Stanley under Section 17(a)(2) in connection with its sale of class B mutual fund shares. Morgan Stanley failed to adequately disclose certain features that could make class A shares more attractive to customers than the class B shares it sold. Also, Morgan Stanley failed to adequately follow its compliance procedures governing large purchases of class B shares. *See id.*

The NASD also has sanctioned Morgan Stanley for regulatory violations arising from its marketing arrangements on behalf of participating funds. The NASD determined that Morgan Stanley violated NASD rule 2830(k), which prohibits a member firm from favoring the distribution of particular mutual fund shares on the basis of brokerage commissions to be paid by the fund companies and which also prohibits a member firm from allowing sales personnel from sharing in directed brokerage commissions. *See* NASD, "Disciplinary and Other NASD Actions," December 2003, at D18 (available on the Internet at *http://www.nasdr.com/pdf-text/0312dis.pdf*).

[21] Revenue sharing arrangements not only pose potential conflicts of interest, but also may have the indirect effect of reducing investors' returns by increasing the distribution-related costs incurred by funds. Even though revenue sharing is paid to broker-dealers directly by fund investment advisers, rather than out of fund assets, it is possible that some advisers may seek to increase the advisory fees that they charge the fund to finance those distribution activities. It is not clear whether that has occurred. *See* U.S. General Accounting Office, *Mutual Funds: Greater Transparency Needed in Disclosures to Investors* (June 2003) at 39 (discussing uncertainty about how revenue sharing has affected fund fees). Moreover, revenue sharing arrangements may prevent some advisers from reducing their current advisory fees.

We have noted that fund assets would be indirectly used for distribution "if any allowance were made in the investment adviser's fee to provide money to finance distribution." *See* Investment Company Act Release No. 16431 (June 13, 1988) at text accompanying note 124.

[22] If the associated person is paid a fixed percentage of the broker-dealer's fee, then he or she may earn more to sell one fund instead of another when the broker-dealer receives a higher fee for selling the first fund. Also, in some circumstances, an associated person may receive a higher percentage of the broker-dealer's compensation when he or she sells a fund that is favored by the broker-dealer (such as a fund that is affiliated with the broker-dealer or that pays revenue sharing to the broker-dealer). The latter arrangement was a factor in the Commission's recent action against Morgan Stanley, as associated persons whose annual production exceeded $1 million received a 42% payout to sell favored products but only a 40% payout to sell other products. *See In the Matter of Morgan Stanley DW Inc., supra* note 20. Associated persons with lower annual production also received higher payouts to sell favored products.

[23] Associated persons may earn more when they sell class B shares than when they sell the same dollar amount of class A shares of the same fund. Because class B shares are not associated with breakpoint discounts that can reduce the distribution costs that investors pay, broker-dealers often receive higher sales fees for distributing class B shares.

[24] NASD rules prohibit non-cash compensation through sales contests for mutual funds and variable products, except under certain conditions.

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may receive additional fees in the years after a sale, such as fees that some funds pay to broker-dealers for providing shareholder services.[25] Each of those types of arrangements may motivate broker-dealer personnel to promote the sale of some funds over others. The funds that are favored by those arrangements may include proprietary funds that are affiliated with the broker-dealer, or funds whose advisers pay revenue sharing to the broker-dealer. Differential compensation may give the associated person an incentive to improperly limit the range of mutual fund choices presented to customers, or may affect the associated person's recommendations.

UITs, which include certain insurance company separate accounts that issue variable insurance products (*i.e.*, variable annuity contracts and variable life insurance policies),[26] are subject to similar distribution-related costs and conflicts.

c. *Costs and conflicts related to 529 plans.* Compensation practices for municipal fund securities used for education savings, or "529" plans, raise many of the same issues. Those securities may be sold subject to loads that can reduce the returns they produce. At times, brokers, dealers and municipal securities dealers that distribute municipal fund securities also may participate in distribution-related arrangements that create conflicts of interest for them, including revenue sharing payments and the use of portfolio commissions to reward distribution. In some cases, a broker, dealer or municipal securities dealer chooses to distribute only the municipal fund securities issued by a particular state, and does not provide its customers with the opportunity to invest in 529 plans issued by other states, even though those other plans may have lower loads or lower expense ratios, or may provide state income tax benefits that are absent from the plans being offered.

The associated persons of brokers, dealers and municipal securities dealers selling 529 plans may also receive incentives, such as differential compensation, that create conflicts of interest for them. Moreover, in contrast to NASD rules applicable to the distribution of mutual fund shares, associated persons of brokers, dealers and municipal securities dealers are not generally precluded from receiving non-cash compensation for selling municipal fund securities.[27]

2. Current Confirmation Disclosure Requirements for Mutual Funds and Municipal Fund Securities

Rule 10b–10 under the Exchange Act requires broker-dealers to disclose specific information to their customers about securities transactions.[28] While the rule generally directs broker-dealers to disclose the required information at or before the completion of each securities transaction,[29] broker-dealers may also disclose the information monthly or quarterly in limited situations, such as when a customer has entered into a periodic plan for purchasing mutual fund shares.[30] The rule requires disclosure of, among other information, the identity of the security, the number of shares purchased or sold, and the price at which the transaction was effected. When a broker-dealer acts as the customer's agent, it must also disclose the amount of the remuneration it receives from the customer. For agency transactions in which the broker-dealer also participates in the distribution of the securities, it must disclose the source and amount of remuneration that it receives from third parties.[31]

The Commission and its staff have taken the position, with respect to mutual fund transactions, that a broker-dealer may satisfy its rule 10b–10 obligations without providing customers with a transaction-specific document that discloses information about loads or third-party remuneration, so long as the customer receives a fund prospectus that adequately discloses that information. This position had its genesis in a statement by the Commission when it adopted rule 10b–10. In response to comments related to the rule's disclosure requirement about third-party remuneration, the Commission suggested that prospectus disclosure would be an adequate substitute for confirmation disclosure, explaining:

> [I]n the case of offerings registered under the Securities Act of 1933, the final prospectus delivered to the customer should generally set forth the information required by the proviso with respect to source and amount of remuneration. * * *
>
> In such situations the information specified in the proviso need not be separately set forth in the confirmation.[32]

In other words, the Commission was of the view that broker-dealer disclosure of third-party remuneration would be redundant if the customer received a prospectus disclosing that information.[33]

The Commission's staff reflected that position in a 1979 letter to the Investment Company Institute, in which the Division of Market Regulation stated that it would not recommend enforcement action against broker-dealers that did not provide transaction-specific disclosure about mutual fund

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Those rules, however, do not regulate contests that result in cash awards. *See* NASD Notice to Members 99–81 (September 1999). The NASD sanctioned Morgan Stanley for violating the non-cash compensation rules to promote the sale of proprietary mutual funds and selected variable annuities. Prohibited sales contests within the firm offered a variety of rewards, including tickets to Britney Spears and Rolling Stones concerts. *See* NASD, "Disciplinary and Other NASD Actions," October 2003, at D18–D19 (available on the Internet at *http://www.nasdr.com/pdf-text/0310dis.pdf*).

[25] A fund may pay a service fee of up to 0.25% to a broker-dealer out of fund assets pursuant to rule 12b–1 plans. *See supra* note 15. Associated persons may receive some of those fees. The Commission's recent action against Morgan Stanley also noted that associated persons received a portion of the ongoing revenue sharing payments that fund complexes provided to Morgan Stanley. *See In the Matter of Morgan Stanley DW Inc., supra* note 20.

[26] Although most variable insurance products are issued by insurance company separate accounts that are structured as UITs, some are issued by insurance company separate accounts that are structured as open-end management investment companies. Because proposed rules 15c2–2 and 15c2–3 would apply to transactions involving interests in UITs and open-end companies, they would encompass transactions in both types of variable insurance products.

[27] In contrast to NASD rules, MSRB rules do not generally bar associated persons from receiving non-cash compensation. The MSRB has noted, however, that its fair dealing rule and other customer protection rules do apply to the marketing of 529 plans. *See* Municipal Securities Rulemaking Board, *Application of fair practice and advertising rules to municipal fund securities* (May 14, 2002).

[28] Rule 10b–10 applies to broker-dealer transactions in all securities, excluding U.S. Savings Bonds and municipal securities. The MSRB has a separate confirmation rule that governs member transactions in municipal securities, including municipal fund securities. *See* MSRB rule G–15.

[29] Rule 10b–10 defines "completion of the transaction" by reference to rule 15c1–1 under the Exchange Act. *See infra* note 125.

[30] *See* Rule 10b–10(a) (general disclosure requirement) and rule 10b–10(b) (periodic reporting alternative).

[31] *See* Rule 10b–10(a)(2)(i)(B) (customer remuneration) and Rule 10b–10(a)(2)(i)(D) (third party remuneration). In the mutual fund context, third party remuneration generally is paid by the fund and its affiliates. Rule 10b–10 also requires disclosure of the mark-ups and mark-downs that a broker-dealer earns on transactions involving a contemporaneous sale and purchase when it acts as a principal for its own account in a transaction, other than as a market maker. *See* Rule 10b–10(a)(2)(ii)(A).

[32] *See* Rule 10b–10 Adopting Release, *supra* note 5, at n.41.

[33] Of course, this applies only to information disclosed in a prospectus that is delivered to customers at or before completion of the transaction. The requirements of rule 10b–10 cannot be satisfied via disclosure in a document that is not delivered at or before completion of the transaction, such as a statement of additional information ("SAI"). The SAI is part of a fund's registration statement and contains information about a fund in addition to that contained in the prospectus. The SAI is required to be delivered to investors upon request and is available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System.

loads and related charges, so long as the customer received a prospectus that "disclosed the precise amount of the sales load or other charges or a formula that would enable the customer to calculate the precise amount of those fees." [34]

The Commission later discussed how Rule 10b–10 disclosure obligations apply to mutual fund transactions in an *amicus* brief filed with the Second Circuit in 2000.[35] That brief focused on the adequacy of prospectus disclosure by broker-dealers that received third-party remuneration—in the form of rule 12b–1 payments from funds and revenue sharing payments from fund investment advisers—in connection with sweeping customer funds into money market accounts. We concluded that the prospectus disclosure at issue substituted for confirmation disclosure, when the prospectuses included the information required to be disclosed by Form N–1A, including the maximum rule 12b–1 fees payable by the funds as a percentage of net assets, and noted the presence of "significant amounts" of non-rule 12b–1 payments by the funds' investment advisers. In arriving at that conclusion, we interpreted the rule 10b–10 Adopting Release as establishing the general principle that "delivery of a prospectus containing sufficient disclosure can satisfy a broker-dealer's obligations under Rule 10b–10." Recognizing that "there is no precise standard as to how much disclosure the Rule currently requires," we went on to note that the staff's 1979 letter, with its "precise amount" standard for prospectus disclosure of loads and related fees, did not apply to third-party remuneration because precision was not necessary to inform customers about conflicts of interest.

While the Commission has never directly addressed the disclosure of payments to a broker-dealer in the form of portfolio brokerage commissions, the same principles apply. Currently, if a prospectus is not delivered at or before completion of the transaction, or if the prospectus fails to disclose the fact that the fund pays portfolio brokerage commissions to broker-dealers that participate in distribution, or fails to disclose information about the degree of the resulting conflict, then the transaction confirmation must provide information about the source and amount of those payments.[36]

In one case before the Second Circuit, we viewed the disclosures at issue as meeting the requirements of rule 10b–10, but we went on to state: "We are not saying that this is necessarily all the disclosure about these types of fees that should be required as a matter of policy." [37] We also noted that we had directed the staff to make recommendations to us about whether to require new disclosures or to refine the existing disclosures.[38] The Second Circuit also questioned whether the prospectus disclosure at issue adequately placed investors on notice about the receipt of those payments and any resulting conflicts of interest.[39] The rules we propose today address those concerns.

3. Concerns About the Adequacy of Current Disclosure Practices

The disclosure rules we are proposing are designed to respond to the ways in which the mutual fund industry and its distribution practices have evolved in the years since the 1977 adoption of rule 10b–10 and the staff's 1979 letter to the ICI.

During the past quarter century, the number of mutual fund customers, the value of mutual fund investments, and the number of mutual funds all have increased exponentially.[40] The public increasingly has placed retirement savings into mutual funds through individual retirement accounts and other retirement plans. In addition, distribution costs and broker-dealer conflicts have grown more complex. Since 1980, many funds have offered multiple share classes, including class B shares with deferred sales loads that can have the effect of obscuring the distribution costs borne by investors. Many mature funds continue to rely on rule 12b–1 fees to pay for distribution, even though those fees were intended by the Commission to be short-term tools for helping funds gather assets. The increase in the number of mutual funds has made broker-dealer "shelf space" more critical to investment companies, leading to revenue sharing and other distribution arrangements that quietly compensate broker-dealers for distribution. The growth of funds affiliated with broker-dealers has also generated special broker-dealer marketing incentives to promote the distribution of those affiliated "proprietary" funds. In addition, the development of fund "supermarkets" sponsored by broker-dealers has led to related arrangements in which a fund or its affiliates compensates broker-dealers in ways that are not generally disclosed to investors. Moreover, the introduction of highly promoted 529 plans has brought many new investors into products that themselves invest in mutual funds and that are associated with similar distribution-related costs and conflicts.

Those changes raise significant concerns about the adequacy of current disclosure practices. For example, we are concerned that some investors may misunderstand the costs associated with purchasing mutual fund shares and 529 plan securities because they lack transaction-specific confirmation and point of sale information about loads and fees.

In late 2002, in response to learning that some mutual fund investors did not receive appropriate volume discounts on the front-end sales loads they paid—commonly known as "breakpoint discounts"—NASD, the ICI, and the Securities Industry Association ("SIA") convened a task force to recommend industry-wide changes relating to breakpoints.[41] The task force issued a report in July 2003 recommending, among other changes, that mutual fund confirmations include front-end sales

[34] See Letter regarding Investment Company Institute, *supra* note 6. That 1979 letter referred both to the agency disclosure and the principal disclosure requirements of rule 10b–10.

Although in 1994 the staff indicated that it intended to withdraw the 1979 letter, the letter currently remains in effect. The staff was concerned that confirmations that do not disclose any transaction charges could mislead customers who might not look to the prospectus for a full description of the remuneration. *See* Letter regarding Investment Company Institute (March 16, 1994). The mutual fund industry commenced discussions with the staff noting that some mutual funds impose transaction charges over the duration of or at the end of the investment, and asserted that disclosing the transaction charges through prospectus fee tables was more accurate than trying to estimate them on the confirmation at the beginning of the investment. As a result of that dialogue, the staff decided not to withdraw the letter.

[35] See Commission brief, *Cohen* v. *Donaldson, Lufkin & Jenrette Securities Corp.*, reported as *Press* v. *Quick & Reilly, Inc.*, 218 F.3d 121 (2d Cir. 2000) (No. 97–9159) ("*amicus* brief"). The Commission filed the brief in two separate dockets that were consolidated before the Second Circuit.

[36] *Id.* at 10–12, 21, 24–28.

[37] *Id.* at 24.

[38] *See id.*

[39] *See Press* v. *Quick & Reilly, Inc.*, 218 F.3d 121, 129 (2d Cir. 2000).

[40] Industry data indicates that between 1977 and 2002, the number of mutual funds increased from 477 to 8,256, total fund assets increased from $49 billion to $6.4 trillion, and the number of shareholder accounts increased from 8.7 million to 251 million. The magnitude of the changes, however, is likely greater than what those figures depict. The earlier figures include data for funds that invested in other mutual funds, while the latter figures exclude that data. *See* Investment Company Institute, *Mutual Fund Fact Book* (43rd ed., 2003) at 63.

[41] Mutual funds typically offer discounts on front-end sales loads assessed on class A shares if the amount of an investor's investment in the fund reaches certain pre-determined "breakpoint" levels. Examinations by the Commission staff and self-regulatory organizations determined that many investors did not receive the breakpoint discounts to which they were entitled.

load disclosure.[42] The task force also recommended that the Commission staff revisit its 1979 letter to the ICI.[43] While the task force was studying the issue, the Commission also received a rulemaking petition on behalf of a mutual fund customer asking the Commission to require broker-dealer confirmations to specifically disclose the front-end sales loads that customers incur with mutual fund transactions.[44]

Our concerns, however, go beyond the adequacy of front-end load disclosure. More complete disclosure also may help customers understand the costs associated with purchasing fund share classes that carry deferred sales loads, as well as the potential conflicts of interest that broker-dealers and their associated persons have in connection with the sale of those share classes. For example, when the amount invested reaches certain breakpoint discount levels, associated persons of broker-dealers generally are paid more for selling class B shares than for selling shares of other classes. Because class A shares typically carry front-end sales loads while class B shares do not, some investors may be inclined to purchase class B shares believing that they are cheaper, even though class B shares generally carry contingent deferred sales loads and higher 12b–1 fees. NASD has issued an alert informing investors that, before purchasing class B shares, "you should determine whether this investment is in your interest, and not just in the interest of your broker or adviser who may receive higher commissions from the sale of Class B shares than other classes of fund shares."[45] In fact, questions have been raised about whether class B shares ever would be appropriate for most investors.[46] Recent enforcement actions have underscored how those types of compensation arrangements produce conflicts of interest that lead associated persons of broker-dealers to act against the interests of their customers.[47]

Investors also lack information about whether their broker-dealers receive revenue sharing or other third-party remuneration to distribute particular mutual funds. Prospectus disclosure does not identify which individual broker-dealers receive revenue sharing, let alone quantify those arrangements. Yet the magnitude of revenue sharing payments—estimated in 2001 to be $2 billion annually[48]—suggests that those arrangements influence the mutual fund choices that broker-dealers and their representatives present to investors. Prospectus disclosure, moreover, is not designed to inform investors about whether their particular broker-dealers are compensated in other ways for distributing fund shares, such as by receiving commissions for fund portfolio brokerage transactions.

Broker-dealer compensation practices related to proprietary funds raise additional disclosure issues. In 1994, a committee was formed at the request of the Commission's Chairman to examine securities industry compensation practices, identify actual and perceived conflicts of interest, and identify "best practices" for controlling those conflicts. The committee raised a number of concerns in its 1995 report, including concerns about the practice of offering higher payouts for selling proprietary mutual funds. It recommended that broker-dealers pay identical commissions to registered representatives for selling proprietary and non-proprietary products within a product category.[49] While some broker-dealers followed that recommendation, its adoption has not been uniform.[50]

In September 2003, NASD requested comment on proposed rules to require member firms to disclose certain information about revenue sharing and differential compensation to customers at account opening or, if no account is established, at the time the customer first purchases shares of an investment company.[51] Stating that those compensation arrangements could create conflicts of interest for broker-dealers and their associated persons, NASD added, "Disclosure of revenue sharing and differential cash compensation arrangements would enable investors to evaluate whether a registered representative's particular product recommendation was inappropriately influenced by these arrangements." The Commission will consider the proposal in the event that NASD submits it as a proposed rule change. We note, however, that NASD's proposal is geared to giving customers generalized access to information about revenue sharing and differential compensation at the time the customer is evaluating potential mutual fund investments. That particular focus would complement the disclosures we propose today—which would improve disclosure of transaction-specific information about distribution-related costs and arrangements that lead to conflicts of interest. Investors who have access to relevant transaction-specific information about those costs and conflicts of interest should be better prepared to scrutinize the adequacy of the investment choices presented by their broker-dealers as well as the recommendations their broker-dealers make.[52]

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[42] "Confirmations should reflect the entire percentage sales load charged to each front-end load mutual fund purchase transaction. This information would enable investors to verify that the proper charge was applied." Report of the Joint NASD/Industry Task Force on Breakpoints (July 2003) at 10 (footnote omitted) ("Task Force Report") (available at *http://www.nasdr.com/breakpoints_report.asp*).

[43] *See id.*

[44] *See* Letter to Jonathan Katz, Secretary, Commission, from Donna Matheney, Vice President, Joe Becks & Associates, Inc., January 22, 2003. The petition was written on behalf of a company profit sharing plan that was invested in mutual funds.

[45] *See* NASD Investor Alert, "Class B Mutual Fund Shares: Do They Make the Grade?" (June 2003).

[46] *See* "Why B Shares Deserve to Get an 'F': These Broker-Sold Funds are a Bad Deal," *Wall Street Journal*, July 2, 2003 at D1.

[47] In one matter, the Commission affirmed a NASD disciplinary action against an associated person of a broker-dealer who placed a customer into class B shares of a mutual fund instead of the more appropriate class A shares. The associated person testified that he generally recommended that his clients purchase class B shares because he received higher commissions for selling that class. The Commission affirmed the NASD's conclusion that the associated person violated NASD suitability requirements and standards of conduct requirements. *See In the Matter of Wendell D. Belden*, Securities Exchange Act Release No. 47859 (May 14, 2003).

In another matter, the Commission sanctioned a broker-dealer for failing to adequately supervise an associated person who inappropriately placed investors into class B shares to generate higher commissions. *See In the Matter of Prudential Securities, Inc.*, Securities Exchange Act Release No. 48149 (July 10, 2003).

As discussed above, we found that Morgan Stanley violated the antifraud provisions of Section 17(a)(2) of the Securities Act by placing customers into class B shares without adequately disclosing information about the relative costs of class A and class B shares. *See In the Matter of Morgan Stanley DW Inc., supra* note 20.

[48] *See* "How high can costs go?," *Institutional Investor*, May 2001 at 56.

[49] "Of particular concern is the practice of firms offering higher payouts when [registered representatives] sell proprietary mutual funds instead of funds of a similar class managed by outside investment companies. (Proprietary funds are those created and/or managed by the firm.) This differentiation raised the question: Is the [registered representative] rendering objective advice or simply maximizing commission income?"

Report of the Committee on Compensation Practices (April 10, 1995) at 7–8 (available at *http://www.sec.gov/news/studies/bkrcomp.txt*). The committee was chaired by Daniel Tully of Merrill Lynch & Co., and its report commonly is known as the "Tully report."

[50] As discussed above, Morgan Stanley had a practice of paying associated persons a higher percentage payout for selling proprietary funds or other funds that were favored by the firm. *See In the Matter of Morgan Stanley DW Inc., supra* note 20. This was not a unique situation, as other broker-dealers also provide associated persons with higher percentage payouts for selling proprietary funds.

[51] *See* NASD Notice to Members 03–54 (September 2003).

[52] The SIA recently submitted suggestions to the staff for amending rule 10b–10 to provide additional disclosure about revenue sharing and differential compensation related to purchases of mutual fund shares. *See* Letter from Stuart

*B. New Rule and Proposed Amendments Regarding Cost and Conflict Disclosure*

1. Proposed Rule 15c2–2

To provide investors with adequate access to information regarding the costs of their investments, as well as the conflicts of interest their broker-dealers face, the Commission is proposing a new rule to require brokers, dealers and municipal securities dealers to provide their customers with certain information in connection with certain transactions in mutual fund shares, UIT interests and 529 plan shares. Because those securities have special distribution and compensation practices, the Commission is proposing to address those disclosure requirements in a new rule, rather than in rule 10b–10. A broker, dealer or municipal securities dealer that misstates information in a confirmation delivered pursuant to proposed rule 15c2–2 with an intent to mislead may be subject to liability under the antifraud provisions of section 10(b) and rule 10b–5.

Proposed rule 15c2–2 would retain much of the disclosure framework of rule 10b–10, while also providing customers of brokers, dealers and municipal securities dealers with targeted cost and conflict information that is relevant to purchases and sales of those securities.[53] Accordingly, the preliminary note to proposed rule 15c2–2 would explain that the rule requires brokers, dealers and municipal securities dealers to provide specified information in writing to customers at or before completion of a transaction in certain investment company securities or municipal fund securities. The preliminary note also would state that rule 10b–10 would continue to set forth the confirmation requirements that apply to broker-dealer transactions in other securities. More generally, as is the case under current law, disclosure provided pursuant to the proposed rules would not derogate from a broker-dealer's other legal obligations to customers, such as in the context of making recommendations or suitability determinations.

a. *No safe harbor from antifraud provisions or other legal requirements.* Proposed rule 15c2–2, like rule 10b–10, would not function as a safe harbor for non-disclosure that constitutes deception or that otherwise violates a securities firm's legal obligations. Rather, it would provide a minimal benchmark for disclosing certain costs and conflicts related to the distribution of these securities, in a manner that would be accessible to investors and that could fit on a single piece of paper. In setting forth the minimum level of disclosure, the proposed rule also would not preclude additional disclosures, as appropriate. While we believe the information required to be disclosed under the proposed rule is material to investors, there may be other information that is material for purposes of alerting investors about the costs of these transactions and the conflicts raised by them.[54] That is true even in instances where the confirmation rules specifically address the categories of information at issue, but do not require disclosure of the information in question.

Accordingly, we propose to make that point explicit in the preliminary note to proposed rule 15c2–2. Currently, the preliminary note to rule 10b–10 explains that the confirmation disclosure requirements do not exhaust a firm's obligation under the general antifraud provisions of the federal securities laws to disclose additional information to a customer at the time of the customer's investment decision. We are aware, however, that a court has interpreted rule 10b–10 to limit disclosure obligations in a way that is inconsistent with our intent.[55] To clarify our intent, the preliminary note to proposed rule 15c2–2 would state that the confirmation disclosure requirements are not determinative of, and do not exhaust, a broker's, dealer's or municipal securities dealer's disclosure obligations under the antifraud provisions of the federal securities laws or under any other legal requirements.[56]

b. *Securities transactions covered.* The disclosure requirements of proposed rule 15c2–2 would apply to transactions by brokers, dealers and municipal securities dealers[57] on behalf of customers in "covered securities." Proposed paragraph (f)(6) of rule 15c2–2 would define the term "covered security" as: (i) Any security issued by an "open-end company," as defined by section 5(a)(1) of the Investment Company Act, that is not traded on a

Strachan, Chair, Investment Company Committee, SIA, to Paul Roye, Director, Division of Investment Management, Commission, October 31, 2003. This letter will be available in the public comment file.

The SIA recommends that, when applicable, confirmations should include a statement indicating that associated persons may have received additional compensation in connection with the purchase. The SIA further suggests that when a broker-dealer has received a cash payment "as a condition for inclusion of the investment company on a preferred or select sales list, or similar grouping, in connection with any other sales program, or as a reimbursement of advancement of expenses," then the confirmation should contain a statement indicating that it "may have received a cash payment relating to the distribution." In either case, the SIA suggests that the disclosure should also indicate that the customer can obtain "further information" by calling a toll-free or collect telephone number or by visiting a website. As discussed below, we are taking a different approach.

[53] While Exchange Act rule 10b–10 does not apply to transactions in municipal securities, transactions in 529 plan interests nonetheless pose cost and conflict concerns similar to those associated with transactions in mutual fund shares and UIT interests. Including municipal fund securities within the ambit of rule 15c2–2 therefore would promote a consistent disclosure framework.

[54] While the confirmation rules require delivery of information at *or* before a securities transaction, the antifraud provisions of the securities laws at times require a broker, dealer or municipal securities dealer to disclose particular information before a securities transaction. *See Ettinger* v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, 835 F.2d 1031, 1036 (3d Cir. 1987); *Krome* v. *Merrill Lynch & Co.*, 637 F. Supp. 910, 916 (S.D.N.Y. 1986).

Moreover, the Commission recently sanctioned Morgan Stanley for violating certain antifraud provisions of the Securities Act with respect to its sale of class B mutual fund shares, based in part on a failure to disclose material information about differences between class B and class A shares. The Commission did not sanction Morgan Stanley for those omissions under rule 10b–10. *See In the Matter of Morgan Stanley DW Inc., supra* note 20.

[55] The Second Circuit, in *Press* v. *Quick & Reilly, Inc.*, 218 F.3d 121 (2d Cir. 2000), expressed the view that the confirmation requirements of rule 10b–10 also could determine which information is material under the antifraud standards of rule 10b–5 under the Exchange Act. The court reasoned that the Commission "has decided precisely" what disclosure was needed with regard to conflicts of interest arising from third-party payments to broker-dealers, and concluded that "we will not undermine the SEC's interpretation of its regulation by requiring even greater disclosure about that conflict of interest under the general antifraud provisions of Rule 10b–5." *Id.* at 131–32. We recognize the importance of the principle that guided the court. That principle, however, is not what we intended when we adopted rule 10b–10. Even if a confirmation rule specifically addresses a particular practice, a broker, dealer or municipal securities dealer could provide enough disclosure to satisfy that rule, but nonetheless violate the antifraud provisions of the securities laws through its omission of material information to its customer in a particular transaction or under particular arrangements. When we adopt confirmation rules, we cannot consider all information that will be material in a particular transaction, and we do not determine that additional information is not material under the antifraud provisions. The confirmation rules cannot account for the variety of conflicts that are encompassed by the antifraud provisions. *See SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (noting that Congress intended "securities regulation 'enacted for the purpose of avoiding frauds'" to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes"). Similarly, with regard to other courts that have looked to rule 10b–10 in a more general context, we emphasize that rule 10b–10 was not intended to limit a broker-dealer's obligation to disclose information, or otherwise to limit a broker-dealer's responsibilities to its customers. *See, e.g., Orman* v. *Charles Schwab & Co.*, 179 Ill. 29 282, 688 N.E.2d 620 (Ill. 1998), *cert. denied*, 523 U.S. 1075 (1998).

[56] As discussed below, we also propose to amend the preliminary note to rule 10b–10 to be consistent with this language.

[57] As the preliminary note to the rule would make clear, municipal securities brokers would be subject to the proposed rule because they are a type of "broker." *See* Exchange Act Section 3(a)(31) (definition of "municipal securities broker").

national securities exchange;[58] (ii) any security issued by a "unit investment trust," as that term is defined by Section 4(2) of the Investment Company Act, other than an ETF that is traded on a national securities exchange or facility of a national securities association, or a unit investment trust that is the subject of a secondary market transaction;[59] and (iii) any "municipal fund security." Proposed paragraph (f)(12) of rule 15c2–2 would define a "municipal fund security" as any municipal security that is issued pursuant to a qualified state tuition program as defined by Section 529 of the Internal Revenue Code [26 U.S.C. 529], and that is issued by an issuer that, but for the application of Section 2(b) of the Investment Company Act, would constitute an investment company within the meaning of Section 3 of the Investment Company Act.[60]

- The Commission requests comment on the proposed definition of "covered security," including whether the definition appropriately encompasses all the types of securities having distribution practices that warrant targeted confirmation disclosure of information about distribution-related costs and conflicts.
- The Commission seeks comment on whether proposed rule 15c2–2 should encompass transactions in all UIT interests, given the differences in distribution practices between UIT interests and other securities within the scope of the proposed rule. While some UIT interests are associated with revenue sharing (*e.g.*, revenue sharing with respect to the underlying funds of variable annuity contracts and variable life insurance policies), commenters are invited to address the extent to which revenue sharing and other arrangements that raise conflict of interest issues are not associated with the distribution of UIT interests.
- The Commission also seeks comment about whether proposed rule 15c2–2 should also apply to other types of investment company securities, such as ETF shares. Commenters moreover are invited to address whether the rule also should apply to closed-end investment companies generally, or to particular closed-end companies such as "interval funds" that make regular repurchase offers.[61] Do transactions in closed-end company shares at those times raise the types of costs or conflicts that warrant proposed rule 15c2–2's disclosure requirements?
- We also request comment about whether persons other than brokers, dealers or municipal securities dealers also should be required to deliver confirmations to investors pursuant to proposed rule 15c2–2. Commenters are invited to discuss whether other persons that participate in the distribution of covered securities—such as banks—are subject to the same or similar conflicts of interest as brokers, dealers and municipal securities dealers. Commenters also are invited to discuss whether the Commission should propose rules to require those other persons to disclose confirmation information on or before the completion of such transactions.
- In addition, the Commission requests comment on whether a transitional period is necessary to make adjustments necessary to deliver confirmations that comply with proposed rule 15c2–2.

*c. Schedule 15C and the form of disclosure.* Proposed rule 15c2–2 would require brokers, dealers and municipal securities dealers to disclose a range of cost and conflict information arising from transactions in covered securities. To be effective, this information would have to be disclosed in a manner that is clear and that provides useful context to investors.[62] Thus, paragraph (a) of proposed rule 15c2–2 would require a broker, dealer or municipal securities dealer to make the required disclosures (other than disclosures subject to the periodic disclosure alternative, discussed below) in a manner that is "consistent with Schedule 15C" under the Exchange Act. Proposed Schedule 15C, which is set forth at Figure 1, would establish the format for disclosing the required information to investors. While much of the form would be standardized, we have included flexibility to accommodate implementation costs as well as the fact that confirmations are business forms traditionally utilized by brokers, dealers and municipal securities dealers for their own business purposes. Proposed Schedule 15C has six main parts: A, general information; B, distribution-cost information; C, broker-dealer compensation information; D, differential compensation information; E, breakpoint discount information, and F, explanations and definitions. Proposed paragraph (f)(4) of rule 15c2–2 would provide that the term "consistent with Schedule 15C" means using Schedule 15C, or using a similar layout of disclosure so long as: (i) All information specified in Schedule 15C is set forth in the confirmation; (ii) information specified in Sections B through F of Schedule 15C (if applicable) is included with no change, including the use of bold print for data items printed in bold in Schedule 15C, and in the order set forth in Schedule 15C; and (iii) information specified in Section A of Schedule 15C is displayed prominently.

Proposed Schedule 15C would not only provide the format for disclosing quantitative information about a transaction, but also would provide definitions and explanatory information intended to help make the quantitative information more useful to investors. By supplementing the required disclosures with explanations of the meaning of terms such as net asset value,[63] revenue sharing and portfolio brokerage commissions, and by explaining why investors may wish to scrutinize information about revenue sharing and differential compensation, proposed Schedule 15C is intended to help give investors the tools they need to ask the

[58] That definition excludes securities issued by exchange traded funds ("ETFs"). Although ETFs are open-end management investment companies or unit investment trusts, they do not present the same disclosure concerns as other open-end investment companies or UITs. Rather then being sold and redeemed through retail transactions, large blocks of ETF shares are created and redeemed through the exchange of large blocks of the underlying securities. Retail investors then can buy or sell ETF shares on the secondary market. Broker-dealers that effect retail transactions in ETFs generally charge commissions that are disclosed on the confirmations. Moreover, we do not believe that ETFs pose the same type of potential conflicts of interest that are associated with traditional open-end fund shares. We therefore do not believe it is necessary to include ETFs within the scope of the rule.

[59] Broker-dealers may buy and sell UITs on the secondary market, following their initial distribution. Because proposed rule 15c2–2 focuses on disclosure of costs and conflicts when covered securities are distributed, we would except secondary market transactions in UITs from the rule's scope.

[60] Section 2(b) of the Investment Company Act excludes the United States, states and certain other government-related instrumentalities and corporations from the scope of that Act.

Because our proposed definition of "municipal fund security" does not encompass interests in local government investment pools, it would differ from the way the term is defined in MSRB rule D–12.

[61] In general, shares of closed-end investment companies are distributed through one-time underwritings, rather than on an ongoing basis. The broker-dealers that distribute the shares are compensated through the receipt of underwriting fees, and practices such as revenue sharing may not be present. As a result, transactions in those securities generally may not raise the same disclosure issues as transactions in open-end investment companies. Some closed-end investment companies, however, may offer to repurchase their shares on a periodic basis. *See, e.g.*, Investment Company Act section 23(c) and rule 23c–3 thereunder.

[62] As discussed below, certain arrangements that raise cost and conflict concerns raise special disclosure challenges, particularly with regard to disclosure of deferred sales loads, revenue sharing and portfolio brokerage commissions.

[63] When we use the term "net asset value" in this release, it includes "accumulation unit value" in the case of variable insurance products.

right questions and to make informed decisions. Attachments 1, 2 and 3 to this proposal set forth examples of confirmations that are consistent with Schedule 15C.

- We are not at this time proposing a form for disclosures made pursuant to proposed rule 15c2–2's periodic disclosure alternative. Because of the variance in the types of transactions that could be disclosed pursuant to this alternative, we do not believe that a standardized disclosure form would be appropriate. We request comment, however, on whether standardized disclosure should be required with respect to periodic disclosures. If so, should the format follow Schedule 15C? In the event a customer invests in multiple securities, including mutual fund shares, UIT interests and 529 plan securities, should the information pertaining to each be in a separate section? Alternatively, should there be separate forms for each category of investment? Commenters are invited to send prototype forms reflecting their view.
- The Commission also requests comment on whether proposed Schedule 15C is an appropriate template for disclosing information to customers. The Commission also requests comment on whether disclosure should be required to be in the exact form of proposed Schedule 15C, rather than merely consistent with it.
- The Commission further requests comment on whether it is appropriate for the proposed form of Schedule 15C to combine quantitative information with explanatory and definitional information. Commenters are invited to address the issue of whether the inclusion of both types of materials may conflict with the business purposes that confirmations fundamentally address. Commenters also are invited to discuss whether there are preferable alternatives for providing explanatory and definitional information that would permit investors to fully use the information set forth in the confirmation.

d. *General and purchase-specific disclosure requirements.* As outlined above, the disclosure requirements of proposed rule 15c2–2 in large part are based on existing rule 10b–10, with modifications to alert customers to targeted information about the special cost and conflicts raised by transactions in mutual fund shares and municipal fund securities.

Paragraph (a) of proposed rule 15c2–2 would provide that it is unlawful for any broker, dealer or municipal securities dealer to effect any customer transaction in, or to induce any customer purchase or sale of, any covered security unless the broker, dealer or municipal securities dealer complies with the requirements set forth in paragraphs (b), (c), (d) and (e) of the rule. Paragraph (b) would set forth general disclosure requirements under the rule. Paragraph (c) would set forth additional disclosures that customers shall receive when they purchase mutual fund shares, UIT interests and municipal fund securities, because purchase transactions implicate the costs and conflicts associated with the distribution of these securities. Paragraph (d) would set forth alternative requirements for periodic reporting. Paragraph (e) would set forth the requirement to disclose median information and comparison ranges for the types of information required under paragraphs (b), (c) and (d).

i. *General disclosure requirements.* Proposed paragraphs (b)(1) and (b)(2) of rule 15c2–2 would require disclosure of the date of the transaction, and the issuer and class of the covered security. Those requirements are similar to the requirements of rule 10b–10(a)(1). While rule 10b–10(a)(1) does not specifically mention share class, disclosure of class, when applicable, is necessary to identify the security.

Proposed paragraph (b)(3) of rule 15c2–2 would require disclosure of both the net asset value of the shares or units and, if different, their public offering price.[64] Rule 10b–10(a)(1) only requires disclosure of price. Fund share classes that charge front-end sales loads are sold to investors at a public offering price that exceeds the net asset value by the size of the load. Providing customers with information about both price and net asset value would help them verify whether they are obtaining the benefit of any applicable breakpoints, and would make the costs associated with front-end sales loads more transparent in general.

Proposed paragraph (b)(4) of rule 15c2–2 would require disclosure of the number of shares of a covered security purchased or sold by the customer. It also would require the total dollar amount paid or received in the transaction and the net amount of the investment bought or sold in the transaction, which would be equal to the number of shares or units bought or sold multiplied by the net asset value of those shares or units. Rule 10b–10(a)(1) requires disclosure of the number of shares. Specific disclosure of the dollar value of the transaction—equal to the number of shares bought or sold multiplied by the transaction price—would help safeguard against misunderstandings about the value of the transaction. Confirmations already typically contain information about the dollar value of the transaction, together with the price of the shares and the number of shares bought or sold.

Proposed paragraph (b)(5) of rule 15c2–2 would require disclosure of any commission, markup or other remuneration the broker, dealer or municipal securities dealer will receive from the customer in connection with the transaction. Rule 10b–10(a)(2)(i)(B) already requires disclosure of remuneration from customers. This remuneration is distinct from dealer concessions and other types of sales fees that a broker, dealer or municipal securities dealer may receive from the fund or its primary distributor. Remuneration from customers also is distinct from any sales load that the customer may pay in connection with a transaction. Both of those would be disclosed separately.[65] Under proposed paragraph (b)(5), a broker, dealer or municipal securities dealer often would not be required to disclose any information because the firm would receive all of its compensation from the issuer or distributor of the covered security, or other third parties, rather than directly from the customer. Proposed paragraph (b)(5) would require separate disclosure or commissions or other compensation from the customer, however, when a broker, dealer or municipal securities dealer, such as a fund "supermarket," charges its customer a commission or service fee for purchasing a fund.[66]

Proposed paragraph (b)(6) of rule 15c2–2 would require disclosure, for any transaction in which a customer

[64] This discussion's references to "share" and "per-share" information also apply to "unit" and "per-unit" information connected to transactions involving UITs.

[65] Proposed paragraph (c)(4) of rule 15c2–2, discussed below, would require disclosure of dealer concessions and other types of sales fees received from the issuer, its agent or primary distributor, or others. Brokers, dealers or municipal securities dealers would not receive those fees directly from customers, although the fees may be funded by sales loads paid by customers.

Proposed paragraphs (c)(1) and (c)(2) of rule 15c2–2, also discussed below, would require disclosure of front-end and deferred sales loads that the customer would incur in connection with the transaction.

[66] In some cases, a broker, dealer or municipal securities dealer itself may impose a special fee on a customer that sells a mutual fund share shortly after purchase, to discourage short-term trading. Paragraph (b)(5) would not require disclosure of that type of fee at the time of purchase, unless the amount and timing of the fee is reasonably foreseeable to the firm at the time of purchase (such as because the broker, dealer or municipal securities dealer is aware of the customer's intent to sell). This paragraph, however, would require disclosure of that type of fee when it is incurred at the time of the subsequent sale.

sells a covered security, of the amount of any deferred sales loads incurred by the customer. Rule 10b–10 does not explicitly require that disclosure, although rule 10b–10 does require disclosure of price, and the deferred sales load charged to a customer at the time of sale does affect the effective price that the customer receives. Disclosure of the deferred sales loads that customers incur when they sell their shares would make those distribution costs more transparent.[67]

Proposed paragraph (b)(7) of rule 15c2–2, when applicable, would require disclosure of the fact that a broker, dealer or municipal securities dealer is not a member of the Securities Investor Protection Corporation ("SIPC"), or that the broker, dealer or municipal securities dealer clearing or carrying the customer account is not a member of SIPC.[68] That disclosure would not be required, however, if the customer sends funds or securities directly to, or receives funds or securities directly from, the issuer or its transfer agent, custodian, or other designated agent that is not an associated person of the broker, dealer or municipal securities dealer, and if that other person would provide disclosure on behalf of the broker, dealer or municipal securities dealer. This would be consistent with the disclosure requirement of rule 10b–10(a)(9).[69]

• The Commission requests comment on whether these proposed general disclosure requirements would provide customers with adequate information about transactions in covered securities. Commenters particularly are invited to discuss whether all of these proposed general disclosure requirements are appropriate to transactions in securities that have a substantial insurance component, such as variable life insurance policies.[70]

• Commenters may also wish to discuss whether all of these proposed general disclosure requirements are appropriate to transactions in variable annuities. Commenters are invited to discuss any issues they believe are relevant to the application of proposed rule 15c2–2 to variable insurance products, as well as any modifications they believe could improve the proposed rule's effectiveness as applied to variable insurance products. Specifically, commenters may wish to address whether alternative or additional disclosure requirements would provide investors with more useful information for transactions in variable insurance products. In addition, we invite comment on whether to use a single confirmation for transactions in both the contract or policy and the underlying funds. Commenters should address whether such a single confirmation is appropriate under the federal securities laws.

ii. Additional Disclosures For Purchases. Proposed rule 15c2–2(c) would require additional disclosures when customers purchase covered securities.

(a) Cost disclosure. Proposed paragraph (c)(1) of rule 15c2–2 would require disclosure of the amount of any sales load that the customer has incurred or will incur at the time of purchase, expressed in dollars and as a percentage of the net amount invested,[71] together with information about the potential relevance of breakpoint discounts. Specifically, proposed paragraph (c)(1)(i) would apply if the customer will incur a sales load at the time of sale, and would require disclosure of information about the availability of breakpoints as reflected in Schedule 15C with regard to the covered security, including a statement about what is the applicable sales load that is set forth in the prospectus, in light of any breakpoint discount and the value of the securities position. In determining the value of the position that may be subject to a breakpoint discount, the broker-dealer should consider net asset value, public offering price, historic cost or any other measurement that reflects the covered security's particular method of providing breakpoint discounts. This proposed paragraph therefore requires disclosure not only of the sales load actually incurred at the time of purchase, but also the sales load that should have been charged based on the availability of breakpoint discounts.[72]

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[67] Proposed paragraph (c)(2) of rule 15c2–2, discussed below, would separately require prospective disclosure, in the confirmation, of the potential amounts of the deferred sales load that the customer may incur when he or she later sells the shares. Proposed paragraph (b)(6), in contrast, would require disclosure of deferred sales loads actually incurred at the time of sale.

[68] SIPC is a private-sector, nonprofit membership corporation that Congress created under the Securities Investor Protection Act of 1970 to help protect customers of failed broker-dealers. Generally, all broker-dealers registered with the Commission must be members of SIPC. If a broker-dealer fails and is unable to meet its obligations to customers, SIPC steps in as quickly as possible and, within certain limits, returns cash and securities to customers. Broker-dealers who sell only shares of mutual funds are exempt from the requirement to be a member of SIPC.

If disclosure of SIPC membership is adopted, it may be placed in the part A (general information) of Schedule 15C.

[69] We are proposing conforming changes to rule 10b–10.

[70] We note that customers who purchase a variable life insurance policy will buy an insurance component as well as make an investment, and that the investment component initially may be relatively small. That would be reflected in disclosure of net amount invested.

[71] The fee table set forth in the front of a fund prospectus expresses front-end sales loads as a percentage of the offering price, pursuant to Item 3 of Form N–1A, which governs prospectus content. A separate table in the prospectus expresses the front-end sales loads as a percentage of both the offering price and the net asset value, pursuant to Item 8(a)(1) of Form N–1A. The differences between those two amounts is significant. For example, a front-end sales charge that equals 5.75% of the public offering price would equal approximately 6.10% of net asset value. We are proposing to amend the prospectus fee table to require disclosure of loads as a percentage of net asset value. *See infra* section VI.

We also note that industry practice is to round the public offering price to two decimal places when calculating the number of shares purchased, and to round the number of shares purchased to three decimal places. That rounding practice can lead to an actual front-end sales load as a percentage of gross amount invested or net amount invested that is higher or lower than the sales load disclosed in the prospectus as a percentage of offering price or net asset value. *See infra* note 154 and accompanying text. Accordingly, as discussed below, the Commission is proposing prospectus disclosure requirements to address these differences. Proposed rule 15c2–2 would require disclosure of the load as a percentage of the net amount invested in the transaction, regardless of that rounding practice. Attachment 1 illustrates the practical impact of the rounding practice. The front-end sales load in that example is 4.0% of the public offering price. Rounding, however, causes the sales load charged on that $8,000 purchase to equal $321.18, rather than $320. The impact of the rounding practice can be more significant when net asset value is relatively low.

[72] Broker-dealers who sell fund shares to retail customers must disclose breakpoint discount information to their customers and must have procedures reasonably designed to ascertain information necessary to determine the availability and appropriate level of breakpoints. A failure to do so can result not only in the customer being deprived of a benefit to which he or she is entitled, but also in the broker-dealer and representative receiving increased commissions at the customer's expense. *See In the Matter of Application of Harold R. Fenocchio for Review of Disciplinary Action Taken by NASD*, 46 SEC 279 (1976) (registered representatives had a responsibility to make certain that a letter of intent was filed with the mutual fund or, at the very least, to inform the clients of their rights of accumulation). Because of the large number of mutual funds offering different discounts and employing different criteria for determining breakpoint eligibility, many broker-dealers have experienced operational challenges and other difficulties in assuring that customers consistently receive the applicable discounts. Nevertheless, each broker-dealer is responsible for exercising due care, based on information reasonably ascertainable by the broker-dealer, to provide the appropriate breakpoint discounts.

Part E of Attachment 1, which illustrates a confirmation for a transaction in class A shares with a front-end sales load, states the front-end sales load set forth in the prospectus. Note that the $8,000 purchase in that example is entitled to a breakpoint discount. This could be because the current purchase should be considered in conjunction with other purchases by the investor or the investor's family under rights of accumulation, or because it is subject to a letter of intent.

Alternatively, proposed paragraph (c)(1)(ii) would apply if the customer will not incur a sales load at the time of sale, and would require disclosure of information about the availability of breakpoints as reflected in Schedule 15C with regard to a different class of the covered security, including a statement of the sales load that the customer would have incurred at the time of sale if the transaction had been in that different class of the covered security. In other words, for transactions in share classes without a front-end sales load, the proposed paragraph would require disclosure of information about the sales load that would have been charged had a share class with a front-end load been purchased.[73]

Proposed paragraph (f)(17) of rule 15c2–2 would define "sales load" to have the meaning set forth in Section 2(a)(35) of the Investment Company Act.[74] Proposed paragraph (f)(13) would define "net amount invested" to mean the price paid to purchase the covered securities less any applicable sales loads. Proposed paragraph (f)(18) of rule 15c2–2 would define "securities position" to mean the value of the purchase of covered securities; the value of securities that are subject to rights of accumulation under the terms of the prospectus with respect to the covered security or a related class of the covered security, to the extent known by the broker, dealer or municipal securities dealer, including the value of such securities purchased in other accounts or by other persons; and the value of any such securities that are the subject of letters of intent that may be considered in computing a breakpoint with respect to the covered security or a related class of the covered security.

As discussed above, any sales load that an investor may pay to a fund's principal underwriter is distinct from the commission that the investor may pay to a broker, dealer or municipal securities dealer.[75] Providing customers with information about the amount of the sales load they pay when they purchase covered securities would enable them to more effectively monitor potential breakpoint discounts and would make the impact of distribution costs generally more transparent. Moreover, brokers, dealers and municipal securities dealers are well positioned to provide load information to customers on a transaction-by-transaction basis. Confirmation disclosure should make this information more readily accessible to customers, rather than expecting them to turn to a prospectus to calculate the amount of the load paid.[76]

Proposed paragraph (c)(2) to rule 15c2–2 would require disclosure of the potential amount of deferred sales loads[77] (other than a deferred sales load of no more than one percent that expires no later than one year after purchase, when no other sales load would be incurred).[78] We recognize that broker-dealers would rarely, if ever, know in advance when an investor may redeem those shares, and therefore would generally not be able to disclose the specific amount of a deferred sales load. Investors nonetheless have an interest in seeing transaction-specific information about the potential cost of deferred sales loads. Deferred sales loads cannot exceed a specified percentage of the net asset value or the offering price at the time of purchase.[79] In practice, a deferred sales load may equal the lesser of a specified percentage of the net asset value at the time of purchase "which can be calculated as a dollar amount by multiplying that percentage by the net asset value and the number of shares purchased "or a specified percentage of the net asset value at the time of sale. Accordingly, proposed paragraph (c)(2) would require the broker, dealer or municipal securities dealer to disclose, on a year-by-year basis for as long as the deferred load may be in effect, information about the maximum amount of the load expressed in dollars. Proposed paragraph (c)(2) also would require disclosure of the maximum deferred sales load as a percentage of net asset value at the time of purchase or sale, as applicable.[80] This not only would improve the transparency of distribution costs, but also would promote balanced comparisons between the distribution costs associated with front-end load share classes and those associated with deferred sales load share classes.

Proposed paragraph (c)(3) of rule 15c2–2 would require disclosure of any asset-based sales charges and service fees paid in connection with the customer's purchase of covered securities. Proposed paragraph (f)(1) of rule 15c2–2 would define "asset-based sales charges" as all asset-based charges incurred in connection with the distribution of a covered security, paid by the issuer or paid out of assets of covered securities owned by the issuer. roposed paragraph (f)(2) of rule 15c2–2 would define "asset-based service fee" as all asset-based amounts paid for personal service and/or the maintenance of shareholder accounts by the issuer, or paid out of assets of covered securities owned by the issuer. Those terms would encompass rule 12b–1 fees and any similar types of distribution or service fees incurred by issuers. Those terms, moreover, would be broad enough to require disclosure when the issuer of the covered security itself does not directly pay these fees, but instead invests in other covered securities that incur those fees.[81] We recognize that because the amount of rule 12b–1 or similar fees would be linked to net asset value, a broker, dealer or municipal securities dealer would rarely, if ever, know in advance what amount of those fees would be attributable to the shares purchased in a particular transaction. This amount could be particularly uncertain because a fund's board of directors may later determine not to renew the fund's rule 12b–1 plan. The

[73] Part E of Attachments 2 and 3, which illustrate confirmations for transactions in class B shares with a deferred sales load, state what would have been the front-end sales loads associated with the purchase of class A shares of that dollar amount. The $8,000 purchases in those examples would have been entitled to breakpoint discounts on front-end sales loads. As noted, brokers, dealers and municipal securities dealers must have procedures in place to determine the availability and level of breakpoint discounts. *See supra* note 72. Disclosure of information about front-end sales loads as part of confirmations for the purchase of share classes that carry deferred sales loads in no way immunizes a broker, dealer or municipal securities dealer from its suitability obligations or any other requirements.

[74] Section 2(a)(35) of the Investment Company Act generally defines "sales load" as the difference between the price of a security to the public and that portion of the proceeds from its sale that is received and invested or held for investment by the issuer, less any portion of such difference deducted for expenses or fees.

[75] An investor who pays a sales load often will not have to separately pay a commission. In some circumstances, however, such as certain transactions through a broker-dealer's mutual fund "supermarket," an investor may have to pay both.

[76] If this proposed provision is adopted, it would supercede the 1979 letter to the ICI. *See supra* note 6.

[77] Deferred sales loads include surrender charges on variable contracts.

[78] At times, purchases of class A shares of more than $1 million will not carry any front-end sales load due to the availability of breakpoint discounts, but a deferred sales load of up to one percent is imposed for up to one year to discourage short-term holdings. That type of deferred sales load does not raise the disclosure issues that this proposed rule seeks to address.

[79] *See* Investment Company Act rule 6c–10.

[80] Attachment 2 depicts confirmation disclosure of a transaction in a fund share that carries a deferred sales load that equals a specified percentage multiplied by the minimum of the net asset value at the time of purchase or time of redemption. Attachment 3 depicts confirmation disclosure of a transaction in a fund share that carries a deferred sales load that equals a specified percentage multiplied by the net asset value at the time of purchase.

[81] For example, while the issuer of a 529 plan may not pay rule 12b–1 fees, the plan assets may be invested in mutual funds that incur those fees. Similarly, mutual funds underlying variable insurance contracts may also pay 12b–1 fees. In those cases, the confirmation would have to disclose information about those fees, even though they are not directly paid by the issuer.

proposed rule therefore would require brokers, dealers and municipal securities dealers to disclose asset-based sales charges and asset-based service fees as a percentage of net asset value, and also to disclose an estimate of the total annual dollar amount of asset-based sales charges and asset-based service fees that would be associated with the shares purchased if net asset value were to remain unchanged (and assuming that the level of fees paid out of assets under a rule 12b–1 plan or similar distribution arrangement remains unchanged).

- The Commission requests comment on whether these requirements would provide customers with an appropriate amount of information about the amount of distribution-related costs they or the issuer would incur in connection with their purchases. If not, please describe additional disclosure that would be helpful. Commenters are specifically invited to comment on whether the proposed requirements related to deferred sales loads would provide disclosure that is sufficiently clear to customers.
- The Commission also requests comment on whether these requirements would appropriately be applied to all types of covered securities, or whether in certain circumstances the disclosure requirements should be modified or eliminated. Commenters in particular may wish to address how disclosure of front-end loads as a percentage of the net amount invested would apply to securities which include a life insurance component, such as variable life insurance policies, and whether alternative disclosure requirements would be preferable for those products.[82] Commenters also may address whether all of these requirements are appropriately applied to variable annuities. Commenters should address whether and how up-front bonus payments on variable insurance products and the recapture of such bonus payments should be disclosed.
- The Commission further requests comment about how proposed Schedule 15C could best disclose sales loads and asset-based fees in percentage terms, based on the customer's investment. This disclosure needs to reflect the fact that while front-end sales loads will equal a percentage of the *present value* of the securities being purchased, deferred sales loads and asset-based fees can be a function of the *future value* of those securities. How can Schedule 15C best state those percentages in a way that is accurate and readily understood?[83]

(b) Sales fee disclosure. Proposed paragraph (c)(4) of rule 15c2–2 would require disclosure of any dealer concession that the broker, dealer or municipal securities dealer earns in connection with the transaction, expressed in dollars and as a percentage of the net amount invested. Proposed paragraph (f)(8) of rule 15c2–2 would define "dealer concession" as fees that the broker, dealer or municipal securities dealer will earn at the time of the sale, in connection with the transaction, from the issuer of the covered security, an agent of the issuer, the primary distributor, or any other broker, dealer or municipal securities dealer. That amount would be distinct from the commission that the broker, dealer or municipal securities dealer may receive directly from the customer, as well as any load that the investor may pay to the fund's principal underwriter.[84] Because a dealer concession constitutes part of the broker's, dealer's or municipal securities dealer's financial stake in selling the security to the customer, the amount of that stake is relevant to customers so they can better scrutinize the adequacy of the investment options with which they were presented, as well as any recommendations they received.

- The Commission requests comment about whether this requirement is adequate to inform customers about the incentives associated with sales fees and, if not, suggestions as to how it could be modified to do so.

(c) Revenue sharing and portfolio brokerage disclosure. Proposed rule 15c2–2 also seeks to put customers on notice about the existence of arrangements that lead to conflicts of interest, and provide information about the degree of those conflicts. That goal cannot be satisfied by superficial changes, such as boilerplate confirmation language that may attract the attention only of those investors who already are attuned to the potential impacts of revenue sharing. For this reason, the proposed rule would place quantified information about the arrangements directly in front of investors, so they may immediately evaluate its importance and determine whether to seek additional information.

Proposed paragraph (c)(5) of rule 15c2–2 would require disclosure of information related to revenue sharing payments and portfolio securities transaction commissions received by the broker, dealer or municipal securities dealer. The proposed rule specifically would require disclosure of information about two types of arrangements: (i) Revenue sharing payments from persons within the fund complex; and (ii) commissions, including riskless principal compensation, associated with portfolio securities transactions on behalf of the issuer of the covered security, or other covered securities within the fund complex.[85] Because revenue sharing and portfolio brokerage arrangements may be linked in part or in whole to a firm's success in distributing securities on behalf of an entire fund complex, the information would be disclosed on the basis of the firm's sales on behalf of the fund complex, rather than on a fund-by-fund basis.[86]

Proposed paragraph (f)(16) of rule 15c2–2 would define "revenue sharing" as any arrangement or understanding by

[82] Because variable life insurance initially may have a relatively small investment component, disclosure of the front-end sales load as a percentage of net asset value may result in a relatively high disclosed percentage.

[83] Proposed Schedule 15C states those amounts (as well as dealer concession, revenue sharing and portfolio brokerage commissions, *see infra*) as a percentage of "your investment." The note on the reverse of proposed Schedule 15C explains that the term "your investment" generally is based on current values, but in the case of deferred sales loads and asset-based fees may be based on future values. The use of the single term "your investment" is intended to be simple to understand, while flexible enough to accommodate the fact that present values and future values both can be relevant.

[84] As noted above, commissions would be disclosed pursuant to proposed paragraph (b)(4) of rule 15c2–2. Front-end and deferred loads would be disclosed pursuant to proposed paragraphs (c)(1) and (c)(2) of that rule.

For transactions in share classes that impose a front-end sales load, the dealer concession is likely to be smaller than the amount of the load, because the fund's primary distributor generally will retain some of the load to pay its own expenses. For transactions in share classes that impose a deferred sales load, the amount of the dealer concession may be linked to the expected amount of asset-based sales charges (*e.g.*, 12b–1 fees) and of deferred sales loads associated with the shares.

[85] Although these disclosures would be consistent with the requirements of rule 10b–10(a)(i)(D) regarding third-party remuneration, the rule 10b-10 disclosure requirements have been interpreted in the context of the prospectus disclosure principles that the Commission articulated in the 1977 release adopting that rule. *See supra* text accompanying note 5. Because we conclude that prospectus disclosure is inadequate in this context, those interpretations—which permit prospectus disclosure to satisfy the requirements of rule 10b–10—would not apply to disclosure requirements under new rule 15c2–2.

[86] A confirmation should inform an investor of the potential conflicts of interest that confront a broker, dealer or municipal securities dealer. Because the relationships that can lead to those potential conflicts typically are established on a fund complex basis, rather than on a fund-by-fund basis, it is appropriate to disclose those relationships on a fund complex basis. Given that a prospectus is a fund-specific document, a prospectus is particularly inappropriate for disclosing information about those arrangements.

which a person within a fund complex, other than the issuer of the covered security, pays a broker, dealer or municipal securities dealer, or any associated person of the broker, dealer or municipal securities dealer, apart from dealer concessions or other sales fees that would be disclosed pursuant to paragraph (b)(4). This definition of revenue sharing would encompass payments that have a variety of labels—including payments that may be characterized as having purposes other than paying a broker, dealer or municipal securities dealer for "shelf space." For example, in responding to NASD's recent proposal regarding disclosure of revenue sharing and differential compensation, the SIA stated that revenue sharing arrangements are used to reimburse broker-dealers for a variety of expenses, such as reviewing fund prospectuses.[87] While recognizing that brokers, dealers or municipal securities dealers incur expenses in connection with selling and distributing mutual fund shares and maintaining customers accounts, just as they incur expenses in connection with selling other types of securities and maintaining those customer accounts, payments that arguably reimburse firms for these expenses may still influence the firms to promote the sale of particular funds. Moreover, payments that have the effect of reimbursing broker-dealers for expenses that they would incur in their normal course of business, or that exceed the expenses the broker-dealers actually incur, act as subsidies that create conflicts of interest. The proposed definition of revenue sharing excludes payments made by the issuer of the covered security, because those other payments, such as payments for transfer agent services, do not raise the same conflict of interest concerns that are the subject of this proposed rulemaking.[88]

Proposed paragraph (f)(14) of rule 15c2–2 would define "portfolio securities transaction" as any transaction involving securities owned by the issuer of a covered security, or owned by any other issuer within the same fund complex. The required disclosure of commissions associated with portfolio transactions would include disclosure of commissions received by a broker, dealer or municipal securities dealer as part of a "soft dollar" arrangement. Proposed paragraph (f)(10) of rule 15c2–2 would define "fund complex" to include the issuer of the covered security (including the sponsor, depositor or trustee of a unit investment trust, and any insurance company issuing a variable annuity contract or variable life insurance policy), the issuer of any other covered security that holds itself out to investors as a related company for purposes of investment or investor services, any agent or investment adviser for such issuer, and any affiliated person of any such issuer or any such investment adviser.[89]

For both revenue sharing and portfolio brokerage commissions, a broker, dealer or municipal securities dealer would be required to disclose information about amounts directly or indirectly earned from the fund complex by: (A) The broker, dealer or municipal securities dealer; (B) any associated person (as defined in Sections 3(a)(18) and 3(a)(32) of the Exchange Act) that is a broker, dealer or municipal securities dealer, and (C) if the covered security is not a proprietary covered security, any other associated person. Proposed paragraph (f)(15) of rule 15c2–2 would define the term "proprietary covered security" as any covered security as to which the broker, dealer or municipal securities dealer is an affiliated person, as defined by Section 2(a)(3) of the Investment Company Act, of the issuer, or is an associated person of the issuer's investment adviser or principal underwriter, or, in the case of a covered security that is an interest in a UIT, is an associated person of a sponsor, depositor or trustee of the covered security.

Those amounts should be disclosed as a percentage of the total net asset value represented by such broker's, dealer's or municipal securities dealer's (including brokers, dealers and municipal securities dealers that fall in category (B) above) total sales of covered securities (as measured by cumulative net asset value) on behalf of the fund complex over the four most recent calendar quarters, updated each calendar quarter. The required disclosure also would set forth the total dollar amount of revenue sharing or portfolio brokerage commissions that the broker, dealer or municipal securities dealer may expect to receive in connection with the transaction, calculated by multiplying that percentage by the net amount invested in the transaction. Firms would have 30 days to update the information following the end of the calendar quarter.[90]

By requiring disclosure of information about amounts paid to affiliates, as well as information about amounts paid directly to the broker, dealer or municipal securities dealer, the proposed rule would inform investors about the firm's conflicts of interest even when the firm does not directly receive payment. Amounts received by affiliates that are not brokers, dealers or municipal securities dealers would not be included with respect to transactions involving proprietary covered securities, to avoid requiring disclosure of management fees and other payments between funds and investment advisers and any other service providers that are associated with the broker, dealer and municipal securities dealer.[91]

Moreover, to the extent that the broker, dealer or municipal securities dealer has entered into a revenue sharing arrangement or understanding that would result in a specific amount of remuneration in connection with purchases of the covered security, the broker, dealer or municipal securities dealer would have to disclose that expected remuneration as a percentage

[87] *See* Letter from Stuart Strachan, Chairman, Investment Company Committee, SIA, to Barbara Sweeny, NASD, October 17, 2003 (available at http://www.sia.com/2003_comment_letters/pdf/NASD10–17–03.pdf). The letter identified the following categories of reimbursement of broker-dealer expenses: "Customer Sub-accounting'; mailing disclosure documents; maintaining websites; reviewing prospectuses, statements of additional information and other "marketing materials'; implementing changes initiated by funds, such as systems and procedures changes, and communicating changes to registered representatives and customers; and "overseeing and coordinating fund wholesaler activities."

[88] In contrast, we believe that investors should be informed about portfolio brokerage commissions even though they are subject to regulation under Section 12 of the Investment Company Act and oversight by the fund's board of directors. We believe that prospectus disclosure requirements for such payments are not specific enough to place the brokerage customer on notice of the conflicts of interest that they present to particular brokers, dealers and municipal securities dealers.

[89] The term "affiliated person" of another person is defined by Section 2(a)(3) of the Investment Company Act to include, among others, officers, directors, partners or employees of the other person, and persons directly or indirectly controlling, controlled by or under common control with the other person, and investment advisers to investment companies.

The definition of "fund complex," by including any agent of the issuer, may at times encompass the selling broker, dealer or municipal securities dealer that is required to make disclosure under this rule. The amounts of revenue sharing to be disclosed under this provision would apply only to payments made to the broker, dealer or municipal securities dealer by other persons within the fund complex.

[90] The twelve month disclosure period is intended to accommodate the fact that certain payment streams associated with revenue sharing may be annual in nature, such as sponsorship of seminars and other events held by brokers, dealers and municipal securities dealers. At the same time, requiring the information to be updated quarterly is intended to permit the disclosure to reflect any changes in a distribution relationship.

[91] In any event, when a broker, dealer or municipal securities dealer is affiliated with a fund family, revenue sharing may be less significant as a distribution incentive.

of the net amount invested in the covered securities, and would have to disclose the total dollar amount of remuneration it may expect to receive in connection with the transaction.[92]

Disclosing information about revenue sharing and portfolio brokerage commissions in the context of the firm's total sales on behalf of a fund complex, instead of simply disclosing the absolute dollar values the firm has received from the fund complex, would enable customers to see information about a firm's selling stake in a standardized manner, regardless of whether a customer's particular broker, dealer or municipal securities dealer is large or small, and regardless of whether the covered security is issued by a large or small fund complex.[93] Disclosure of this information would alert customers to the existence and magnitude of revenue sharing and portfolio commission arrangements that cause conflicts of interest for brokers, dealers and municipal securities dealers and their associated persons. At the same time, disclosure of the particular arrangements applicable to the transaction will provide information to investors about the most direct incentives for such transactions.

Proposed rule 15c2–2 is not intended to preempt or otherwise negate other provisions of law that may apply. We note that NASD rule 2830(k)(1) bars broker-dealers from favoring the distribution of funds that pay portfolio brokerage commissions.[94] We wish to stress that the proposal to require broker-dealers to disclose information about receipt of portfolio brokerage commissions in no way should be read to condone favoring distribution of funds that pay portfolio brokerage commissions, and would not prevent a broker-dealer from being held liable for violating that NASD rule. Moreover, a mutual fund that uses brokerage commissions to promote the distribution of another mutual fund may also be in violation of the Investment Company Act. Nor would proposed rule 15c2–2 protect a firm from other forms of liability, such as liability under agency law principles.

- The Commission requests comment on whether the proposed definition of revenue sharing appropriately encompasses all distribution arrangements that pose conflicts of interest to brokers, dealers and municipal securities dealers. Commenters particularly are invited to discuss whether the definition should include additional distribution-related arrangements that lead to conflicts of interest, such as distribution-related payments to other affiliates of brokers, dealers and municipal securities dealers. Commenters also are invited to discuss whether the definition should exclude certain arrangements that compensate brokers, dealers or municipal securities dealers for actual expenses they incur (such as mailing expenses) as part of activities that they would not generally be expected to perform as part of a securities business.
- In addition, commenters are invited to provide information about which specific payment streams would be encompassed by the proposed definition of revenue sharing, the dollar value of those payment streams, and the uses of those payments.
- Commenters also are invited to discuss whether the rule should use a term other than "revenue sharing," given that the proposed disclosure requirement would encompass more than the traditional use of the term "revenue sharing" in the mutual fund industry, which is limited to payments from an investment adviser to the broker, dealer or municipal securities dealer. Commenters suggesting alternative terms should explain why those are preferable. Moreover, commenters are invited to discuss whether the definition of revenue sharing appropriately excludes payments made by the issuer of the covered security, and whether the proposed rule should require disclosure of payments made out of the issuer's assets, such as transfer agent payments, that lead to conflicts, regardless of whether those payments already would be accounted for in fund financial statements and are subject to oversight by the fund's board of directors.
- More generally, the Commission requests comment on whether the proposal for disclosure of revenue sharing and portfolio brokerage arrangements would provide sufficient information to investors. Commenters particularly are invited to discuss whether firms should be required to disclose absolute dollar amounts of revenue sharing and portfolio commissions, in addition to or in lieu of disclosing those payments in percentage terms and in terms of the amount of the transaction. Commenters also are invited to discuss whether these arrangements more appropriately should be disclosed on a different basis than for 12 month periods, updated quarterly. We request comment on whether the proposed approach takes sufficient account of the fact that revenue sharing arrangements at times may consist of separate revenue streams arising from a firm's new sales of fund shares and its prior sales of fund shares. Given that it is conceivable that a fund complex may pay different levels of revenue sharing depending on the fund, or may pay revenue sharing only in connection with selected funds, commenters are invited to discuss whether the proposed approach can be improved to account for differences in revenue sharing practices between different funds in the same complex.
- Commenters also are invited to discuss whether, when calculating revenue sharing and portfolio brokerage commissions as a percentage of a broker's, dealer's, or municipal securities dealer's sales on behalf of a fund complex, that percentage should be based on all sales, or whether certain transactions such as transactions involving money market funds should be excluded from the denominator used to calculate those percentages. We also request comment on whether there are alternative ways to effectively inform investors of material information about arrangements that lead to conflicts of interest, while posing lower disclosure costs. In that regard, commenters may wish to discuss whether investors can be adequately informed about revenue sharing and portfolio commission arrangements through disclosures of approximate percentage ranges or dollar ranges, possibly in conjunction with checkboxes. Finally, commenters are invited to discuss whether disclosure of portfolio brokerage commissions is appropriate given existing restrictions on those relationships influencing fund distribution.[95]

(d) Differential compensation disclosure. Proposed paragraph (c)(6) of rule 15c2–2 would require disclosure of whether a broker, dealer or municipal securities dealer pays differential compensation to associated persons related to purchases of two specific

[92] Section C of Schedule 15C would provide space for disclosure of additional remuneration.

[93] For example, a one hundred thousand dollar annual revenue sharing payment from a mutual fund family may pose more of a potential conflict of interest to a firm that annually sells ten million dollars worth of shares for that fund complex than it would pose to a firm that annually sells fifty million dollars worth of shares for that fund family.

[94] NASD rule 2830(k)(1) bars member firms from favoring funds on the basis of brokerage commissions received or expected from any source. That restriction has not been uniformly followed. *See supra* note 20 (discussing NASD action against Morgan Stanley). Moreover, NASD rule 2830(k)(4) restricts member firms from disseminating information about its receipt of commissions from fund complexes other than to certain management personnel. In proposing required disclosure of portfolio brokerage commission arrangements, we do not intend to provide any comfort for relationships or activities that are barred by existing rules.

[95] *See* discussion of NASD rule 2830(k)(1), *supra* note 94.

types of securities: (i) Covered securities that carry a deferred sales load (other than a deferred load of no more than one percent that expires no later than one year after purchase, when no other sales load would be incurred),[96] and (ii) shares of "proprietary covered securities" that are issued by an affiliate of the broker, dealer or municipal securities dealer. If a customer purchased a proprietary covered security that carries a deferred sales load, both disclosures would be required. The proposed rule would provide for affirmative, negative or "not applicable" disclosure about differential compensation to alert customers to the presence of compensation practices that provide incentives leading to conflicts for associated persons.

Disclosure of differential compensation would be limited to transactions in those two types of securities because of the special concerns they raise. Securities that carry a deferred sales load—such as class B shares—may appear more appealing to investors than shares with a front-end sales load, but their long-term costs may be greater and the personnel of a broker, dealer or municipal securities dealer may be more highly compensated for selling them, particularly when the same investment in a share class with a front-end sales load would have been entitled to a breakpoint discount. Moreover, a broker, dealer or municipal securities dealer may pay its personnel extra compensation for selling securities of issuers affiliated with the broker, dealer or municipal securities dealer. While a broker, dealer or municipal securities dealer also may pay extra compensation for selling securities that generate revenue sharing, revenue sharing would be disclosed elsewhere on the confirmation.

The proposed rule would define the term "differential compensation" differently depending on the securities transaction at issue. With respect to customer purchases of a class of covered security associated with a deferred sales load (other than a deferred load of no more than one percent that expires no later than one year after purchase, when no other sales load would be incurred), proposed paragraph (f)(9)(i) of rule 15c2–2 would define "differential compensation" as any form of higher compensation (including total commissions, reimbursement or avoidance of charges or expenses, or other cash or non-cash compensation) that a broker, dealer or municipal securities dealer can be expected to pay to any associated person in connection with the sale of a stated dollar amount of that class of covered security over the next year, based on its current practices and assuming no change in the shares' net asset value if applicable, compared with the compensation that the associated person would have been paid over the next year in connection with the sale of the same dollar amount of another class of the same security that is associated with a front-end sales load.[97] The broker, dealer or municipal securities dealer would have to disclose the existence of differential compensation related to securities with a deferred end sales loads whenever any associated person—salesperson or supervisor—is paid more to sell a security that has a deferred sales load—*i.e.*, differential compensation.[98] Disclosure of those incentives should be useful to investors, especially given the recent instances in which associated persons were found to have inappropriately placed customers into class B shares to increase their own compensation.[99] Investors have an interest in knowing whether salespersons or other associated persons have those higher incentives.[100] The proposed rule only relates to remuneration expected to be paid in the next year when identifying the presence or absence of differential compensation, because short-term compensation reflects the associated person's most immediate financial incentive and because of the difficulty of estimating the near-term value of later revenues. We note, however, that an associated person may receive significant compensation after the first year for selling some share classes.[101]

In the case of customer purchases of proprietary covered securities, proposed paragraph (f)(9)(ii) of rule 15c2–2 would define "differential compensation" as: (A) Any practice by which a broker, dealer or municipal securities dealer pays an associated person a higher percentage of the firm's gross dealer concession in connection with selling a proprietary covered security than the percentage of the gross dealer concession that the firm would pay in connection with selling the same dollar amount of any non-proprietary covered security offered by the firm; and (B) other practices of a broker, dealer or municipal securities dealer that cause an associated person to earn a higher rate of compensation in connection with selling a proprietary covered security, such as additional cash compensation or the imposition, allocation, or waiver of expenses, overhead costs, or ticket charges. That aspect of the proposed rule takes percentage payment rates into account, rather than absolute dollar amounts, because that would lead to more effective disclosure.[102] Proposed paragraph (f)(11) of rule 15c2–2 would define the term "gross dealer concession" as the total amount of any discounts, concessions, fees, service fees, commissions, or asset-based sales charges received by the broker, dealer or municipal securities dealer from the issuer in connection with the sale and distribution of a covered security, other than portfolio brokerage commissions for transactions effected on behalf of the

[96] As noted, some large purchases of class A shares will carry a deferred sales load of up to one percent is imposed for up to one year to discourage short-term holdings. Those sales do not raise the conflict concerns that differential compensation disclosure is intended to capture.

[97] Typically, class B shares are subject to a decreasing deferred sales load for several years following purchase. The amount of the deferred sales load, usually calculated as the lesser of a percentage of the value of the initial investment or the account's value, declines each year that the customer holds the shares and eventually disappears entirely. Some class C shares are subject to a deferred sales load for the first year after purchase. Generally, this disclosure requirement would apply to investor purchases of class B shares. Purchases of class A shares of $1 million or more typically are subject to a one percent deferred sales load for one year, but those purchases generally would not be within the scope of this requirement.

When a customer purchases a class B share, the question of whether an associated person receives differential compensation should take into account the remuneration he or she would have earned from the sale of class A shares.

Class B shares often carry relatively high 12b–1 fees, but may automatically convert into class A shares (which generally carry lower 12b–1 fees) several years after purchase. Class C shares also generally carry relatively high 12b–1 fees, and usually do not automatically convert to a class of shares with lower 12b–1 fees. The Commission's Internet site contains an online calculator that illustrates the impact of loads and other costs on the relative total returns earned on mutual fund investments in different share classes for different holding periods. The calculator is located at *http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm*.

[98] For example, suppose that an associated person is paid a fixed 50% payout of the dealer concession received by a selling broker-dealer in connection with the sale of fund shares, and that the dealer concession received by the firm for selling $200,000 of a particular mutual fund's shares is 4% for class B shares and 2.5% for class A shares. In that case, the associated person would receive a commission of $4,000 for selling the class B shares, but only $2,500 for selling the class A shares. That would amount to $1,500 (or 60%) higher compensation for selling the customer class B shares.

[99] *See supra* note 20.

[100] *See supra* note 49.

[101] Broker-dealers that sell class C shares may receive a relatively modest upfront dealer concession, followed by a portion of the long-term 12b–1 fees that are paid on those shares. Because class C shares generally do not automatically convert to a share class associated with lower 12b–1 fees, unlike class B shares, the broker-dealer's and its associated person's post-first year compensation for selling class C shares may be particularly significant.

[102] Because some non-proprietary securities can have a relatively modest payout, a focus on dollar amounts would invariably lead to "yes" disclosures.

issuer.[103] As discussed above in the context of revenue sharing, proposed paragraph (f)(15) of rule 15c2–2 would define the term "proprietary covered security" as any covered security as to which the broker, dealer or municipal securities dealer is an affiliated person, as defined by Section 2(a)(3) of the Investment Company Act, of the issuer, or is an associated person of the issuer's investment adviser or principal underwriter, or, in the case of a covered security that is an interest in a UIT, is an associated person of a sponsor, depositor or trustee of the covered security. The broker, dealer or municipal securities dealer would be required to disclose the existence of differential compensation related to the sale of proprietary funds because investors would benefit from knowing whether salespersons or other associated persons may receive higher incentives, which create conflicts of interest for them.[104]

The proposed rule would not require brokers, dealers or municipal securities dealers to identify all instances in which an associated person has a higher financial stake to sell the shares of one fund than another. Rather, the proposed rule is targeted toward transactions in securities without front-end sales loads and proprietary securities because other aspects of the proposed rule 15c2–2 should provide customers with information about other conflicts of interest facing the broker, dealer or municipal securities dealer. This point of sale proposal is intended to alert customers to additional information about the existence conflicts that otherwise would be hidden.[105]

- We seek comment on whether this proposal would adequately place customers on notice about the conflicts associated with differential compensation. We specifically request comment on whether brokers, dealers and municipal securities dealers should be required to disclose payment of differential compensation in contexts other than transactions involving shares with deferred sales loads and proprietary covered securities (such as in the context of fund complexes that pay revenue sharing to the broker, dealer or municipal securities dealer).
- We also specifically request comment about whether the proposed approach for defining differential compensation in transactions involving securities with a deferred sales load—which focuses on compensation per dollar of covered security sold, rather than on compensation as a percentage of the dealer concession—should apply to other transactions in light of the fact that dealer concessions can vary widely among funds.[106]
- We also request comment on whether the definition of "proprietary covered security" is sufficiently broad. We further request comment on whether firms should be required to disclose information about their receipt of ongoing asset-based payments from funds (sometimes known as "trailing commissions"), or information about their payment of those fees to associated persons.[107] We moreover request comment on whether firms should be required to account for remuneration received after the first year when determining whether associated persons receive differential compensation in connection with selling share classes without a front-end load.
- Finally, we request comment on whether, in addition to disclosure about the fact that associated persons receive differential compensation, customers should receive information about the amount of any differential compensation received by associated persons. If so, how should the differential compensation be quantified? What time period or periods would be most relevant and useful to investors?

iii. Provisions not included in general and purchase-specific requirements. Proposed rule 15c2–2 would not incorporate several provisions of rule 10b-10 that do not appear material to customer transactions in mutual fund shares, UIT interests and municipal fund securities. In particular, proposed rule 15c2–2 would not require disclosure of whether the broker, dealer or municipal securities dealer is acting in the capacity of agent or principal[108] because those firms would act in an agency capacity for the transactions at issue. For the same reason, the rule 10b-10 disclosure standards for principal transactions[109] would not be incorporated into proposed rule 15c2–2. Proposed rule 15c2–2 also would not incorporate requirements for disclosing information about the person from whom the security was purchased,[110] payment for order flow,[111] odd-lot differentials[112] and several requirements specific to transactions in debt securities.[113]

- The Commission requests comment on whether it would be appropriate to include any of those requirements in proposed rule 15c2–2. Commenters who

[103] Revenue sharing is not encompassed by the term "gross dealer concession" because it is not paid by the issuer. These proposed rules contain separate definitions for the terms "gross dealer concession" and "dealer concession." The term "gross dealer concession" would determine the baseline for identifying whether associated persons are paid differential compensation (through a higher percentage payout) in connection with the sale of proprietary securities. That term focuses on amounts that the broker, dealer or municipal securities dealer receives from the issuer. The term "dealer concession" would govern the obligation of a broker, dealer or municipal securities dealer, under proposed paragraph (c)(4) of rule 15c2–2, to disclose the sales fee that it earns from the issuer or issuer's agent, or from the primary distributor or another broker, dealer or municipal securities dealer.

[104] For example, a firm would have to disclose the existence of differential compensation when an associated person receives a 50% payout of the firm's gross dealer concession in connection with selling $200,000 of a proprietary fund, if the associated person's percentage payout associated with the sale of $200,000 of any other fund would be less than 50%. The firm also would have to disclose differential compensation if an associated person benefits from any practice that compensates him or her in connection with selling the proprietary fund, or reimburses his or her expenses in connection with selling the proprietary fund, if the same programs or practices are not uniformly available in connection with the sale of all other funds.

[105] For example, while firms may provide higher percentage payouts to associated persons in connection with selling mutual funds associated with revenue sharing, other requirements of proposed rule 15c2–2 should place investors on notice about the firms' potential conflicts associated with that practice. Also, while an associated person could have a heightened financial interest in selling non-proprietary funds associated with relatively high dealer concessions (for example, if the associated person is compensated by receiving a particular percentage of the dealer concessions), the proposed requirement that the broker, dealer or municipal securities dealer disclose the sales fee it receives would provide the customer with information about the relative size of the firm's financial stake in the sale.

[106] As proposed, the rule would not require disclosure of all differences in financial incentives. If an associated person is paid a specified percentage payout of the gross dealer concession received by the broker, dealer or municipal securities dealer, then differences in the dealer concession paid on behalf of specific funds can lead to significant differences in compensation. For example, if a proprietary fund offers a dealer concession of 4.0% for selling $100,000 of class A fund shares, while another nonproprietary fund offers a dealer concession of 2.5% for selling the same amount of class A fund shares, then the broker, dealer or municipal securities dealer would earn $4,000 for selling the proprietary fund and $2,500 for the selling the nonproprietary fund. If an associated person is paid 50% of the firm's gross dealer concession, then his or her compensation would be $2,000 for selling the proprietary fund and $1,250 for selling the nonproprietary fund. That $750 difference in compensation represents a potential conflict of interest, but would not be identified if differential compensation related to that transaction is identified solely by reference to percentage payouts.

[107] As noted above, funds may pay ongoing service fees of 0.25% of assets under their 12b–1 plans. Brokers, dealers and municipal securities dealers may pay some or all of those amounts to salespersons as "trailing commissions." Although the fees may be depicted as service fees, they may be viewed by registered representatives as deferred compensation for sales.

[108] *See* rule 10b–10(a)(2).

[109] *See* rule 10b–10(a)(2)(ii).

[110] *See* rule 10b–10(a)(2)(i)(A).

[111] *See* rule 10b–10(a)(2)(i)(C).

[112] *See* rule 10b–10(a)(3).

[113] *See* rule 10b–10(a)(4).

believe that proposed rule 15c2–2 should be expanded to encompass transactions in additional types of securities also should address what additional disclosure provisions such inclusion would require.

e. *Periodic disclosure alternative.* Proposed paragraph (d) of rule 15c2–2 would permit brokers, dealers and municipal securities dealers to disclose the required information periodically, rather than transaction-by-transaction, in certain limited circumstances involving transactions in a "covered securities plan" or in no-load open-end money market funds. This provision is based on the periodic disclosure requirements of rule 10b–10(b), but modified to be consistent with the targeted disclosure standards of proposed rule 15c2–2. Proposed paragraph (f)(5) of rule 15c2–2 would define "covered securities plan" as any plan for direct purchase or sale of a covered security pursuant to certain retirement or pension plans or other agreements or arrangements.[114] While this definition in large part would be analogous to the rule 10b-10 definition of "investment company plan," it also would encompass arrangements for automatic reinvestment of dividends or other distributions paid by the issuer of a covered security. The periodic disclosure alternative of proposed rule 15c2–2 would require a broker, dealer or municipal securities dealer to provide quarterly disclosure for transactions involving covered securities plans, and monthly disclosure for money market fund transactions subject to the periodic disclosure alternative.[115]

This disclosure would encompass summary information designed to inform investors about costs and conflicts, consistent with the general and purchase-specific disclosure requirements in other provisions of proposed rule 15c2–2. In general, it would require disclosure of the same types of information that are required by paragraphs (b) and (c), but some information would be disclosed in summary form that reflects all transactions within a period, rather than each individual transaction. Proposed paragraph (d)(2) of rule 15c2–2 would require disclosure of each transaction, and of the total number of shares in the customer's account at the end of the period. It would further require, for each transaction, disclosure of the general information related to date, issuer and class of the security, price and net asset value, number of shares, the total amount paid or received and the net amount of the investment bought or sold, commissions from the customer, deferred sales load charges, and SIPC membership.[116] Also, to the extent applicable, it would require disclosure of information about front-end sales loads charged to the customer,[117] and about dealer concessions received by the firm.[118] As of the date of the final purchase or reinvestment during the period, the provision would require disclosure of information about revenue sharing and portfolio brokerage commission arrangements [119] and about differential compensation.[120] Based on the total value of the purchases and reinvestments during the period, and the net asset value at the end of the period, the rule would also require disclosure of information related to deferred sales loads [121] and to asset-based sales charges and service fees such as rule 12b–1 fees.[122]

Proposed paragraph (d)(3) of rule 15c2–2 would require a broker, dealer or municipal securities dealer to provide the customer with written notification before it could take advantage of the periodic disclosure alternative. Moreover, the broker, dealer or municipal securities dealer would be required to provide the customer with at least one written disclosure document consistent with the general and purchase-specific disclosure standards at the time of each purchase of a particular security within a covered securities plan, prior to relying on the periodic disclosure alternative.[123] This latter requirement is intended to help customers to receive timely notice about the costs and conflicts raised by purchases involving each security that is the subject of the covered securities plan.

- The Commission requests comment on whether any periodic disclosure alternative is appropriate, in light of the distribution-related concerns associated with covered securities.
- The Commission also requests comment on whether this proposal strikes the right balance between alerting investors to the distribution-related issues associated with these securities and minimizing firms' cost of disclosure. Should we require periodic disclosures to be made more frequently? If so, commenters are requested to suggest alternative time frames and their reasons for believing they would provide more meaningful information to investors.
- We also request comment about whether permitting some categories of information to be disclosed in summary fashion is appropriate, or if broker-dealers should be required to provide all the transaction-by-transaction information otherwise required by the rule in the periodic statements.

f. *Other provisions and definitions.* Proposed paragraph (g) of rule 15c2–2 would permit the Commission to exempt any broker, dealer or municipal securities dealer from the provisions of the rule with regard to any transactions or any class of transactions, when the Commission finds that firm will provide alternative procedures to effect the purposes of the rule. Rule 10b–10 has a similar exemptive provision.[124]

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[114] This alternative would apply to three general types of arrangements: (i) individual retirement or individual pension plans; (ii) agreements for purchasing covered securities at the public offering price, or redeeming covered securities at the applicable redemption price, at specified time intervals and setting forth the commissions or charges to be paid by the customer; or (iii) other arrangements by which a group of two or more customers engage in periodic purchases of covered securities through a person designated by the group, subject to specific notice requirements.

As discussed below, we are proposing conforming amendments to the periodic disclosure provisions of rule 10b–10.

[115] Because the definition of "covered securities plan" encompasses reinvestment of dividends and other distributions paid by issuers of covered securities, proposed rule 15c2–2 would permit quarterly disclosure related to those reinvestment transactions. This would encompass covered security dividend reinvestment activity that has been the subject of exemptive relief under rule 10b–10. *See, e.g.*, Letter regarding Newbridge Securities (February 20, 1997) (providing for monthly disclosure in connection with dividend reinvestment transactions involving mutual funds and other securities); Letter regarding Edward D. Jones & Co. (August 1, 2003) (providing for quarterly disclosure in connection with dividend reinvestment transactions involving money market funds).

We do not propose at this time to amend rule 10b–10 in a corresponding way to provide for quarterly disclosure in connection with dividend reinvestment programs involving other securities.

[116] Those are set forth in paragraph (b) to proposed rule 15c2–2.

[117] Those are set forth in paragraph (c)(1) to proposed rule 15c2–2.

[118] Those are set forth in paragraph (c)(4) to proposed rule 15c2–2.

[119] Those are set forth in paragraph (c)(5) to proposed rule 15c2–2.

[120] Those are set forth in paragraph (c)(6) to proposed rule 15c2–2.

[121] Those are set forth in paragraph (c)(2) to proposed rule 15c2–2.

[122] Those are set forth in paragraph (c)(3) to proposed rule 15c2–2.

[123] In other words, if a covered securities plan encompasses purchases of three separate mutual funds, the broker, dealer or municipal securities dealer would have to provide a purchase-specific disclosure upon the first purchase of each of those funds. Subsequent purchases of each particular fund would not require the purchase-specific disclosure, because the customer already has been alerted to the costs and conflicts at issue.

[124] The Commission, acting by authority delegated to its staff, has granted a significant number of exemptions under rule 10b–10. Persons who have received those exemptions would not be automatically exempt from the provisions of proposed rule 15c2–2. As discussed above, however, the periodic disclosure alternative

Continued

Proposed paragraph (f)(3) of rule 15c2–2 would also use the same definition of the term "completion of the transaction" as is found in rule 10b–10.[125] In addition, proposed paragraph (f)(7) of rule 15c2–2, consistent with rule 10b–10, would provide that the term "customer" does not include any broker, dealer or municipal securities dealer.[126] Because the two confirmation rules have parallel goals, it is appropriate for those definitions to be the same.

g. *Comparison range disclosure.* Proposed paragraph (e) of rule 15c2–2 would provide a mechanism to give investors additional context for evaluating the significance of certain required disclosures by requiring brokers, dealers and municipal securities dealers to provide comparison information. In many cases, including disclosures about sales loads, asset-based sales charges and service fees, revenue sharing and portfolio brokerage commissions, investors could benefit from knowing how the position of the broker, dealer or municipal securities dealer compares to industry practices. Investors may obtain that context if they are provided information about where costs and payments fall in comparison to the median and ranges in the marketplace. In the case of disclosures of loads, asset-based sales charges and service fees, and dealer concessions, these comparisons would be based on the median of, and the ranges associated with, 95 percent of the transactions involving the same type of covered security (*i.e.*, mutual fund, unit investment trust or 529 plan). In the case of disclosures of revenue sharing and portfolio brokerage, these would be the medians and the ranges associated with 95 percent of the brokers, dealers or municipal securities dealers that distribute the same type of covered security. Median and 95th percentile range information are accepted statistical methods that, applied here, would provide a snapshot about whether a cost or conflict is typical or is an outlier. The Commission would publish the medians and comparison ranges from time to time in the **Federal Register**.[127] The Commission would publish those medians and ranges in percentage form. Firms would have to update median and percentage range information on their confirmations within 90 days of their publication. If adopted, this requirement would not take effect until 90 days after the Commission publishes the initial schedule of comparison ranges.

- We request comment about the utility and implementation of this proposal to disclose median and comparison range information. For example, in calculating comparison ranges related to loads and dealer concessions, to what extent is it appropriate to take into account the type of security (such as equity fund, debt fund, money market fund, or blend) that is the subject of the transaction. Are there specific categories of covered securities that would lead to the fairest "apples to apples" comparisons? Should all UITs be in a single category, or would it be necessary, for example, to separate variable annuities, variable life insurance, and other UITs? Should issuers of covered securities, or brokers, dealers or municipal securities dealers, be able to select the comparison category applicable to particular securities, or should the Commission assign covered securities to specific categories? Should median and percentile range information related to covered securities be weighted to account for the relative sales of covered securities? In other words, should covered securities that are more highly sold have a higher weight in calculating the medians and 95th percentile ranges? Similarly, should median and range information related to brokers, dealers and municipal securities dealers be weighted to account for relative sales by those firms? In other words, should brokers, dealers and municipal securities dealers that sell more covered securities have a higher weight in calculating the medians and 95th percentile ranges? Should transactions be compared to other transactions of a similar dollar amount? Moreover, should confirmations disclose comparison information that is more specific than medians and 95th percentile ranges, such as by stating the percentile rank of the loads, other costs or compensation associated with a transaction? Should the Commission be responsible for analyzing the information used to calculate medians and comparison ranges, or should the Commission permit or require the disclosure of median and comparison range information published by a vendor or other third-party source? Should the Commission establish standards for vendors or other third parties to derive and publish that information?

We recognize that implementing these reporting requirements for medians and comparison ranges will require additional rulemaking to implement reporting requirements to permit the Commission or its vendors to gather information to calculate appropriate medians and comparison ranges.

- What entities should be required to disclose information that is necessary to calculate median and comparative range information? In particular, should investment companies or brokers, dealers and municipal securities dealers be required to provide us with information to expedite the calculation of comparison ranges?

There will be additional opportunity to comment about those requirements at the time of a reporting requirement proposal. If we conclude that publication of median and comparison range information is not feasible due to implementation issues, then brokers, dealers and municipal securities dealers would not be required to disclose median and comparative range information.

If we conclude that comparative information would be useful to investors in this context, we may consider implementing comparative information disclosure requirements in other contexts, as well.

h. *Disclosures about transactions effected by multiple firms.* The requirements of proposed rule 15c2–2 would apply to every broker, dealer or municipal securities dealer that effects a transaction in a covered security, including transactions effected by more than one broker, dealer or municipal securities dealer. As is the case today, customers whose transactions have been effected in the context of an introducing-clearing arrangement nonetheless may receive a single confirmation if the two brokers, dealers or municipal securities dealers enter into a written agreement—disclosed to the customer—that determines the responsibilities of each, including the responsibility to provide confirmations to customers.[128]

provisions of proposed rule 15c2–2 encompass dividend reinvestment activities that have been the subject of several of those exemptions under rule 10b–10. *See supra* note 115.

[125] Rule 10b–10(d)(2) defines "completion of the transaction" by reference to rule 15c1–1 under the Exchange Act. Rule 15c1–1 defines that term by reference to the time of payment, delivery, transfer or bookkeeping entry, depending on the specific circumstances.

[126] Rule 10b–10(d)(1) provides that the term "customer" does not include a broker or dealer.

[127] Our goal is to do this annually.

[128] In an introducing-clearing relationship, both the introducing firm and the clearing firm effect the transaction and are subject to confirmation requirements. The agreement between the two firms would be provided to customers upon the establishment of the account or the establishment of the introducing-clearing arrangement, and the customers thereafter have a reasonable expectation of the responsibilities of both the introducing broker-dealer and the clearing broker-dealer in transactions effected for their accounts. *See* NYSE rule 382 and NASD rule 3230.

Although a customer may receive a single confirmation for a transaction effected as part of an introducing-clearing arrangement, proposed rule 15c2–2 would require specific disclosure of sales fees, revenue sharing and portfolio brokerage commissions received by any broker, dealer or municipal securities dealer that effects a transaction. It is important that an investor see information about those types of remuneration specifically attributed to each broker, dealer or municipal securities dealer, so the investor may evaluate conflicts of interest. Thus, a single confirmation still shall separately disclose the sales fees, revenue sharing and portfolio brokerage commissions earned by each firm.[129] That may require a broker, dealer or municipal securities dealer that receives sales fees, revenue sharing or portfolio brokerage to convey responsive information to the firm that sends out the confirmation, which may require enhancement of existing flows of information. There are other instances in which a broker, dealer or municipal securities dealer may effect transactions in covered securities in conjunction with another broker, dealer or municipal securities dealer. For example, a broker, dealer or municipal securities dealer may solicit persons at their workplaces, as part of an employer-sponsored marketing arrangement, to invest in covered securities. Although the broker, dealer or municipal securities dealer that solicits transactions may be paid on a transaction-basis, the customer accounts may be opened at a different firm. Proposed rule 15c2–2 would require disclosure of payments to the broker, dealer or municipal securities dealer soliciting the transaction, even if it does not maintain the account.[130]

• We request comment on whether proposed rule 15c2–2 would result in adequate disclosure of information about distribution-related costs and conflicts connected with transactions effected by more than one broker, dealer or municipal securities dealer. Commenters are invited to discuss any potential implementation issues associated with the proposed rule, including any operational challenges or difficulties that the requirement may pose to introducing and clearing firms or other firms that together effect securities transactions. Commenters may also wish to discuss the application of the proposed rule to the principal underwriter or distributor of a covered security.

2. Amendments to Rule 10b-10

Because proposed rule 15c2–2, if adopted, would govern confirmation disclosure of purchases and sales in investment company securities, we also propose to amend rule 10b-10 to exclude those securities.[131] In particular, we propose to amend paragraph (a) of rule 10b-10 to provide that the rule does not apply to securities excluded by paragraph (g) of the rule. Proposed paragraph (g) would provide that rule 10b-10 does not extend to transactions in: (i) U.S. Savings Bonds, (ii) municipal securities, and (iii) any other security that is defined as a "covered security" by rule 15c2–2. Transactions in savings bonds and municipal securities already are excluded from the application of rule 10b-10. The Commission also proposes amending the preliminary note to rule 10b-10 to clarify the application of the rule.[132]

Two other changes to rule 10b-10 are necessary to accommodate the addition of proposed rule 15c2–2. First, we propose to modify paragraph (a)(9) of rule 10b-10, which, when applicable, requires disclosure when a broker-dealer that effects a transaction is not a member of SIPC. As currently written, that paragraph contains an exception for certain transactions in open-end investment companies and UITs. Because proposed rule 15c2–2 would encompass transactions in those securities, we propose eliminating that exception from rule 10b-10.[133]

Second, we propose to modify the periodic reporting alternative permitted by paragraph (b) of rule 10b-10. That alternative applies to transactions effected pursuant to a "periodic plan" or "investment company plan," or to transactions in no-load money market funds. Because the latter two categories would be encompassed within the periodic alternative of rule 15c2–2, we propose deleting them from the scope of the periodic alternative of rule 10b-10. Because the term will no longer be used in the rule, we also propose removing the definition of "investment company plan" from rule 10b-10.

Finally, we propose to modify the preliminary note of rule 10b-10 to be consistent with the preliminary note of proposed rule 15c2–2. As explained above, this would reflect the fact that the confirmation disclosure requirements are not determinative of, and do not exhaust, a broker-dealer's disclosure obligations under the antifraud provisions of the federal securities laws or under any other legal requirements.

## V. Point of Sale Disclosure for Transactions in Mutual Fund Shares, Unit Investment Trust Interests and 529 Plan Interests

In addition to the tailored confirmation requirements of rule 15c2–2, the Commission is also proposing rule 15c2–3, which would require brokers, dealers and municipal securities dealers to provide customers with specified information at the point of sale—prior to the time they purchase mutual fund shares, UIT interests and 529 plan securities. Investors, therefore, would have this information before they finalize their investment decision to purchase a covered security, regardless of whether the transaction is solicited or unsolicited. The proposed rule would not apply to transactions in which an investor sells a covered security, because those transactions do not raise the same special cost and conflict concerns.

The new rule is designed to be consistent with the existing obligations of brokers, dealers and municipal securities dealers under the antifraud provisions of the securities laws, which at times require a broker, dealer or municipal securities dealer to disclose information about particular costs and conflicts prior to effecting a transaction in a covered security.[134] It is also

[129] Attachments 1–3 hereto provide models for confirmations sent by clearing firms on behalf of themselves and introducing firms that receive sales fees, revenue sharing and portfolio brokerage commissions. Generally, so long as the fees that a clearing firm receives in connection with a transaction do not constitute sales fees, revenue sharing and portfolio brokerage commissions, the clearing firm would not have to separately state that it does not receive that type of remmeration.

[130] Absent an agreement disclosed to the customer, it is unlikely that the selling broker, dealer or municipal securities dealer would be able to send a single confirmation jointly with another firm effecting the transaction. *See* Office of Compliance Inspections and Examinations, Commission, "Inspection Report on the Soft Dollar Practices of Broker-Dealers, Investment Advisers and Mutual Funds" (September 22, 1998) at n.78. The Commission, however, will consider requests for exemptive relief permitting joint confirmations in circumstances where the customer may reasonably consent to such use.

[131] As noted, rule 10b–10 already exempts transactions in municipal securities.

[132] Specifically, the preliminary note to rule 10b–10 would be amended to note that rule 15c2–2, not rule 10b–10, governs disclosure requirements related to transactions in open-end management investment company shares, interests in unit investment trusts, and municipal fund securities used for education savings.

[133] Proposed rule 15c2–2 would not apply to secondary market transactions in interests in UITs. That does not preclude this proposed amendment to rule 10b–10, however, because secondary market transactions in UITs would not fall within the scope of the "investment company plan" exception of rule 10b–10.

[134] For example, the antifraud provisions at times require disclosure prior to transactions about

Continued

intended to supplement the prudent business ethic of firms that assure their customers will be apprised of key facts prior to sales, to avoid surprises and broken trades. Point of sale disclosure should also complement confirmation disclosure, which provides a retrospective record of the complete terms of a transaction for customers to assess in determining whether the transaction occurred as described and whether they received any applicable breakpoint discounts.[135] A broker, dealer or municipal securities dealer that misstates information in a point of sale disclosure with an intent to mislead may be subject to liability under the antifraud provisions of section 10(b) and rule 10b-5.

The preliminary note to proposed rule 15c2–3, consistent with the preliminary note to proposed rule 15c2–2 and the proposed amendment to the preliminary note of rule 10b-10, would state that the point of sale disclosure requirements are not determinative of, and do not exhaust, a broker's, dealer's or municipal securities dealer's disclosure obligations under the antifraud provisions of the federal securities laws or under any other legal requirements.

Paragraph (a) of proposed rule 15c2–3 would provide that it is unlawful for any broker, dealer or municipal securities dealer to effect a purchase of any covered security for a customer unless the broker, dealer or municipal securities dealer delivers to the customer, at the point of sale, quantified information regarding distribution-related costs and the dealer concession that would be connected with the purchase, along with qualitative information about revenue sharing, portfolio brokerage commissions and differential compensation.

**A. Securities Transactions and Persons Covered**

The point of sale disclosure requirements of proposed rule 15c2–3 would govern purchase transactions in the same securities that are subject to the confirmation requirements of proposed rule 15c2–2, because those are the securities that raise the cost and conflict issues that warrant this type of disclosure requirement. Accordingly, the disclosure requirements of proposed rule 15c2–3 would apply to transactions in "covered securities." Paragraph (f)(2) of proposed rule 15c2–3 provides that the term "covered security" has the meaning set forth in rule 15c2–2.

- We request comment on whether this proposed rule appropriately encompasses the types of securities that raise distribution-related concerns that warrant point of sale disclosure. Commenters specifically are invited to address whether this type of disclosure requirement could have the effect of directing investors away from mutual funds and related securities.[136]
- We also request comment about whether persons other than brokers, dealers or municipal securities dealers also should be required disclose information to investors prior to transactions in covered securities. Commenters are invited to discuss whether other persons that participate in the distribution of covered securities—such as banks—are subject to the same or similar conflicts of interest as brokers, dealers and municipal securities dealers. Commenters also are invited to discuss whether the Commission should propose rules to require those other persons to disclose specific information to investors prior to transactions, or to disclose confirmation information on or before the completion of such transactions.
- Commenters may also wish to discuss whether the point of sale disclosure requirements of proposed rule 15c2–3 would be appropriate to transactions in variable annuities. Commenters are invited to discuss any issues they believe would be relevant to the application of proposed rule 15c2–3 to variable insurance products, as well as any modifications they believe could improve the proposed rule's effectiveness as applied to variable insurance products. Specifically, commenters may wish to address whether point of sale disclosure would provide investors with more useful information for transactions in variable insurance products. In addition, we invite comment on whether point of sale disclosure is appropriate at or prior to the time the contract or policy is entered into or at the time the underlying funds are allocated. Commenters should address whether such point of sale disclosure is appropriate under the federal securities laws.

*B. Timing of Disclosure*

Proposed rule 15c2–3 would require the broker, dealer or municipal securities dealer to deliver information at the point of sale. Proposed paragraph (f)(1) of the rule would define "point of sale" differently depending on the relationship between the broker, dealer or municipal securities dealer and the customers that it solicits. Generally, the time of the point of sale would be immediately prior to the time that the broker, dealer or municipal securities dealer accepts the order from the customer. In the case of transactions in which the customer has not opened an account with the broker, dealer or municipal securities dealer, or in which the broker, dealer or municipal securities dealer does not accept the order from the customer—such as may be the case with workplace marketing of 529 plans—the point of sale would be the time that the broker, dealer or municipal securities dealer first communicates with the customer about the covered security, specifically or in conjunction with other potential investments.

This definition of point of sale is geared to be as simple as possible while avoiding disclosure gaps. For most transactions, the time of disclosure is based on the time that the broker, dealer or municipal securities dealer receives the order from the customer—a standard that should allow customers to consider material information when they make their investment decisions. That standard would not work, however, in the case of brokers, dealers or municipal securities dealers that solicit transactions in covered securities—and receive compensation in connection with those transactions—without opening accounts for or handling orders from the investors who make those purchases.[137] Because the investors solicited by those firms instead would contact another broker, dealer or municipal securities dealer or the issuer to complete those transactions, it would not be feasible to trigger the disclosure obligations of those soliciting brokers,

revenue sharing and portfolio brokerage arrangements, and about the cost differences between various mutual fund share classes. *See generally In the Matter of Morgan Stanley DW Inc., supra* note 20.

[135] As noted above, the confirmation also serves as a record of previous transactions that customers can assess in determining whether to make further investments with the same broker-dealer in the same mutual fund or similar type of security. Confirmation disclosure can be particularly valuable with respect to transactions in mutual fund shares and municipal fund securities, given that customers often invest in those securities through a regular course of purchases. Moreover, brokers, dealers and municipal securities dealers may supplement the disclosures required by proposed rule 15c2–2 by providing their customers with additional information about costs and conflicts, using media such as the Internet.

[136] Other than in connection with transactions in "penny stocks," the rules we have promulgated under the Exchange Act generally do not specifically require a broker, dealer or municipal securities dealer to disclose particular information prior to transactions. *See* Exchange Act rules 15g–2 to 15g–5. As discussed above, however, the antifraud provisions of the federal securities laws may mandate certain disclosures prior to transactions.

[137] Those may include brokers, dealers or municipal securities dealers that market covered security investments in the workplace of potential investors.

dealers or municipal securities dealers on the time that an order is accepted.[138] Those soliciting firms therefore would disclose the required information at the time they recommend the security or otherwise discuss the investment.

• We request comment on the point of sale definition, and more generally on the question of when, prior to transactions, should disclosure be provided to customers. Commenters specifically are invited to address whether alternative times of disclosure would be more effective. In their responses, commenters may wish to discuss alternatives such as at the time of account opening or shortly thereafter, at the time a broker, dealer or municipal securities dealer solicits a transaction, on a periodic or annual basis, or at certain other times. Commenters also may wish to address whether early disclosure that is not specific to a particular contemplated transaction would be an adequate substitute for disclosure later in time (but prior to the transaction) that does contain information that is specific to the transaction being contemplated.

• In addition, commenters are invited to discuss how to harmonize point of sale disclosure requirements with NASD's proposal to require member firms to disclose information about revenue sharing and differential compensation.[139] Commenters further are invited to discuss whether the proposed point of sale disclosure requirement would impact the need for the transaction confirmation requirements we propose in rule 15c2–2. For example, would the transaction confirmation disclosures we propose be less necessary if the point of sale disclosure requirements of proposed rule 15c2–3 were combined with additional periodic disclosures that inform customers about distribution-related costs and conflicts of interest, such as quarterly account statements from the broker, dealer or municipal securities dealer? Commenters are invited to provide empirical information to support their views.

• In addition, the Commission requests comment on whether a transitional period is necessary to make adjustments necessary to deliver confirmations that comply with proposed rule 15c2–3.

[138] In fact, the broker, dealer or municipal securities dealer may not even know the identities of the persons whom it solicits until after the investment is made and it is paid for helping make the sale.

[139] *See supra* text accompanying note 51.

*C. Information Requirements*

Proposed paragraph (a) would require a broker, dealer or municipal securities dealer to deliver quantitative information about distribution-related costs that the investor may bear and the dealer concession that the broker, dealer or municipal securities dealer may expect to receive in connection with the transaction, combined with qualitative information about practices that lead to conflicts of interest in connection with the transaction. This proposed scope of information is intended to give investors useful context for evaluating whether to proceed with a possible investment, while accommodating practicalities of disclosure.

Proposed paragraph (a)(1) specifically would require the broker, dealer or municipal securities dealer to inform its customer about the distribution-related costs that the customer would be expected to incur in connection with the transaction, with separate disclosure about: the amount of sales loads that would be incurred at the time of purchase; estimated asset-based sales charges and asset-based service fees paid out of fund assets in the year following the purchase if net asset value remained unchanged; and the maximum amount of any deferred sales load that would be associated with the purchase if those shares are sold within one year (other than deferred sales loads of no more than one percent that expire no later than one year after purchase, when no other sales load would be incurred on that transaction), along with a statement about how many years a deferred sales load may be in effect. Proposed paragraph (a)(1) also would require the broker, dealer or municipal securities dealer to disclose the dealer concession or other sales fees it would expect to receive in connection with the transaction. Those amounts would be disclosed by reference to the value of the purchase, or, if that value is not reasonably estimable at the time of the disclosure, by reference to a model investment of $10,000.

Proposed paragraphs (a)(2)(i) and (a)(2)(ii) would require the broker, dealer or municipal securities dealer to state whether it receives revenue sharing or portfolio brokerage commissions from the fund complex. Proposed paragraph (a)(2)(iii) would require the broker, dealer or municipal securities dealer to state whether it pays differential compensation in connection with transactions in the covered security, if the covered security charges a deferred sales load or is a proprietary covered security.

The definitions of the terms "asset-based sales charge," "asset-based service fee," "dealer concession," "differential compensation," "portfolio securities transaction," "revenue sharing" and "sales load" would be the same as the definitions used in proposed rule 15c2–2. Proposed paragraph (f)(2) of rule 15c2–3 would cross-reference those definitions.

Like the confirmation provisions of proposed rule 15c2–2, the point of sale provisions of proposed rule 15c2–3 are not intended to preempt or negate any other provisions of law that may apply.[140]

• The Commission requests comment about the form and specificity of the information that should be disclosed at the point of sale. Commenters specifically are invited to discuss whether information about costs and information about conflicts both are appropriate elements of point of sale disclosure. Commenters may also wish to discuss whether the proposed combination of qualitative and quantitative disclosure is appropriate, and whether the choice of quantitative or qualitative disclosure is appropriate in each instance. In that regard, should all of the disclosures be qualitative? Alternatively, should all of the disclosures be quantitative?

• Commenters also are invited to address whether this proposed rule should encompass additional categories of information, and whether the cost of providing certain types of information is justified by the benefits to investors. Commenters further are invited to address whether, if applicable, the broker, dealer or municipal securities dealer should be required to identify the type of differential compensation (*e.g.*, related to sales of proprietary securities, or related to sales of securities without a front-end load) it pays in connection with transactions in the covered security. Commenters further are invited to address whether a broker, dealer or municipal securities dealer should be required, at the point of sale, to deliver the same information that is required be disclosed in a transaction confirmation under proposed rule 15c2–2.

• In addition, commenters are invited to address whether disclosure related to breakpoint discounts would be

[140] As noted above, NASD rule 2830(k)(1) bars member firms from favoring funds on the basis of brokerage commissions received or expected, and NASD rule 2830(k)(4) restricts member firms from disseminating information about its receipt of commissions from fund complexes other than to certain management personnel. *See supra* note 94. In proposing required disclosure of portfolio brokerage commission arrangements, we do not intend to provide any comfort for relationships or activities that are precluded by existing rules.

warranted as part of point of sale disclosure. In that regard, we note that broker-dealers already are required to provide information about breakpoint discounts to customers.[141]

• Commenters moreover are invited to discuss whether additional point of sale disclosures are appropriate when a broker, dealer or municipal securities dealer recommends that an investor sell a covered security that the investor currently owns, and invest in or "switch to" a different covered security. At times, a broker, dealer or municipal securities dealer may recommend switching of securities even if the investor would incur extra fees to make the switch, or even if the investor has already incurred a front-end sales load on the covered security he or she currently owns. While this is a complex issue that is addressed by other rules including the antifraud provisions of the federal securities laws and self-regulatory organization sales practice rules and related guidance,[142] we seek comment on the extent to which additional specific confirmation or point of sale disclosure should be required, and possible disclosure alternatives.

*D. Customers' Right To Terminate Orders Made Prior to Disclosure*

Proposed paragraph (b) of rule 15c2–3 would provide that an order made prior to the disclosure required by paragraph (a) must be treated as an indication of interest until after the point of sale information is disclosed, and customers have received an opportunity to terminate any order following disclosure of the information. It further would provide that the broker, dealer or municipal securities dealer shall disclose this right to the customer at the time it discloses the information required under the paragraph to the customer. This provision is intended to enable customers to consider material information prior to a transaction being finalized. Based on the information, customers may conclude that it would be prudent to explore alternative investments, such as investments that carry lower distribution-related costs. In that case, the customer may determine not to make the order effective.

Because disclosure of information is necessary for orders to be effective, we expect that brokers, dealers and municipal securities dealers would engage in careful procedures to ensure that only effective orders are conveyed to the issuer, and would be required to keep appropriate records demonstrating compliance with the rule, as discussed below.[143]

• We request comment on this proposed provision. Commenters specifically are invited to address how customers may terminate orders made prior to receiving point of sale disclosure, and whether the rule should specify how customers may terminate orders.

*E. Manner of Disclosure*

Proposed paragraph (c) generally would require the broker, dealer or municipal securities dealer to give or send the information to the customer in writing using Schedule 15D, supplemented by oral disclosure if the point of sale occurs at an in-person meeting. If the point of sale occurs through means of an oral communication other than at an in-person meeting, however, then the information shall be disclosed to the customer orally at the point of sale.

Attachments 4 and 5 to this proposal set forth examples of point of sale disclosure that are consistent with Schedule 15D. Like Schedule 15C for confirmation disclosure, Schedule 15D provides the format for the required disclosure accompanied by materials that will help permit the customer to evaluate the significance of the disclosure information.

Those requirements are geared to promote effective disclosure while accommodating practicality. For example, if the broker, dealer or municipal securities dealer took the customer's order over the telephone, then oral disclosure over the telephone would be required. If the broker, dealer or municipal securities dealer took the customer's order over the Internet, then the Internet could be used to provide the required disclosure.[144] If the broker, dealer or municipal securities dealer solicited the transaction in a seminar or meeting, then the firm would have to provide the disclosure orally and in writing. A written disclosure document that provides information consistent with the confirmation disclosure requirement of rule 15c2–2 generally also would satisfy this requirement.

• We request comment on these proposed requirements about the manner of disclosure. Commenters particularly are invited to discuss whether customers should have the right to receive this information in writing as a supplement to oral disclosure, when the rule otherwise would only require oral disclosure.[145]

• Commenters also are invited to discuss whether Schedule 15D is an appropriate form for written disclosures, and whether the explanatory information accompanying Schedule 15D is appropriate.

• Commenters further may wish to discuss whether the rule should require the broker, dealer or municipal securities dealer to obtain from the customer a signed acknowledgement of having received point of sale disclosure, and; if so, what would be the appropriate exceptions to that requirement. Commenters also should discuss appropriate practices or safeguards that may be necessary to prevent brokers, dealers, or municipal securities dealers from delivering point of sale disclosure in a manner that undermines its purpose.

*F. Recordkeeping*

Proposed paragraph (d) of rule 15c2–3 would require brokers, dealers or municipal securities dealers, at the time they disclose information required by this rule, to make records of communications and their disclosure sufficient to demonstrate compliance with the delivery requirements of paragraphs (a) and (b). The brokers, dealers or municipal securities dealers

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[141] When we recently proposed rules to require open-end management investment companies to disclose enhanced information about breakpoint discounts, we pointed out that a "broker-dealer who sells fund shares to retail customers must disclose breakpoint information to its customers and must have procedures reasonably designed to ascertain information necessary to determine the availability and appropriate level of breakpoints." *See* Securities Act Release No. 8349 (December 17, 2003), 68 FR 74732 (December 24, 2003).

Moreover, the joint NASD/industry task force on breakpoints recommended that broker-dealers provide disclosure statements to investors at the time of or prior to the confirmation of the initial purchase of front-end load fund shares, and thereafter on a periodic basis or at the time of or prior to the confirmation of subsequent purchases. *See* Task Force Report, *supra* note 42 at 14–15.

[142] For instance, broker-dealer recommendations related to investment switching would be subject to NASD rule 2310, regarding suitability.

NASD Notice to Members 99–35 (May 1999), which discussed the responsibility of members related to sales of variable annuities, noted that member firms may develop an analysis document or use a state-authorized form in connection with the replacement of variable annuities. If the firm uses that type of document, then it "should include an explanation of the benefits of replacing one contract for another variable contract," and the document should be signed by the customer, the registered representative and the registered principal. We note, of course, that any practice that provides information about the "benefits" of switching, without discussing the costs of switching, may be inconsistent with the antifraud provisions of the federal securities laws.

[143] For example, brokers, dealers and municipal securities dealers may limit their exposure to losses resulting from violations of the rule by maintaining records demonstrating that the customer received the disclosure information.

[144] The use of electronic media to deliver the required disclosure is subject to applicable legal requirements.

[145] If the customer were to conclude the purchase, then this supplementary disclosure may arrive at roughly the same time as the confirmation.

would have to preserve those records and for the period specified in Exchange Act rule 17a–4(b), or, in the case of records of oral communications and their disclosures, in accordance with Rule 17a–4(f) and for the period specified in Exchange Act rule 17a–4(b) with regard to similar written communications and records.

Often maintaining a copy of the disclosure document that was provided to the customer can satisfy this requirement. In the case of disclosure solely by means of oral communications, this provision would require the broker, dealer or municipal securities dealer to have compliance procedures in place that are adequate to demonstrate that it provided the required disclosure.[146]

• We request comment on this recordkeeping requirement. Commenters are invited to discuss whether, in the case of information that only is delivered orally, the rule should require electronic copies. Commenters also are invited to address, in the case of oral disclosures, what records or procedures would be necessary to demonstrate compliance with the rule. Also, should the recordkeeping provisions of proposed rule 15c2–3(d) instead be included in rules 17a–3 and 17a–4, the Commission's books and records rules?

*G. Exceptions*

Proposed paragraph (e) of rule 15c2–3 would except several types of transactions from the rule's scope. First, proposed paragraph (e)(1) would conditionally except transactions resulting from orders that a customer placed via U.S. mail, messenger delivery or a similar third-party delivery service. Proposed paragraph (e)(1)(i) would provide that the exception is available only to brokers, dealers or municipal securities dealers that meet the requirements of proposed paragraph (e)(1)(ii), discussed below, and that the broker, dealer or municipal securities dealer must have, within the prior six months, provided the customer with information about the maximum potential size of sales loads and asset-based sales charges and service fees associated with covered securities sold by that broker, dealer or municipal securities dealer, as well as statements about whether the broker, dealer or municipal securities dealer receives revenue sharing or portfolio brokerage commissions or pays differential compensation. Proposed paragraph (e)(1)(ii) of the rule would further specify that the exception in paragraph (e)(1) is available only to brokers, dealers or municipal securities dealers that are not compensated for effecting transactions for customers that do not have accounts with that broker, dealer or municipal securities dealer.[147] This proposed exception is intended to promote disclosure while avoiding the need to delay the execution of orders received via mail or similar services, given that it may not be possible to quickly locate those customers, let alone provide disclosure.

• We request comment on this proposed exception, and particularly if the scope of the exception is appropriate.

Proposed paragraph (e)(2) of rule 15c2–3 would except a clearing broker, dealer or municipal securities dealer, or a fund's primary distributor, from having to disclose information under the rule if the clearing firm or the primary distributor did not communicate with the customer about the transaction other than to accept the customer's order, and if that clearing or distributing firm reasonably believed that another broker, dealer or municipal securities dealer (such as an introducing firm or a selling firm) has delivered the information to the customer required by rule 15c2–3. The clearing or distributing firm could demonstrate this "reasonable belief" if it has entered into an agreement providing for the other broker, dealer or municipal securities dealer to make the required point of sale disclosures, supplemented with appropriate auditing practices.[148] This proposed exception in paragraph (a)(2) is intended to preclude imposing unnecessary burdens on clearing firms and on primary distributors that do not solicit transactions, when the investor can be expected to receive the required disclosure from another broker, dealer or municipal securities dealer.

• We request comment on whether this proposed exception avoids unnecessary duplication of disclosure and whether it is tailored appropriately. Commenters specifically are invited to discuss, based on their experiences, what types of agreements, certification or verification would be appropriate for establishing a "reasonable belief."

Proposed paragraphs (e)(3) through (e)(5) of rule 15c2–3 would provide additional targeted exceptions. Proposed paragraph (e)(3) would provide an exception for transactions effected as part of a covered securities plan, as defined under proposed rule 15c2–2, so long as the broker, dealer or municipal securities dealer provides disclosure consistent with proposed rule 15c2–3 prior to the first purchase of any covered security as part of the plan. Proposed paragraph (e)(4) would provide an exception for reinvestments of dividends earned. Proposed paragraph (e)(5) would provide an exception for transactions in which the broker, dealer or municipal securities dealer exercises investment discretion. Paragraph (f)(2) of proposed rule 15c2–3 provides that the term "covered securities plan" has the meaning set forth in proposed rule 15c2–2. We believe that transactions that would be excluded by these three proposed exceptions do not link the customer's investment decision to the customer's communications with the broker, dealer or municipal securities dealer in a way that establishes a compelling need for point of sale disclosure.

• We request comment on those proposed exceptions. Commenters are also invited to discuss whether additional exceptions may be appropriate. Commenters particularly are invited to discuss whether the proposed rule should have an exception for institutional orders and, if so, what the appropriate scope of such an exception would be.

*H. Definitions*

As noted above, proposed paragraph (f)(1) of rule 15c2–3 would define the term "point of sale." Proposed paragraph (f)(2) would define the terms "asset-based sales charges," "asset-based service fee," "covered securities plan," "covered security," "dealer concession," "differential compensation," "fund complex," "portfolio securities transaction," "revenue sharing" and "sales load" by

[146] Broker-dealers are required to maintain copies of outgoing communications relating to their business for a period of not less than three years, the first two years in an easily accessible place. *See* rule 17a–4(b)(4).

[147] As discussed above with respect to the definition of point of sale, brokers, dealers or municipal securities dealers that may be paid for effecting transactions without having to open accounts with those customers would have to provide disclosure at the time they recommend or discuss the investment, regardless of how the investor ultimately transmits the order.

[148] The rules of the NASD and the NYSE require clearing and carrying agreements to specify the responsibilities of each party with respect to a number of matters, including confirmations and statements, as well as maintenance of books and records. *See* NASD rule 3230, NYSE rule 382. Agreements that specify the responsibilities of parties with respect to point of sale disclosure, and associated recordkeeping, may form the basis for a reasonable belief.

A fund's primary distributor may enter into arrangements with other brokers, dealers or municipal securities dealers to sell interests in the fund. That primary distributor may demonstrate the requisite reasonable belief if its selling agreement with those other firms provides that the selling brokers, dealers or municipal securities dealers will deliver point of sale information, and if the primary distributor audits the compliance of those other firms.

referring to the definition of those terms in proposed rule 15c2–2. Paragraph (f)(2) also would define the term "customer" by reference to the definition in proposed rule 15c2–2.

## VI. Prospectus Disclosure

The Commission is proposing to amend Form N–1A in order to enhance disclosure of sales loads. Currently, a fund is required to disclose the maximum sales loads as a percentage of offering price in the fee table that is located in the front of the prospectus.[149] In addition, elsewhere in the prospectus, a fund is required to include a table of front-end sales loads at each breakpoint, shown as a percentage of both the offering price and the net amount invested.[150]

The Commission is proposing to amend the fee table to require the maximum front-end sales load to be shown as a percentage of net asset value rather than as a percentage of offering price.[151] The proposed amendment would make disclosure of front-end sales loads in the prospectus fee table consistent with that in the confirmation that would be required by proposed rule 15c2–2. For consistency, the proposed amendments would also remove the current requirement that a deferred sales load based on net asset value at the time of purchase be shown in the fee table as a percentage of offering price at the time of purchase. Instead, the proposed amendments would require that a deferred sales load based on offering price at the time of purchase be shown in the fee table as a percentage of net asset value at the time of purchase.[152] Similarly, we are proposing to revise the instructions to the fee table to clarify that if a fund imposes more than one type of sales load (*e.g.*, a deferred sales load and a front-end sales load), the aggregate load should be shown in the fee table as a percentage of net asset value.[153]

We believe that disclosure of sales loads as a percentage of net asset value rather than offering price would better help investors to understand the true costs of investing in a load fund. This method would present sales loads as a percentage of the net amount invested in the fund, rather than a percentage of the sum of the net amount invested in the fund plus the load. For example, if an investor started with $10,000 and paid a 5% front-end load on the gross amount, the load would be $500. The net amount invested would be $9,500 ($10,000–$500), and the load as a percentage of the net amount invested would be 5.26% ($500/$9,500 x 100%). The fee table currently requires the load to be disclosed as 5%. Our proposed amendment would require the load to be disclosed as 5.26%.[154]

The Commission is also proposing to amend Form N–1A to require disclosure in the fund prospectus that would alert investors to the fact that sales loads shown in the prospectus as a percentage of the net asset value or offering price may be higher or lower than the actual sales load that an investor would pay as a percentage of the net or gross amount invested. This difference is a result of rounding.[155]

Specifically, we are proposing to require a fund to disclose in a footnote to the fee table, if applicable, that the actual maximum sales load that may be paid by an investor as a percentage of the net amount invested may be higher than the maximum sales load shown as a percentage of net asset value in the fee table. The footnote would be required to explain briefly the reason for this variation and disclose the maximum sales load as a percentage of the net amount invested.[156] The footnote requirement would apply to front-end and back-end sales loads, as well as cumulative sales loads where more than one type of sales load is imposed.

We are also proposing to require similar footnote disclosure with respect to the table of front-end sales loads that is required elsewhere in the prospectus.[157] Our proposal would require a fund to disclose in a footnote to the table of front-end sales loads, if applicable, that the actual front-end sales load that may be paid by an investor as a percentage of the gross or net amount invested at any breakpoint may be higher or lower than the applicable load in the table of front-end sales loads. The footnote also would be required to explain briefly the reason for this variation and to disclose the range of the actual front-end sales loads at each sales load breakpoint as a percentage of the gross and net amount invested.[158]

- The Commission requests comment on the proposed amendments to the fee table and front-end sales load table of Form N–1A. In particular, the Commission requests comment on the proposed requirement that the fee table of the prospectus disclose the sales loads as a percentage of net asset value rather than offering price. Commenters are specifically invited to comment on whether continuing to require disclosure of sales loads in the fee table as a percentage of offering price may confuse investors if the confirmation that would be required by proposed rule 15c2–2 requires sales loads to be shown as a percentage of net amount invested. Which presentation better reflects costs to investors? Which presentation is easier for investors to use and understand?
- Commenters are also invited to comment on whether the proposed disclosure alerting investors to the fact that, as a result of rounding, sales loads shown in the prospectus as a percentage of the offering price or net asset value

[149] Item 3 of Form N–1A.

[150] Item 8(a)(1) of Form N–1A.

[151] Proposed Item 3 of Form N–1A (fee table caption).

[152] Proposed Instruction 2(a)(i) to Item 3 of Form N–1A.

[153] Proposed Instruction 2(a)(ii) to Item 3 of Form N–1A.

[154] As described below, there are differences attributable to rounding between sales loads as a percentage of net and gross amount invested, on the one hand, and sales loads as a percentage of net asset value and offering price, on the other. Because prospectus disclosure does not relate to a particular amount invested, it must be based on net asset value or offering price rather than net amount invested or gross amount invested.

[155] For example, if the net asset value per share is $1.98 and the applicable sales load is 4.25% of the offering price, the offering price would be calculated as follows: $1.98/(1.00 – 0.0425), which equals $2.07 when rounded to two decimal places. The number of shares purchased is determined by dividing the gross amount invested by this offering price. Thus, if the gross amount invested is $30,000, the number of shares purchased is 14,492.754 (rounded to three decimal places) ($30,000/$2.07). The net amount invested would be the number of shares purchased, multiplied by the net asset value per share, or $28,695.65 (14,492.754 × $1.98), and the remaining $1,304.35 would be deducted as a sales load. This $1,304.35 is equivalent to 4.35% of the gross amount invested of $30,000, rather than the 4.25% sales load shown as a percentage of offering price.

As a second example, if the net asset value per share is $7.78 and the applicable sales load is 5.75% of the offering price, the offering price would be calculated as follows: $7.78/(1.00 – 0.0575), which equals $8.25 when rounded to two decimal places. If the gross amount invested is $30,000, the number of shares purchased is 3,636.364 (rounded to three decimal places) ($30,000/$8.25). The net amount invested would be the number of shares purchased, multiplied by the net asset value per share, or $28,290.91 (3,636.364 × $7.78), and the remaining $1,709.09 would be deducted as a sales load. This $1,709.09 is equivalent to 5.70% of the gross amount invested of $30,000, rather than the 5.75% sales load shown as a percentage of offering price.

[156] Proposed Instruction 2(a)(iv) to Item 3 of Form N–1A. For example, if the maximum front-end sales load shown as a percentage of net asset value is 6.10%, but the maximum front-end sales load that may be paid by an investor may range between 6.00% and 6.20% of the net amount invested, the fund would be required to disclose the maximum 6.20% figure in the footnote.

[157] Proposed Instruction 4 to Item 8(a)(1) of Form N–1A.

[158] For example, if the front-end sales load is 6.10% of net asset value and 5.80% of offering price, but the front-end sales load that may be paid by an investor may range between 6.00% and 6.20% of the net amount invested and 5 .70% and 5.90% of the gross amount invested, the fund would be required to disclose these sales load ranges of 6.00%–6.20% of net amount invested and 5.70%–5.90% of gross amount invested.

may be higher or lower than the actual sales load that an investor would pay as a percentage of the gross or net amount invested is appropriate. Is this disclosure necessary for both sales loads disclosed as a percentage of net asset value and sales loads disclosed as a percentage of offering price? Should this disclosure be required with respect to both front-end sales loads and deferred sales loads? Should this disclosure be required in both the prospectus fee table and the table of front-end sales loads?

- The Commission also requests comment on whether it is possible to quantify the variation between sales loads disclosed as a percentage of net asset value or offering price and the amounts that investors will pay as a percentage of net or gross amount invested, as would be required by the proposals. If it is possible to quantify this variation, should the fee table and the table of front-end sales loads, rather than a footnote, contain the sales loads that an investor would pay as a percentage of net or gross amount invested after rounding is taken into consideration?

The Commission is also proposing to amend Form N–1A to require that a mutual fund include brief disclosure in its prospectus regarding revenue sharing payments, in order to direct investors to the disclosure regarding revenue sharing that we are proposing to require in the confirmation and point of sale disclosure. If any person within a fund complex makes revenue sharing payments, the proposed amendment would require a fund to disclose that fact in its prospectus.[159] For this purpose, "fund complex" and "revenue sharing" would have the meanings set forth in proposed rule 15c2–2(f)(10) and (15). If any such revenue sharing payments are made, the fund would also be required to disclose that specific information about revenue sharing payments to an investor's financial intermediary is included in the confirmation or periodic statement required under proposed rule 15c2–2 and in the disclosure provided at the point of sale required under proposed rule 15c2–3.

- The Commission requests comment on whether this proposed requirement for prospectus disclosure regarding revenue sharing payments, including the reference to the confirmation and periodic statement required under proposed rule 15c2–2, and the point of sale disclosure required under proposed rule 15c2–3, would provide useful information to investors.

[159] Proposed Item 8(c) of Form N–1A.

- We also request comment on whether additional prospectus disclosure requirements regarding revenue sharing payments would be appropriate. Should we adopt similar prospectus disclosure requirements regarding portfolio securities transaction commissions?

- The Commission further requests comment on whether amendments parallel to those being proposed for Form N–1A should be made to Forms N–3,[160] N–4,[161] and N–6,[162] the registration forms for separate accounts that offer variable annuity contracts and variable life insurance policies. In particular, the Commission invites comment on whether the prospectus fee tables of these registration forms should disclose sales loads as a percentage of accumulation unit value or net amount invested. Would such a requirement be appropriate for separate accounts that offer variable life insurance policies, given that significant deductions may be made from premium payments for these policies for the cost of insurance, in addition to deductions for sales loads?

- Commenters are also invited to comment on whether the actual sales loads paid by investors in variable insurance products may be higher or lower than the sales loads disclosed in the prospectuses for these products as a result of rounding. If so, would disclosure regarding the effects of rounding parallel to that proposed for mutual funds be appropriate?

- The Commission further requests comment on whether the proposed prospectus disclosure regarding revenue sharing payments, including the reference to the confirmation and periodic statements required under proposed rule 15c2–2 and the point of sale disclosure required under proposed rule 15c2–3, would be appropriate for the registration forms for variable insurance products. Are revenue sharing payments to financial intermediaries made in connection with these products, other than those made in connection with underlying funds?

[160] 17 CFR 239.17a and 274.11b. Form N–3 is used by all insurance company separate accounts offering variable annuity contracts that are registered under the Investment Company Act as management investment companies.

[161] 17 CFR 239.17b and 274.11c. Form N–4 is used by all insurance company separate accounts offering variable annuity contracts that are registered under the Investment Company Act as unit investment trusts.

[162] 17 CFR 239.17c and 274.11d. Form N–6 is used by all insurance company separate accounts offering variable life insurance policies that are registered under the Investment Company Act as unit investment trusts.

## VII. Disclosure Related to Transactions in Callable Preferred Stock and Callable Debt Securities, and Other Amendments to Rule 10b–10

In addition to the amendments to rule 10b–10 noted above, we are also proposing to amend rule 10b–10 in connection with transactions involving callable preferred stock and callable debt securities. Finally, we propose to amend the rule to delete an expired transition period related to the confirmation of transactions involving securities futures products.

### *A. Proposed Amendment Related to Transactions in Callable Preferred Stock*

We are proposing to amend rule 10b–10 to require broker-dealers that effect transactions in shares of preferred stock to inform customers about whether the issuer of the stock has reserved the right to repurchase—or call—the shares. Currently, paragraph (a)(4) of Rule 10b–10 requires broker-dealers that effect transactions in callable debt securities to disclose the fact that the debt security may be subject to redemption in advance of maturity, and that the redemption may affect the yield of the debt security. Rule 10b–10, however, does not require similar disclosure for transactions in preferred stock that is callable.

Information about whether shares of preferred stock are callable is material to investors. Investors often purchase shares of preferred stock for their dividend yield. If the preferred stock is callable and is repurchased by the issuer, then the investor may not be able to reinvest his or her proceeds in an instrument with an equivalent yield. This is particularly significant given that issuers are most likely to call preferred stock when interest rates are declining. Confirmation disclosure of this material information could alert an investor to any misunderstandings about the rights associated with the preferred stock, promote the timely resolution of problems, and better enable the investor to evaluate potential future transactions involving that security.

Accordingly, we propose amending rule 10b–10 to redesignate current paragraph (a)(4) as "(a)(4)(A)," and add a new paragraph (a)(4)(B) that would require a broker-dealer that effects a transaction in callable preferred stock to disclose to the customer that the preferred stock may be repurchased at the election of the issuer and that additional information is available upon request.

- The Commission requests comment about whether this proposal would

provide adequate notice to investors. Commenters are specifically invited to address whether transaction confirmations also should state that the callability of preferred stock may affect the yield earned on that stock. The Commission is particularly interested in learning more about current industry practice regarding the disclosure of the callable nature preferred stock and whether broker-dealers already disclose such information as a matter of prudent business practice on confirmations or in some other way highlight such information to their customers.

- Moreover, commenters are invited to address whether transaction confirmations should provide additional disclosures about preferred stock, such as disclosures about annual yield, yield-to-redemption and, if callable, the fixed price at which the preferred stock may be repurchased and the date or dates upon which the issuer may repurchase the preferred stock.[163]
- Commenters also may wish to address whether confirmation disclosure of such information would serve as a useful means of informing customers as to the investment features of preferred stock.

*B. Proposed Amendment Related to Transactions in Callable Debt Securities*

We also are proposing to amend rule 10b–10 to require disclosure of the first date on which a debt security may be called. Currently, paragraph (a)(6) of rule 10b–10 requires a broker-dealer that has effected a transaction in a debt security on the basis of yield-to-call to disclose, among other information, the type of call, the call date and the call price. In practice, a bond may be subject to call on a series of dates. As a result, although a confirmation may state what the bond's yield-to-call would be if the bond is called on one of those dates, the confirmation may not inform a customer about the first possible date on which a bond is subject to call. We believe this may confuse investors who are not otherwise aware that a bond may be called on a date earlier than the one specified on the confirmation. The possibility of earlier call can subject the investor to additional reinvestment risk, because the investor likely would be left with worse alternatives for reinvesting the proceeds if the issuer calls the security when prevailing interest rates decline.

We considered the adequacy of yield-to-call disclosure in the early 1980s, when we proposed and adopted amendments to rule 10b–10. In proposing the amendments, we noted that investors could be surprised by the early redemption of investments in long-term debt securities. We concluded, however, in light of the variety and number of call provisions, that "a legend advising the customer that he may request information from his broker-dealer is a sensible approach to this problem."[164] Nonetheless, a confirmation does not provide optimal disclosure if it specifically identifies one call date, but requires an investor to contact the broker-dealer to find out the first call date.[165]

In our view, disclosure of the first date upon which a debt security may be called would provide customers with meaningful information that would help avoid confusion. We therefore propose amending rule 10b–10 to provide for that additional disclosure. Specifically, we propose to amend paragraph (a)(6)(i) to require a broker-dealer that effects a transaction in a debt security on the basis of yield-to-call to disclose the date upon which the debt security may first be called.

- We request comment on whether this proposal would provide adequate notice to investors, and whether additional information should be disclosed on the confirmation related to the impact of callability on yield. Commenters are requested to address to what extent broker-dealers currently disclose call information in connection with transactions involving debt securities and whether broker-dealers already disclose the first possible call date as a matter of prudent business practice on confirmations or in some other way highlight such information to their customers.

*C. Outdated Transitional Provisions Related to Security Futures Product Transactions*

Paragraph (e) of rule 10b–10 contains a conditional exception from the general requirements of the rule for certain transactions in securities futures products. Transitional provisions permitted broker-dealers to take advantage of that exception up to June 1, 2003 without having to comply with specific conditions. Because those transitional provisions no longer are in effect, we are proposing to delete subparagraph (2) of paragraph (e) of rule 10b–10, and make corresponding technical changes.

**VIII. Paperwork Reduction Act Analysis**

Certain provisions of proposed Exchange Act rules 15c2–2 and 15c2–3, the amendments to Exchange Act rule 10b–10, and the amendments to Form N–1A contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[166] The Commission has submitted them to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The collections of information under proposed rules 15c2–2 and 15c2–3 are new. The title for the new collection of information under proposed rule 15c2–2 is "Rule 15c2–2 Confirmation of transactions in open-end management investment company shares, unit investment trust interests, and municipal fund securities used for education savings". The title for the new collection of information under proposed rule 15c2–3 is "Rule 15c2–3 Point-of-sale disclosure for purchase transactions in open-end management investment company shares, unit investment trust interests, and municipal fund securities used for education savings". The OMB has not yet assigned a control number to the new collections of information under proposed rules 15c2–2 and 15c2–3. In addition, the Commission is revising the collection of information entitled "Rule 10b–10 Confirmation of Transactions," OMB Control Number 3235–0444 and the collection of information entitled "Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies," OMB Control No. 3235–0307. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

[163] Paragraphs (a)(5) and (a)(6) of rule 10b–10 require yield disclosure for transactions in debt securities. Paragraph (a)(5) requires disclosure of yield to maturity for transactions in debt that are effected on the basis of dollar price. Paragraph (a)(6) requires disclosure of yield to maturity, current yield or yield to call for transactions in debt that are effected on the basis of yield.

[164] Exchange Act Release No. 19687 (April 18, 1983), 48 FR 17583 (April 25, 1983).

[165] Consistent with the discussion above, we note that a broker-dealer has an obligation to disclose material information to investors that goes beyond the information that is strictly required to be disclosed in the confirmation.

[166] 44 U.S.C. 3501, *et seq.*

*A. Rule 15c2–2*

1. Collection of Information in Connection With Certain Transactions Involving Open-End Management Investment Company Securities, Unit Investment Trust Interests, and Municipal Fund Securities Used for Education Savings

As discussed previously in this release, proposed rule 15c2–2 would apply to transactions in mutual fund shares, UIT interests and 529 plan securities. The proposed rule would require brokers, dealers and municipal securities dealers to make certain of the disclosures that rule 10b–10 currently requires them to make. Thus, brokers, dealers and municipal securities dealers would no longer be required to comply with the requirements of rule 10b–10 when effecting transactions in the securities covered by proposed rule 15c2–2. Proposed rule 15c2–2 would require brokers, dealers and municipal securities dealers to disclose targeted information about the costs and conflicts of interest connected with those transactions. In particular, they would be required to disclose (a) information about loads and other distribution-related costs that directly impact the returns earned by investors in those securities; (b) information about compensation of brokers, dealers and municipal securities dealers for selling those securities and information about revenue sharing arrangements and portfolio brokerage arrangements that create conflicts of interest for them; and (c) information about whether their associated persons receive extra compensation for selling proprietary fund shares or certain fund share classes. Brokers, dealers and municipal securities dealers would provide this information to customers in the form of written confirmations.

2. Proposed Use of Information

The purpose of proposed rule 15c2–2 is to provide investors in mutual fund shares, UIT interests and 529 plan securities with the relevant information currently required by rule 10b–10, as well as information about certain distribution-related costs and certain distribution arrangements that create conflicts of interest for brokers, dealers, municipal securities dealers, and their associated persons. In addition to certain basic transaction information currently required by rule 10b–10, proposed rule 15c2–2 specifically would require confirmation disclosure of information about loads and other distribution-related costs that directly impact the returns earned by investors in those securities. It also would require brokers, dealers and municipal securities dealers to disclose their compensation for selling those securities, and to disclose information about revenue sharing arrangements and portfolio brokerage arrangements that create conflicts of interest for them. Moreover, the proposed rule would require brokers, dealers and municipal securities dealers to inform customers about whether their salespersons or other associated persons receive extra compensation for selling certain covered securities.

The new rule's more targeted informational requirements would provide investors in mutual fund shares, UIT interests and 529 plan securities with important information about their brokers', dealers' or municipal securities dealers' conflicts of interest and about distribution costs that can reduce their investment returns. In addition, the Commission, the self-regulatory organizations, and other securities regulatory authorities would be able to use records of confirmations delivered pursuant to proposed rule 15c2–2 in the course of examinations, and investigations, as well as enforcement proceedings against brokers, dealers and municipal securities dealers. However, no governmental agency would regularly receive any of the information described above.

3. Respondents

By its terms, proposed rule 15c2–2 potentially would apply to all of the approximately 5,338 brokers, dealers and municipal securities dealers that are registered with the Commission and that are members of NASD. It would also potentially apply to approximately 62 additional municipal securities dealers.[167] It is important to note, however, that only those brokers, dealers and municipal securities dealers that effect transactions in mutual fund shares, UIT interests and 529 plan securities would have to comply with the provisions of proposed rule 15c2–2. Although the staff believes some brokers, dealers and municipal securities dealers do not effect transactions in mutual fund shares, UIT interests or 529 plan securities, the staff is unable to estimate the number of such brokers, dealers and municipal securities dealers and has, therefore, assumed that all brokers, dealers and municipal securities dealers effect such transactions. This assumption may result in the paperwork burdens and costs of proposed rule 15c2–2 being overstated.

4. Reporting and Recordkeeping Burden

The Commission staff estimates that there are 1 billion confirmations delivered annually to customers in connection with securities transactions involving mutual fund shares, UIT interests and 529 plan securities.[168] Rule 10b–10 currently requires broker-dealers to deliver confirmations to customers in connection with transactions in mutual fund shares and UIT interests. In addition, brokers, dealers and municipal securities dealers are required under the rules of the MSRB to deliver confirmations to customers in connection with transactions involving municipal fund securities.[169] The Commission staff does not anticipate that a significant number of new confirmations would be required to be generated if proposed rule 15c2–2 is adopted. The proposed rule would, however, require additional information in confirmations that would otherwise be required to be delivered under Exchange Act rule 10b–10 and MSRB rule G–15.

The Commission staff estimates that brokers, dealers and municipal securities dealers would have a one-time burden associated with reprogramming software and otherwise updating systems in order to enable confirmation delivery systems to generate the information required under proposed rule 15c2–2.[170] We understand that some brokers, dealers and municipal securities dealers have developed their own proprietary confirmation delivery systems, which would need to be reprogrammed and updated to comply with proposed rule 15c2–2. As a general matter, medium-sized and smaller firms, but also some larger firms, use third-party service providers, or vendors, to generate the data necessary to send confirmations.[171] They may also use vendors to actually send confirmations to investors. Therefore, the firms' vendors would be required to reprogram their software and update their systems to generate the data that would allow their clients to comply with proposed rule 15c2–2. Some, if not all, of the cost for this

[167] Source: MSRB Registrants List (available on the Internet at *http://www.msrb.org/msrb1/PQweb/Registrants.xls*).

[168] This estimate is based on discussions with industry participants.

[169] MSRB rule G–15.

[170] The Commission staff understands that, because confirmation delivery systems already exist, new systems are not needed to generate the confirmations that would be required under proposed rule 15c2–2.

[171] Based on discussions with industry representatives, the Commission staff estimates that over 5,000 brokers, dealers and municipal securities dealers use vendors' confirmation data services.

reprogramming and systems upgrading would be allocated to the vendors' clients—the brokers, dealers and municipal securities dealers. The staff understands from discussions with vendors that the allocation of costs would coincide roughly with the volume of the client's transactions, so that a broker, dealer or municipal securities dealer that executes fewer transactions involving covered securities would be allocated less of its vendor's costs than a broker, dealer or municipal securities dealer that executes more transactions.

The Commission staff estimates from information provided by industry participants that the one-time burden to brokers, dealers and municipal securities dealers, and their vendors, for reprogramming software and otherwise updating systems to permit the confirmation delivery systems required under proposed rule 15c2–2 would be 15 million hours.[172]

• The Commission requests comment on the staff's estimates of the one-time reprogramming software and otherwise updating systems to permit the confirmation delivery systems required under proposed rule 15c2–2.

In addition to the one-time burden associated with reprogramming software and upgrading confirmation delivery systems, the Commission anticipates on-going burdens for complying with the requirements of proposed rule 15c2–2, including calculating revenue sharing and portfolio brokerage amounts required under rule 15c2–2. Based upon discussions with industry representatives, the Commission staff understands that, once completed, this reprogramming and systems updating would permit brokers, dealers, and municipal securities dealers to have automated access to the information that would be required to be disclosed in confirmations delivered pursuant to proposed rule 15c2–2. As a result, the burden associated with obtaining data to be included in confirmations would be *de minimis*. The Commission staff estimates from information provided by industry participants that the annual burden to brokers, dealers and municipal securities dealers, and their vendors, to comply with the requirements under proposed rule 15c2–2 to calculate revenue sharing and portfolio brokerage amounts and to maintain and further update the confirmation delivery systems, would be 2 million hours.[173]

• The Commission requests comment on the staff's estimates of the burdens associated with complying with the requirements of proposed rule 15c2–2, including calculating revenue sharing and portfolio brokerage amounts, as well as maintaining and updating confirmation delivery systems. The Commission specifically requests comment on the estimate that, after reprogramming, the burden associated with obtaining the data necessary to comply with the confirmation delivery requirements of proposed rule 15c2–2 would be *de minimis*. In particular, commenters are requested to address whether reprogramming software and updating systems would, in fact, permit the data to be automatically transmitted to brokers', dealers' and municipal securities dealers' systems or whether data would need to be manually entered into such systems. Commenters are further requested to provide quantitative data on the burdens associated with manually entering data into systems, if necessary.

Brokers, dealers and municipal securities dealers also would have a burden for generating and sending confirmations to investors. The Commission staff estimates from information provided by industry participants that it takes about one minute to generate and send a confirmation. Based on the estimate that there are 1 billion transactions annually in the covered securities, the Commission staff estimates that the annual burden to brokers, dealers and municipal securities dealers to generate and send confirmations to customers pursuant to proposed rule 15c2–2 would be 16.7 million hours.[174] It is important to note, however, that confirmations for transactions in covered securities are currently required to be delivered pursuant to rule 10b–10 or MSRB rule G–15, as applicable. As a result, the burden for generating and sending confirmations would not be entirely new, but would reflect a shift of burdens from rule 10b–10 to proposed rule 15c2–2. In addition, brokers, dealers and municipal securities dealers routinely send customers account statements pursuant to self-regulatory organizations' requirements and for reasons of prudent business practice. Nonetheless, the Commission staff estimates that the total annual burden for complying with the requirements of proposed rule 15c2–2 would be 18.7 million hours.[175] The number of confirmations sent and the cost of the confirmations vary from firm to firm. Smaller firms typically send fewer confirmations than larger firms because they effect fewer transactions.

Based upon discussions with industry participants, the Commission staff anticipates that there would be one-time external costs for upgrading and reprogramming printing systems for brokers, dealers municipal securities dealers who use out-sourced printing and other out-sourced services. The staff anticipates that these costs would be passed on to brokers, dealers and municipal securities dealers in the form of higher fees. While the staff is currently unable to determine the number of brokers, dealers and municipal securities dealers that utilize such outsourced services, based on discussions with industry representatives the staff estimates that the cost per broker, dealer or municipal securities would be approximately $18,500. Assuming that all of the approximately 5,400 brokers, dealers and municipal securities dealers subject to proposed rule 15c2–2 use such out-sourced services, the total one-time external cost would be about $100 million. We note that this assumption may result in a significant overstatement of these external costs.

[172] This estimate is based on the staff's understanding that 5,000 brokers, dealers and municipal securities dealers, including virtually all small entities, directly or indirectly through clearing brokers, use the services of 10 vendors. The staff estimates that the total one-time burden to the 10 vendors would be 1,580,000 hours, or 158,000 hours per vendor. Although the staff understands from discussions with vendors that this burden would be allocated to all of the vendors' clients in a manner that reflects the volume of transactions the broker, dealer or municipal securities dealer effects, the staff assumes for purposes of estimating the total burden that the burden would be allocated to each client on a pro rata basis (316 hours per broker, dealer or municipal security dealer that uses vendors' services). In addition, the staff estimates, based on discussions with industry representatives, that 400 brokers, dealers and municipal securities dealers use proprietary confirmation delivery systems that each of them, on average, would have a one-time burden of 33,550 hours. Thus, the total one-time burden is estimated to be 15 million hours ((5,000 × 316) + (400 × 33,550) = 15,000,000).

[173] The staff estimates that the burden to the 10 vendors to maintain their systems would be 500,000 million hours annually, or 50,000 hours per vendor. The staff estimates that the burden allocated to each client on a pro rata basis would be 100 hours annually per broker, dealer or municipal security dealer that uses vendors' services (500,000 hours/5,000 = 100 hours). The staff estimates, based on discussions with industry representatives, that the 400 brokers, dealers and municipal securities dealers that use proprietary confirmation delivery systems, on average, would have a burden of 3,750 hours annually for maintaining systems. Thus, the annual burden for maintaining systems is estimated to be 2 million hours ((5,000 × 100) + (400 × 3,750) = 2,000,000 hours).

[174] (1 billion confirmations at one minute per confirmation = 1 billion minutes; 1 billion minutes/60 minutes per hour = 16.7 million hours.)

[175] (16.7 million hours to generate and send confirmations to customers + 2 million hours to calculate revenue sharing and portfolio brokerage amounts and to maintain and further update the confirmation delivery systems = 18.7 million hours.)

As stated earlier, the Commission staff estimates that there are 1 billion securities transactions annually involving mutual fund shares, UIT interests and 529 plan securities. According to information provided by industry participants, the Commission staff estimates that the average cost, including postage and printing, for a two-page confirmation is about $1.05. As a result, the Commission staff estimates that the annual costs of complying with the requirements of proposed rule 15c2–2, including the printing and postal costs for generating and sending confirmations, would be $1.05 billion,[176] reflecting an increase of $160 million over the cost of the confirmations had they been delivered pursuant to rule 10b–10.[177]

In summary, the Commission staff estimates that there would be a one-time burden of 15 million hours associated with reprogramming software and upgrading systems to permit brokers, dealer and municipal securities dealers, and their vendors, to comply with the requirements of proposed rule 15c2–2. The staff further estimates that there would be an additional one-time cost of $100 million for fees of service providers. The staff estimates that the annual burden for complying with the requirements of proposed rule 15c2–2 would be 18.7 million and that the annual costs of complying with the requirements of proposed rule 15c2–2, including the printing and postal costs for generating and sending confirmations, would be $1.05 billion. We note that, as stated above, many of these costs and burdens, including the majority of the annual costs and burdens, would be shifted from rule 10b–10 to proposed rule 15c2–2. We also note that some of the assumptions the staff has made may result in the costs and burdens being overstated.

[176] (1 billion confirmations at $1.05 per confirmation = $1.05 billion.) As noted above, confirmations for transactions in covered securities are currently required to be delivered pursuant to rule 10b–10 or MSRB rule G–15, as applicable. As a result, this estimated cost is not entirely a new cost, but reflects a shift of costs from rule 10b–10 to proposed rule 15c2–2. This estimated cost also reflects an incremental increase in the cost of generating confirmations from 89 cents under rule 10b–10 to $1.05 under proposed rule 15c2–2. This incremental cost is associated with generating the two-page confirmation that would be required under proposed rule 15c2–2, as compared to a half-page or one-page confirmation that is currently permitted under rule 10b–10.

[177] (1 billion confirmations delivered pursuant to rule 10b–10 at $0.89 per confirmation = $890 million; $1.05 billion − $890 million = $160 million.)

5. Collection of Information Is Mandatory

This collection of information would be mandatory.

6. Confidentiality

The collection of information delivered pursuant to the proposed rule 15c2–2 would be provided by brokers, dealers and municipal securities dealers to customers, and also would be maintained by brokers, dealers and municipal securities dealers.

7. Record Retention Period

Exchange Act Rule 17a–4(b)(1)[178] requires broker-dealers to preserve confirmations for three years, the first two years in an accessible place. Similarly MSRB rule G–9 requires brokers, dealers and municipal securities dealers to preserve confirmations of transactions involving municipal securities for three years, the first two years in an accessible place.

*B. Rule 15c2–3*

1. Collection of Information at the Point of Sale in Connection With Certain Transactions Involving Open-End Management Investment Company Securities, Unit Investment Trust Interests, and Municipal Fund Securities Used for Education Savings

Proposed rule 15c2–3 under the Exchange Act would require brokers, dealers and municipal securities dealers to provide point of sale disclosure to investors prior to effecting transactions in mutual fund shares, UIT interests and 529 plan securities. The disclosure would provide investors with targeted material information about distribution-related costs and remuneration that lead to conflicts of interest for their brokers, dealers or municipal securities dealers. The collection of information under proposed rule 15c2–3 would require some of the disclosure that is also required under rule 15c2–2. However, in contrast to the confirmation disclosure required under proposed rule 15c2–2, which a customer will not receive in writing until after a transaction has been effected, the point of sale disclosure that would be required under rule 15c2–3 would specifically require that investors be provided with information that they can use at the time they determine whether to enter into a transaction to purchase one of the covered securities.

2. Proposed Use of Information

The purpose of proposed rule 15c2–3 is to provide information to investors at the time they make their investment decisions with respect to transactions in mutual fund shares, UIT interests and 529 plan securities. The rule specifically is intended to give investors timely access to information about sales loads and other distribution-related costs associated with transactions in those securities, as well as distribution arrangements that pose conflicts of interest for the brokers, dealers or municipal securities dealers, or their associated persons, that effect those transactions. In the absence of the new rule's requirements, investors in such transactions would lack, at the time they make their investment decision, important information about distribution costs that can reduce investment returns, and about conflicts of interest.

Records of the disclosure described above may be used by the Commission, the self-regulatory organizations, and other securities regulatory authorities in the course of examinations, investigations, and enforcement proceedings. No governmental agency regularly would receive any of the information described above.

3. Respondents

By its terms, proposed rule 15c2–3 potentially would apply to all of the approximately 5,338 brokers, dealers and municipal securities dealers that are registered with the Commission and that are members of NASD. It would also potentially apply to approximately 62 additional municipal securities dealers. It is important to note, however, that only those broker, dealers and municipal securities dealers that effect transactions in mutual fund shares, UIT interests and 529 plan securities would be affected by the provisions of proposed rule 15c2–3. Although as stated above, the staff believes some brokers, dealers and municipal securities dealers do not effect transactions in mutual fund shares, UIT interests and 529 plan securities, the staff is unable to estimate the number of such brokers, dealers and municipal securities dealers and has, therefore, assumed that all brokers, dealers and municipal securities dealers effect such transactions. This assumption may result in the paperwork burdens and costs of proposed rule 15c2–3 being overstated.

4. Reporting and Recordkeeping Burden

As noted above, the Commission staff estimates that there are 1 billion confirmations delivered annually in connection with securities transactions involving mutual fund shares, UIT interests and 529 plan securities.

[178] 17 CFR 240.17a–4(b)(1).

Proposed rule 15c2–3 would require brokers, dealers and municipal securities dealers to provide disclosure to customers about costs and conflicts at the point of sale for each of these transactions. The information that would be required to be delivered pursuant to proposed rule 15c2–3 would be derived from information that brokers, dealers and municipal securities dealers would otherwise prepare in order to fulfill their confirmation disclosure requirements under proposed rule 15c2–2. The Commission staff anticipates that one of the primary burdens to the industry of proposed rule 15c2–3 would be a one-time burden associated with reprogramming software and other such activities that will enable confirmation delivery systems to generate the information at the point of sale. Based on discussions with industry representatives, the Commission staff does not expect that brokers, dealers or municipal securities dealers would require new systems to be developed. Rather, the reprogramming and updating of current systems will enable brokers, dealers and municipal securities dealers to have access to such information at the point of sale, and to provide such information to investors at that time. Based on discussions with industry participants, the Commission staff estimates that the one-time burden to brokers, dealers and municipal securities dealers to reprogram software and conduct such other activities that will enable confirmation delivery systems to generate information required by proposed rule 15c2–3 to be delivered at the point of sale would be approximately 7 million hours.[179] We note that some, but not all of the burdens for complying with proposed rule 15c2–3 would be shared with burdens for complying with proposed rule 15c2–2. The estimates of burdens and costs in this section reflect this shared burden. However, if proposed rule 15c2–3 is adopted and proposed rule 15c2–2 is not, the burdens for complying with proposed rule 15c2–3 may increase.

Proposed rule 15c2–3(d) would require brokers, dealers and municipal securities dealers to make records of their disclosure sufficient to demonstrate compliance with the delivery requirements of paragraphs (a) and (b) of proposed rule 15c2–3. The brokers, dealers or municipal securities dealers would have to preserve those records for the period specified in Exchange Act rule 17a–4(b), or, in the case of records of oral communications or the disclosures, for the period specified in Exchange Act rule 17a–4(b) with regard to similar written communications and records. While this requirement often can be satisfied by maintaining a copy of the disclosure document that was provided to the customer, in the case of disclosure solely by means of oral communications, this provision would require the broker, dealer or municipal securities dealer to have compliance procedures in place that are adequate to demonstrate that it provided the required disclosure. Based on discussions with industry participants, the Commission staff estimates that the annual burden to brokers, dealers and municipal securities dealers to develop and implement such compliance procedures would be approximately 2 million hours.[180]

The Commission staff further estimates from information provided by industry participants that it will take, on average, about one minute to deliver to customers the point of sale disclosure required under proposed rule 15c2–3. The Commission staff also estimates from information provided by industry participants that the annual burden to brokers, dealers and municipal securities dealers to deliver at the point of sale the disclosure that would be required under proposed rule 15c2–3, and to maintaining systems that would permit such disclosure, would be 16.7 million hours.[181] As a result, the Commission staff estimates that the total annual burden to brokers, dealers and municipal securities dealers to comply with the requirements of proposed rule 15c2–3, would be 18.7 million hours.[182]

It is important to note that, under specified conditions, paragraph (e)(1) of proposed rule 15c2–3 would conditionally except transactions resulting from orders that a customer places via U.S. mail, messenger delivery or a similar third-party delivery service. The exception would be available to brokers, dealers or municipal securities dealers that, within the prior six months, have provided the customer with information about the maximum potential size of sales loads and asset-based sales charges and service fees associated with covered securities sold by that broker, dealer or municipal securities dealer, as well as statements about whether the broker, dealer or municipal securities dealer receives revenue sharing or portfolio brokerage commissions or pays differential compensation.[183] This exception would have the result of in a decrease in the burden to the industry of proposed rule 15c2–3.

Based upon discussions with industry participants, the Commission staff anticipates that there would be one-time external costs for out-sourced services, including call center services for brokers, dealers and municipal securities dealers that may use such services for delivery of point of sale information for transactions placed by telephone. The staff anticipates that these costs would be passed on to brokers, dealers and municipal securities dealers in the form of higher fees. While the staff is currently unable to determine the number of brokers, dealers and municipal securities dealers that utilize such outsourced services, based on discussions with industry representatives the staff estimates that the cost per broker, dealer or municipal securities dealer would be approximately $18,500. Assuming that all of the approximately 5,400 brokers, dealers and municipal securities dealers subject to proposed rule 15c2–3 use such out-sourced services, the total one-time external cost would be about $100 million. We note that this assumption may result in a significant overstatement of these external costs.

[179] The staff estimates that the total one-time burden to the 10 vendors would be 1,040,000 hours, or 104,000 hours per vendor. Although the staff understands from discussions with vendors that this burden would be allocated to all of the vendors' clients in a manner that reflects the volume of transactions the broker, dealer or municipal securities dealer effects, for purposes of this calculation, the staff assumes that the burden would be allocated to each client on a pro rata basis (208 hours per broker, dealer or municipal security dealer that uses vendors' services). In addition, the staff estimates, based on discussions with industry representatives, that 400 brokers dealers and municipal securities dealers use proprietary confirmation delivery systems that each of them, on average, would have a one-time burden of 22,400 hours. Thus, the total one-time burden is estimated to be 7 million hours ((5,000 × 208) + (400 × 14,900) = 7,000,000 hours).

[180] The staff estimates that the burden to the 10 vendors to maintain their systems would be 500,000 million hours annually, or 50,000 hours per vendor. The staff estimates that the burden allocated to each client on a pro rata basis would be 100 hours annually per broker, dealer or municipal security dealer that uses vendors' services (500,000 hours/5,000 = 100 hours). The staff estimates, based on discussions with industry representatives, that the 400 brokers dealers and municipal securities dealers that use proprietary confirmation delivery systems, on average, would have a burden of 3,750 hours annually for maintaining systems. Thus, the annual burden for maintaining systems is estimated to be 2 million hours ((5,000 × 100) + (400 × 3,750) = 2,000,000).

[181] (1 billion transactions at one minute per point of sale disclosure = 1 billion minutes; 1 billion minutes/60 minutes per hour = 16.7 million hours.)

[182] (16.7 million hours per point of sale disclosure + 2 million hours to develop and implement compliance procedures = 18.7 million hours.)

[183] *See supra* section V.G. for a detailed discussion of this exception.

Based on discussions with industry participants, the Commission staff estimates that the annual cost to brokers, dealers and municipal securities dealers for call center services and other service providers which would assist with development and implementation of procedures sufficient to demonstrate compliance with the delivery requirements of paragraphs (a) and (b) of proposed rule 15c2–3 would be approximately $40 million.[184]

In summary, the Commission staff estimates that there would be a one-time burden of 7 million hours associated with reprogramming software and upgrading systems to permit brokers, dealers and municipal securities dealers, and their vendors, to comply with the requirements of proposed rule 15c2–3. The staff further estimates that there would be an additional one-time cost of $100 million for fees of service providers. The staff estimates that the annual burden for complying with the requirements of proposed rule 15c2–3 would be 18.7 million hours and that the annual costs of complying with the requirements of proposed rule 15c2–3, including call center services, and recordkeeping and compliance costs, would be $40 million.

5. Collection of Information Is Mandatory

This collection of information would be mandatory.

6. Confidentiality

The collection of information delivered pursuant to the proposed rule 15c2–3 would be provided by brokers, dealers and municipal securities dealers to customers, and also would be maintained by brokers, dealers and municipal securities dealers.

7. Record Retention Period

Proposed rule 15c2–3 would require brokers, dealers and municipal securities dealers to preserve records for the period specified in Exchange Act rule 17a–4(b), or, in the case of records of oral communications and their disclosures, for the period specified in Exchange Act rule 17a–4(b) with regard to similar written communications and records. Exchange Act Rule 17a–4(b)(1)[185] requires the preservation of confirmations for three years, the first two years in an accessible place.

[184] Based on discussions with industry representatives, the staff estimates that the annual cost would be $7,400 per broker, dealer or municipal securities dealer. (5,400 brokers, dealers and municipal securities dealers × $7,400 = $39,996,000.)

[185] 17 CFR 240.17a–4(b)(1).

*C. Proposed Amendments to Rule 10b–10*

1. Collection of Information

For the reasons discussed above and consistent with proposed Rule 15c2–2, rule 10b–10 would be modified to exclude transactions in mutual fund shares and UIT interests (other than UIT interests that are traded in a secondary market). The purpose of the exclusion is to enhance disclosure efficiency and to avoid duplicative regulatory burdens. This exclusion from a regulatory burden would not impose recordkeeping or information collection requirements, or other collections of information under rule 10b–10 that require approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* However, the proposed amendments to rule 10b–10 would also require brokers and dealers to disclose additional information in confirmations that would otherwise be delivered in connection with transactions involving callable preferred stock and callable debt. Specifically, the proposed amendments would require disclosure of the callable nature of preferred stock, if such is the case, and, in the case of callable debt that is effected on the basis of price to call, the date upon which the debt security may first be called. This information would be provided to customers in the form of written confirmations.

2. Proposed Use of Information

The purpose of the proposed amendments to rule 10b–10 is to provide to investors the information necessary to evaluate their transactions in callable preferred stock and redeemable debt. In the absence of the proposed amendments, investors in such transactions may not be fully informed of important information, such as whether the preferred stock is callable and the first date upon which callable debt securities may be called. In addition, the Commission, the self-regulatory organizations, and other securities regulatory authorities may use the confirmations described above in the course of examinations, investigations, and enforcement proceedings. No governmental agency would regularly receive any of the information described above.

3. Respondents

Rule 10b–10 applies to all of the 5,338 brokers and dealers that are registered with the Commission and that effect transactions for customers.

4. Reporting and Recordkeeping Burden

Based on information provided by registered broker-dealers to the Commission in FOCUS Reports[186], the Commission staff estimates that registered broker-dealers process approximately 295 million order tickets per month for transactions on behalf of customers. Each order ticket representing a transaction effected on behalf of a customer results in one confirmation. Therefore, the Commission staff estimates that approximately 3.54 billion confirmations[187] are sent to customers annually. As noted above, the staff estimates that approximately 1 billion confirmations are generated in connection with transactions in mutual funds, UIT interests and 529 plan securities and will be delivered pursuant to proposed rule 15c2–2, if adopted, and will accordingly decrease the number of confirmations delivered pursuant to rule 10b–10 by a like amount. As a result, the Commission staff estimates that approximately 2.54 billion confirmations will be sent to customers annually pursuant to rule 10b–10 if proposed rule 15c2–2 and the proposed amendments to rule 10b–10 are adopted.

The Commission staff estimates from information provided by industry participants that it takes about one minute to generate and send a confirmation. As a result, the Commission staff estimates that the annual burden to brokers, dealers and municipal securities dealers to comply with the confirmation delivery requirements of the proposed amendments to rule 10b–10 would be 42.3 million hours.[188] The number of confirmations sent and the cost of the confirmations vary from firm to firm as smaller firms send fewer confirmations than larger firms because they effect fewer transactions.

The Commission staff estimates that the one-time burden associated with reprogramming of software and other such activities to enable confirmation delivery systems to include the call information required under the proposed amendments to rule 10b–10 would be minimal. The Commission staff further estimates that the on-going

[186] FOCUS Reports are annual reports that broker-dealers are required to file with the Commission. They are contained in the broker-dealers' Form X–17A–5 (17 CFR 249.617).

[187] (295 million confirmations/month × 12 months/year = 3.54 billion confirmations.)

[188] (2.54 billion confirmations at one minute per confirmation = 2.54 billion minutes; 2.54 billion minutes/60 minutes per hour = 42.3 million hours.) We note that the estimates of this annual burden reflects a shift of confirmation delivery requirements with respect to open-end investment company securities and unit investment trust interests from rule 10b–10 to proposed rule 15c2–2.

burden for complying with the additional disclosure requirements of rule 10b–10 with respect to callable securities would be minimal. In addition, there would be no additional cost in connection with the deletion of the expired transition period related to the confirmation of transactions involving securities futures products.

According to information previously provided by industry participants, the Commission staff estimates that the average cost, including postage, for a one-page confirmation is 89 cents. Based upon discussions with industry participants, the Commission staff estimates that the total annual cost associated with generating and delivering to investors the information required under rule 10b–10, including the proposed amendments, would be $2.26 billion.[189] It is important to note, however, that the confirmation is a customary document used by the industry for business purposes.

5. Collection of Information Is Mandatory

This collection of information would be mandatory.

6. Confidentiality

The collection of information delivered pursuant to rule 10b–10 would be provided by broker-dealers to customers, and also would be maintained by broker-dealers.

7. Record Retention Period

Exchange Act Rule 17a–4(b)(1)[190] requires broker-dealers to preserve confirmations for three years, the first two years in an accessible place.

*D. Proposed Amendments to Form N–1A*

1. Collection of Information in Connection With Prospectus Disclosure

The Commission is proposing to amend the fee table of the mutual fund prospectus to require the maximum sales loads to be shown as a percentage of net asset value rather than as a percentage of offering price. The proposed amendments also would require a fund to provide disclosure in the fund prospectus to alert investors to the fact that sales loads shown in the prospectus as a percentage of net asset value or offering price may be higher or lower than the actual sales load that an investor would pay as a percentage of the net or gross amount invested, due to rounding. Finally, the proposed amendments would require that a mutual fund include brief disclosure in its prospectus regarding revenue sharing payments, in order to direct investors to the disclosure regarding revenue sharing that the Commission is proposing to require in the confirmation and point of sale disclosure.

2. Proposed Use of Information

The purpose of the proposed amendments is to provide investors in mutual funds with enhanced disclosure regarding sales loads, and to direct investors to disclosure regarding revenue sharing arrangements that a fund may have with an investor's financial intermediary.

3. Respondents

The likely respondents to this information collection are mutual funds registering or already registered with the Commission. We estimate that there are approximately 7,025 mutual fund portfolios that fit this description.

4. Reporting and Recordkeeping Burden

The current hour burden for preparing an initial Form N–1A filing is 812.5 hours per portfolio, and the current annual hour burden for preparing a post-effective amendment on Form N–1A is 104.5 hours per portfolio. The Commission staff estimates that, on an annual basis, registrants file initial registration statements on Form N–1A covering 483 portfolios, and file post-effective amendments on Form N–1A covering 6,542 portfolios. An additional burden of 33,250 hours is expected to result from the Commission's recent proposed rule relating to frequent purchases and redemptions of fund shares and selective disclosure of portfolio holdings, and the recent proposed rule relating to disclosure of sales load breakpoints.[191] Thus, the Commission staff estimates that the total annual hour burden for the preparation and filing of Form N–1A would be 1,109,330 hours.[192]

The Commission staff estimates that the proposed amendments regarding sales loads would increase the hour burden per portfolio per filing of an initial registration statement or a post-effective amendment on Form N–1A by 0.5 hours, and that 36% of mutual fund portfolios have sales loads and hence would be affected by the proposed amendments regarding sales load disclosure.[193] Thus, the additional incremental hour burden resulting from the proposed amendments relating to sales load disclosure would be 1265 hours ((0.5 hours for initial registration statements × 483 portfolios × 36%) + (0.5 hours for post-effective amendments × 6,542 portfolios × 36%)). The Commission staff estimates that the proposed amendments regarding revenue sharing arrangements would increase the hour burden per portfolio per filing of an initial registration statement or post-effective amendment on Form N–1A by 0.1 hours.[194] Thus, the staff estimates that the additional incremental hour burden resulting from the proposed amendments relating to disclosure of revenue sharing would be 703 hours ((0.1 hours for initial registration statements × 483 portfolios) + (0.1 hours for post-effective amendments × 6,542 portfolios)). If the proposed amendments to Form N–1A are adopted, the total annual hour burden for all funds for preparation and filing of initial registration statements and post-effective amendments to Form N–1A would be 1,111,298 hours (1265 hours + 703 hours + 1,109,330 hours).

5. Collection of Information Is Mandatory

This collection of information would be mandatory.

6. Confidentiality

Responses to the disclosure requirements are not confidential.

7. Record Retention Period

There is no mandatory record retention period associated with these amendments.

*E. Request for Comment*

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

[189] (2.54 billion confirmations at $0.89 per confirmation = $2.26 billion.)

[190] 17 CFR 240.17a–4(b)(1).

[191] *See* Investment Company Act Release No. 26287 (Dec. 11, 2003) [68 FR 70402 (Dec. 17, 2003)]; Investment Company Act Release No. 26298 (Dec. 17, 2003) [68 FR 74732 (Dec. 24, 2003)].

[192] This estimate is based on the following calculation: (812.5 hours × 483 portfolios) + (104.5 hours × 6,542 portfolios) = 1,076,080 hours. An additional annual hour burden of 30,998 hours resulting from the proposed rule relating to frequent purchases and redemptions and selective disclosure, and an additional annual hour burden of 2,252 hours resulting from the proposed amendments relating to breakpoints disclosure, yield a total annual hour burden of 1,109,330 hours.

[193] This estimate is based on information regarding the number of mutual fund portfolios with front-end or deferred sales loads, derived by the staff from Commission filings and third-party information sources.

[194] The Commission estimates, for purposes of the Paperwork Reduction Act, that a significant majority of mutual fund portfolios either have revenue sharing arrangements or are part of a fund complex that has such an arrangement and thus would be affected by the proposed amendments regarding revenue sharing disclosure.

(ii) Evaluate the accuracy of the Commission staff's estimate of the burden of the proposed collection of information;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609, and refer to File No. S7–06–04. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register**. Therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer File No. S7–06–04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW, Washington, DC 20549.

## IX. Costs and Benefits of the Proposed Rule and Rule Amendments

### *A. Introduction*

Proposed rules 15c2–2 and 15c2–3 are intended to improve investor access to information about investments in mutual fund shares, UIT interests and 529 plan securities. The Commission is sensitive to the costs and benefits that result from its rules. In proposing new rules 15c2–2 and 15c2–3 and the amendments to rule 10b–10 and Form N–1A, the Commission has strived to minimize compliance costs while promoting investor protection.

In considering the potential costs and benefits of proposed rules 15c2–2 and 15c2–3, the Commission has considered the transaction confirmation practices of brokers, dealers and municipal securities dealers that effect transactions in mutual fund shares, UIT interests and 529 plan securities. The Commission has also considered the practices of mutual funds in disclosing sales loads. Similarly, in considering the potential costs and benefits of the proposed amendments to rule 10b–10, the Commission has considered the transaction confirmation practices of broker-dealers, including those that effect transactions in callable preferred securities and callable debt securities. The amendments to rule 10b–10 are intended to provide investors with information that is helpful in making an informed decision when investing in callable preferred stock and redeemable debt securities. The amendments to Form N–1A are intended to provide investors with a better understanding of the costs of investing in a fund with a sales load, and of revenue sharing received by financial intermediaries.

### *B. Rule 15c2–2*

Proposed rule 15c2–2 responds to concerns that investors in mutual fund shares, UIT interests and 529 plan securities lack adequate information about certain distribution-related costs, as well as certain distribution arrangements, that create conflicts of interest for brokers, dealers, municipal securities dealers, and their associated persons. As noted above, those costs and other distribution arrangements have evolved substantially since 1977, when the Commission adopted its general confirmation rule, rule 10b–10.[195]

#### 1. Benefits

The Commission believes that permitting investors to more readily obtain information about distribution-related costs that have the potential to reduce their investment returns and to give investors a better understanding of some of the distribution-related arrangements that create conflicts of interest for brokers, dealers, municipal securities dealers, and their associated persons.[196] The disclosure of information about these costs and arrangements can help investors make better informed investment decisions. Investors will also be in a better position to compare the costs of these investments, which we preliminarily believe will lead to a general increase in the transparency and efficiency of the market for mutual fund shares, UIT interests and 529 plan securities. Furthermore, as a result of the standardized disclosure that would be required under proposed rule 15c2–2, the Commission believes that the aggregate amount of the distribution-related costs associated with mutual fund shares, UIT interests and 529 plan securities may well decline over time. These benefits, while qualitatively important, are necessarily difficult to quantify. Therefore, the Commission is unable to provide a quantitative estimate of the benefits of proposed rule 15c2–2.

#### 2. Costs

Proposed rule 15c2–2 would require brokers, dealers and municipal securities dealers to include additional information in confirmations that are currently sent to investors pursuant to rule 10b–10. The costs of adding this new information into confirmation disclosures may include both internal costs (for information technology specialists to re-program and update confirmation delivery systems, and for compliance officers and other staff to oversee and maintain confirmation delivery systems) and external costs (for printing and typesetting of the confirmation disclosure), all of which are included in the estimates of the Paperwork Reduction Act burden. For purposes of the Paperwork Reduction Act, the Commission staff has estimated that the one-time burden to brokers, dealers and municipal securities dealers, and their vendors, associated with reprogramming software and otherwise updating systems to permit the confirmation delivery systems required under proposed rule 15c2–2 would be 15 million hours. We estimate that this one-time burden would equal total internal costs of $750 million.[197] The staff further estimates that there would be an additional one-time cost of $100 million for fees of service providers[198], for a total cost of $850

[195] *See supra*, note 5.

[196] The Commission staff estimates that for the one-year period between September 2002 and August 2003, investors in open-end management investment company securities paid more than $6.7 billion in aggregate sales loads, consisting of approximately $4.9 billion in front-end loads and $1.8 billion in back-end loads.

[197] These figures are based on an estimated hourly wage rate of $50. The estimated wage figure is based on published compensation for compliance attorneys outside New York City ($39) and computer programmers ($34), and the estimate that attorneys and programmers would divide time equally on compliance with the proposed disclosure requirements, yielding a weighted wage rate of $36.50 ((39 × .50) + (34 × .50)) = $36.50). *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002). This weighted wage rate was then adjusted upward by 35% for overhead, reflecting the costs of supervision, space, and administrative support, to obtain the total per hour internal cost of about $50 ((36.50 × 1.35) = $49.28).

[198] As noted above, while the staff is currently unable to determine the number of brokers, dealers and municipal securities dealers that utilize outsourced services, based on discussions with

Continued

million, or approximately $157,407 per broker, dealer or municipal securities dealer. These figures will vary depending on whether a firm must update its own proprietary confirmation delivery system or whether it uses vendor services, in which case the cost will likely vary depending on the number of transactions the firm executes on an annual basis.[199]

In addition, for purposes of the Paperwork Reduction Act, the Commission staff has estimated that the annual burden to brokers, dealers and municipal securities dealers for complying with the requirements of proposed rule 15c2–2, including generating and sending confirmations to investors, calculating revenue sharing and portfolio brokerage amounts and maintaining and further updating the confirmation delivery systems, would be 18.7 million hours annually. As noted above, confirmations for transactions in covered securities are currently required to be delivered pursuant to rule 10b–10 or MSRB rule G–15, as applicable. As a result, the burden for generating and sending confirmations would not be entirely new, but would reflect a shift of an annual burden of 16.7 million hours from rule 10b–10 to proposed rule 15c2–2. Nonetheless, the Commission staff estimates that the annual burden for complying with the requirements of proposed rule 15c2–2 would equal total internal costs of $935 million annually, based on an estimated hourly wage of $50. The Commission staff further has estimated for purposes of the Paperwork Reduction Act that the external costs of complying with the requirements of proposed rule 15c2–2, including the printing and postal costs for generating and sending confirmations, would be $1.05 billion. The staff has estimated for purposes of the Paperwork Reduction Act that these external costs would reflect an increase of $160 million over the external cost of delivering the confirmations were they to be delivered pursuant to rule 10b–10. The Commission estimates that the annual costs for complying with proposed rule 15c2–2 would be $1.99 billion, or approximately $367,593 per broker, dealer or municipal securities dealer. It is important to note, however, no new confirmations will be required to be sent to investors under proposed rule 15c2–2; rather new information would be required to be included in confirmations that would otherwise be sent.

In addition to the foregoing costs, the Commission notes that other possible costs resulting from proposed rule 15c2–2 include the possibility that investors' ready access to information about the costs and conflicts associated with mutual fund shares, UIT interests and 529 plan securities may lead to a net reduction in the amount invested in those types of securities. Investors may pursue other types of investments that do not have, or do not appear to have, such costs and conflicts. In addition, the disclosure of distribution-related costs may result in a restructuring of the way funds compensate sellers of their securities.

3. Request for Comments

The Commission requests comment on the costs and benefits of proposed rule 15c2–2. Commenters are strongly encouraged to identify and supply any relevant data, analysis, and estimates concerning the costs and/or benefits of proposed rule 15c2–2, including any costs and benefits not described above. Commenters should address in particular the cost associated with adjusting operational systems to provide the disclosure required under proposed rule 15c2 and whether the proposed rule will generate the benefits described above. In addition, the Commission requests comment on whether a transitional period is necessary to make these adjustments. As always, commenters are specifically invited to share additional quantifiable costs and benefits that they believe may be imposed or generated by new rule 15c2–2.

*C. Proposed Rule 15c2–3*

Proposed rule 15c2–3 is intended to provide information to investors in mutual fund shares, UIT interests and 529 plan securities at the time they make their investment decisions.

1. Benefits

Proposed rule 15c2–3 would require brokers, dealers and municipal securities dealers to provide point of sale disclosure to customers prior to effecting transactions in those securities *i.e.*, at the time they make investment decisions. The Commission staff estimates that for the one-year period between September 2002 and August 2003, investors in open-end management investment company securities paid more than $6.7 billion in aggregate sales loads, consisting of approximately $4.9 billion in front-end loads and $1.8 billion in back-end loads. In addition, funds and their affiliates paid about $13 billion in marketing and distribution payments pursuant to 12b–1 plans. Absent proposed rule 15c2–3, investors in mutual fund shares, UIT interests, and municipal fund securities used for education savings would, at the time they make their investment decision, lack ready transaction-specific access to this information.

The proposed rule specifically would enable investors to see targeted, transaction-specific, information about these distribution-related costs, and about remuneration that lead to conflicts of interest for their brokers, dealers or municipal securities dealers. That would enable investors to better understand the costs and conflicts associated with each investment in those securities prior to entering into the transactions, which should promote better informed investment decision-making. In addition, as a result of the standardized disclosure that would be required under proposed rule 15c2–3, the Commission believes that the aggregate amount of the distribution-related costs associated with mutual fund shares, UIT interests and 529 plan securities may well decline over time. Furthermore, the record-retention requirements of proposed rule 15c2–3 would enable regulators to review the compliance of brokers, dealers and municipal securities dealers with the proposed rule as well as other legal obligations. These benefits, while qualitatively important, are necessarily difficult to quantify. Therefore, the Commission is unable to provide a quantitative estimate of the benefits of proposed rule 15c2–3.

2. Costs

Proposed rule 15c2–3 would require brokers, dealers and municipal securities dealers to provide point of sale disclosure to customers prior to effecting transactions in mutual fund shares, UIT interests and 529 plan securities. The costs of delivering this information to investors at the point of sale may include both internal costs (for information technology specialists to re-program and update confirmation delivery systems to allow point of sale disclosure, and for compliance officers and other staff to oversee and maintain point of sale disclosure systems) and external costs (for services related to point of sale disclosure, such as call center services and out-sourced services

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industry representatives the staff estimates that the cost per broker, dealer or municipal securities dealer would be approximately $18,500. Assuming that all of the approximately 5,400 brokers, dealers and municipal securities dealers subject to proposed rule 15c2–2 use such out-sourced services, the total one-time external cost would be about $100 million. We note that this assumption may result in a significant overstatement of these external costs.

[199] As noted above, based on discussions with vendors, the Commission staff anticipates that vendors will allocate costs to brokers, dealers and municipal securities dealers roughly on the basis of the volume of transactions in the covered securities.

to assist firms with developing and implementing compliance procedures), all of which are included in the estimates of the Paperwork Reduction Act burden. For purposes of the Paperwork Reduction Act, the Commission staff has estimated that the one-time burden to brokers, dealers and municipal securities dealers, and their vendors, associated with reprogramming software and otherwise updating systems to permit the confirmation delivery systems to deliver point of sale disclosure required under proposed rule 15c2–3 would be 7 million hours and that the one-time external cost would be $100 million.[200] We estimate that these one-time burdens and costs would equal total internal costs of $450 million [201], or approximately $83,333 per broker, dealer or municipal securities dealer. These figures will vary depending on whether a firm must update its own proprietary confirmation delivery system or whether it uses vendor services, in which case the cost will likely vary depending on the number of transactions the firm executes on an annual basis.[202]

In addition, for purposes of the Paperwork Reduction Act, the Commission staff has estimated that the annual burden to brokers, dealers and municipal securities dealers for complying with the point of sale disclosure requirements of proposed rule 15c2–3, including delivering point of sale disclosure to investors and maintaining and further updating point of sale disclosure systems, would be 18.7 million hours. The Commission staff estimates that this burden would equal total internal costs of $935 million annually, based on an estimated hourly wage of $50. The Commission staff further estimated for purposes of the Paperwork Reduction Act that the additional external costs of complying with the requirements of proposed rule 15c2–3 would be $40 million per year.[203] Therefore, the Commission estimates that the costs annual costs for complying with proposed rule 15c2–3 would be $975 million, or approximately $180,556 per broker, dealer or municipal securities dealer.

In addition to the foregoing costs, as would be the case with proposed rule 15c2–2, the Commission notes that other possible costs resulting from proposed rule 15c2–3 include the possibility that investors' ready access to information about the costs and conflicts associated with mutual fund shares, UIT interests and 529 plan securities may lead to a net reduction in the amount invested in those types of securities. Investors may pursue other types of investments that do not have, or do not appear to have, such costs and conflicts. In addition, the disclosure of distribution-related costs may result in a restructuring of the way funds compensate sellers of their securities.

3. Request for Comments

The Commission requests comment on the costs associated with requiring brokers, dealers and municipal securities dealers to disclose part or all of the information proposed to be required under rule 15c2–3 prior to each customer purchase or sale of mutual fund shares, UIT interests and 529 plan securities. The Commission requests estimates of the costs and benefits described above, as well as any costs and benefits, not already defined, that may result from the adoption of these proposed amendments. The Commission specifically requests estimates of the one-time costs associated with reprogramming software to permit firms' systems to generate the information required under proposed rule 15c2–3 and estimates of the costs for complying with the record-keeping requirements of paragraph (d) of the proposed rule. In addition, the Commission requests comment on the benefits and costs of requiring brokers, dealers and municipal securities dealers to disclose all or parts of the information proposed to be required under new rule 15c2–2 prior to each customer purchase or sale of mutual fund shares and municipal fund securities.

*D. Amendments to Rule 10b–10*

The proposed amendments to rule 10b–10 would require a broker-dealer effecting transactions in shares of preferred stock to inform customers in writing, at or before the completion of the transaction, if the issuer of the stock has reserved the right to repurchase—or call—the shares. The proposed amendments would also require a broker-dealer effecting a transaction in a debt security on the basis of yield-to-call to disclose the first possible date on which the debt security may be called. Finally, the amendments would exclude transactions subject to rule 15c2–2 from the confirmation delivery requirements of rule 10b–10.

1. Benefits

The proposed amendments to rule 10b–10 are intended to avoid customer confusion by alerting customers to any misunderstandings about the rights associated with preferred stock and callable debt, and to promote the timely resolution of problems. This leads to better informed decision-making by investors.

2. Costs

For purposes of the Paperwork Reduction Act, the Commission staff has estimated that the annual burden to brokers, dealers and municipal securities dealers for complying with the confirmation delivery requirements of rule 10b–10, as modified by the proposed amendments, would be 42.3 million hours. The Commission staff estimates that this burden would equal total internal costs of $2.12 billion annually, based on an estimated hourly wage of $50. The Commission staff further estimated for purposes of the Paperwork Reduction Act that the additional external costs of complying with the requirements of proposed rule 10b–10, as amended, including postage costs to send confirmations, would be $2.26 billion.[204] Therefore, the Commission estimates that the annual costs for complying with proposed rule 10b–10, as amended, would be $4.38 billion, or approximately $811,111 per broker, dealer or municipal securities dealer. We note that this is a net reduction in the annual costs for complying with rule 10b–10, as transactions that would otherwise be required to be delivered pursuant to rule

[200] As noted above, while the staff is currently unable to determine the number of brokers, dealers and municipal securities dealers that utilize outsourced services, based on discussions with industry representatives the staff estimates that the cost per broker, dealer or municipal securities dealers would be approximately $18,500. Assuming that all of the approximately 5,400 brokers, dealers and municipal securities dealers subject to proposed rule 15c2–3 use such out-sourced services, the total one-time external cost would be about $100 million. We note that this assumption may result in a significant overstatement of these external costs.

[201] (7 million hours × $50 per hour = $350 million; $350 million + $100 million for other external costs = $450 million.)

[202] As noted above, based on discussions with vendors, the Commission staff anticipates that vendors will allocate costs to brokers, dealers and municipal securities dealers based roughly on the volume of transactions that require confirmations to be generated and sent.

[203] Based on discussions with industry participants, the Commission staff estimates that the annual cost to brokers, dealers and municipal securities dealers for call center services and other service providers which would assist with development and implementation of procedures sufficient to demonstrate compliance with the delivery requirements of paragraphs (a) and (b) of proposed rule 15c2–3 would be approximately $7,400 per broker, dealer or municipal securities dealer, for a total of $40 million. (5,400 brokers, dealers and municipal securities dealers × $7,400 = $39,996,000.)

[204] (2.54 billion confirmations at $0.89 per confirmation = $2.26 billion.)

to 10b–10 would be delivered pursuant to rule 15c2–2.

3. Request for Comments

The Commission requests comment on the costs and benefits of the proposed amendments to rule 10b–10, including the costs and benefits described above. As always, commenters are specifically invited to share additional quantifiable costs and benefits that they believe may be imposed or generated by the proposed amendments to rule 10b–10. The Commission is particularly interested in learning more about current industry practice regarding the disclosure of call and redemption information in connection with transactions involving preferred stock and debt securities and whether broker-dealers already disclose such information as a matter of prudent business practice on confirmations or in some other way highlight such information to their customers. The Commission also solicits comment on what additional costs the required disclosure of such information would impose on those broker-dealers not currently providing such information to customers. The Commission requests that commenters provide supporting empirical data for any positions advanced.

*E. Amendments to Form N–1A*

The proposed amendments to Form N–1A would require mutual funds to provide enhanced prospectus disclosure regarding sales loads and revenue sharing payments.

1. Benefits

The proposed amendments to Form N–1A are expected to benefit mutual fund investors by providing them with a better understanding of sales loads and revenue sharing arrangements. Specifically, we believe that the proposed amendments relating to disclosure of sales loads as a percentage of net asset value rather than as a percentage of offering price may benefit investors by requiring that information regarding sales loads be provided in a manner that would better help investors to understand the true costs of investing in a load fund. Further, investors would benefit because disclosure of sales loads as a percentage of net asset value would be consistent with the disclosure in the confirmation that would be required by proposed rule 15c2–2. In addition, the proposed requirement that mutual funds disclose in the fund prospectus the fact that sales loads shown in the prospectus as a percentage of the net asset value or offering price may be higher or lower than the actual sales load that an investor would pay as a percentage of the net or gross amount invested may also assist investors in better understanding the sales load that they may pay. Finally, the proposed amendments relating to disclosure of revenue sharing payments may benefit investors by directing them to the disclosure regarding these arrangements that would be required in the confirmation and point of sale disclosure, and therefore may enhance investors' understanding of arrangements that may lead to conflicts of interest.

2. Costs

The proposals would impose new requirements on mutual funds to provide certain new prospectus disclosures regarding sales loads and revenue sharing arrangements. We estimate that complying with the proposed new disclosures would entail a relatively limited burden. The proposals to require fee table disclosure of sales loads on the basis of net asset value rather than offering price would impose a minimal burden, because mutual funds are already required to determine and disclose sales loads on this basis elsewhere in the prospectus. The additional disclosure that would be required regarding the effects of rounding in calculating sales loads would be limited, and the additional calculations regarding the range of variation resulting from rounding that would be required should be straightforward for funds to compute. Similarly, the additional disclosure that would be required regarding revenue sharing arrangements would be brief, and would only be required if any person within the fund complex that includes the fund makes revenue sharing payments.

The costs of adding these new prospectus disclosures may include both internal costs (for attorneys and other non-legal staff of a fund, such as computer programmers, to prepare and review the required disclosure) and external costs (for printing and typesetting of the disclosure). For purposes of the Paperwork Reduction Act, we have estimated that the proposed new disclosure requirements would add 1,968 hours to the total annual burden of completing Form N–1A.[205] We estimate that this additional burden would equal total internal costs of $98,400 annually, or approximately $14.01 per fund portfolio.[206] We expect the external costs of providing the new prospectus disclosure regarding sales loads and revenue sharing arrangements will be limited, because we do not expect that the proposed disclosure would add significant length to the prospectus.

3. Request for Comments

The Commission requests comment on the costs and benefits of the proposed amendments to Form N–1A. Commenters are strongly encouraged to identify and supply any relevant data, analysis, and estimates concerning the costs and/or benefits of the proposed amendments to Form N–1A, including any costs and benefits not described above.

**X. Consideration of Burden on Promotion of Efficiency, Competition, and Capital Formation**

Section 3(f) of the Exchange Act,[207] Section 2(b) of the Securities Act of 1933,[208] and Section 2(c) of the Investment Company Act[209] require the Commission, whenever it is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the Exchange Act[210] requires the Commission, in making rules under the Exchange Act, to consider the impact that any such rule would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Proposed rules 15c2–2 and 15c2–3 are intended to improve investor access to material information about investments and contemplated investments in mutual fund shares, UIT interests and 529 plan securities. Similarly, the

[205] This estimate is based on the following calculation: (0.5 hours per initial registration statement for sales load disclosure × 483 portfolios × 36% of portfolios) + (0.5 hours per post-effective amendment for sales load disclosure × 6,542 portfolios × 36% of portfolios) + (0.1 hours per initial registration statement for revenue sharing disclosure × 483 portfolios) + (0.1 hours per post-effective amendment for revenue sharing disclosure × 6,542 portfolios) = 1,968 hours.

[206] These figures are based on a Commission estimate that initial registration statements for 483 portfolios and post-effective amendments for 6,542 portfolios are filed annually that would be subject to the proposed disclosure requirements, and an estimated hourly wage rate of $50. The estimate of the number of filings is based on data derived from the Commission's EDGAR filing system. For a discussion of the estimated hourly wage rate, *see supra* note 197.

[207] 15 U.S.C. 78c(f).

[208] 15 U.S.C. 77b(b).

[209] 15 U.S.C. 80a–2(c).

[210] 15 U.S.C. 78w(a)(2).

proposed amendments to rule 10b–10 are intended to eliminate duplicative requirements and to improve investor access to material information about investments in callable preferred stock and callable debt securities. The proposed amendments to Form N–1A are intended to provide investors in mutual funds with enhanced disclosure regarding sales loads, and to direct investors to disclosure regarding revenue sharing payments to an investor's financial intermediary.

The Commission preliminarily believes that mandating certain disclosure for transactions in mutual fund shares, UIT interests and 529 plan securities should serve as an efficient and cost-effective means for those entities to deliver information to consumers. The proposals should not hinder efficiency because firms should be able to use present confirmation delivery systems, after making appropriate adjustments, rather than having to build new information delivery systems. In addition, the Commission preliminarily believes that the new rules and the proposed amendments would improve investor confidence and, therefore, would promote capital formation. With respect to the proposed requirements for enhanced disclosure by mutual funds, although we believe that the proposed amendments would benefit investors, the magnitude of the effect of the proposed amendments on efficiency, competition, and capital formation, and the extent to which they would be offset by the costs of the proposals, are difficult to quantify.

The Commission also preliminarily believes that the proposals would enhance competition because investors would have access to information that would allow them to better understand and differentiate among various investments. Because investors would be in a better position to better compare the costs of these investments, market participants would be encouraged to compete on price, thereby increasing market efficiency.

- The Commission requests comment on whether the proposed amendments are expected to promote efficiency, competition, and capital formation.

## XI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [211] we must advise the Office of Management and Budget as to whether the proposed regulation and disclosure requirements constitute "major" rules. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed regulation and disclosure requirements on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

## XII. Initial Regulatory Flexibility Act Analysis

Congress enacted the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq,* to address concerns related to the effects of agency rules on small entities. The Commission is sensitive to the impact its rules may impose on small entities. This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603, and relates to the Commission's proposed rule 15c2–2, 15c2–3 and amendments to rule 10b–10 and Form N–1A.

### *A. Reasons for, and Objectives of, Proposed Rules 15c2–2 and 15c2–3 and Proposed Amendments to Rule 10b–10 and Form N–1A*

The Commission is proposing rules 15c2–2 and 15c3–3 to address the concerns that investors in mutual fund shares, UIT interests and 529 plan securities be provided with adequate access to information regarding the costs of their investments, as well as the conflicts of interest their broker-dealers face. As noted above, those costs, and related distribution arrangements, have evolved substantially since 1977, when the Commission adopted its general confirmation rule—rule 10b–10.[212] We believe that disclosure of information about those costs and the arrangements that lead to conflicts of interest can help investors make better informed investment decisions.

Similarly, the Commission is proposing amendments to rule 10b–10 to eliminate duplicative requirements and to address concerns that certain material information has not been included in confirmations of transactions of callable preferred stock and redeemable debt. As described in detail above, the Commission proposes to amend rule 10b–10 to require broker-dealers to disclose whenever preferred stock could be called by the issuer. Rule 10b–10 requires similar disclosure for transactions in callable debt securities. The Commission further proposes to amend rule 10b–10 to require disclosure of the date of first call for transactions in callable debt securities. Finally, the Commission is proposing amendments to Form N–1A in order to provide investors with a better understanding of the costs of investing in a fund with a sales load, and of revenue sharing payments to an investor's financial intermediary.

### *B. Legal Basis*

The Commission is proposing new rule 15c2–2, new rule 15c2–3 and amendments to rule 10b–10 under the Exchange Act pursuant to the authority conferred by the Exchange Act, including Sections 10, 11, 15, 17, 23(a), and 36 [15 U.S.C. 78j, 78k, 78o, 78q, 78w(a), and 78mm] and Sections 12(b) and 38 of the Investment Company Act [15 U.S.C. 80a–12(b) and 80a–37]. The Commission is proposing amendments to Form N–1A pursuant to authority set forth in Sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)], and Sections 8, 12(b), 24(a), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–12(b), 80a–24(a), 80a–29, and 80a–37].

### *C. Small Entities Subject to Proposed Rules 15c2–2 and 15c2–3 and Proposed Amendments to Rule 10b–10 and Form N–1A*

Proposed rules 15c2–2 and 15c2–3 would apply to all brokers, dealers and municipal securities dealers, regardless of size, that effect transactions in mutual fund shares, UIT interests and 529 plan securities. The proposed amendments to rule 10b–10 would exclude from the general disclosure requirements of rule 10b–10 transactions in those securities. The proposed amendments to rule 10b–10 would also require all broker-dealers, regardless of size, to provide confirmation disclosure about the callable nature of preferred stock and, in the case of debt securities that are effected on the basis of yield-to-call, the date upon which the debt securities may first be called.

For purposes of the Regulatory Flexibility Act, a broker-dealer is a small business if it had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited

[211] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[212] *See supra* note 5.

financial statements were prepared pursuant to rule 17a–5(d) of the Exchange Act or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter) and if it is not an affiliate of an entity that is not a small business.[213] The Commission staff estimates that approximately 885 brokers, dealers and municipal securities dealers meet this definition.[214]

The proposed amendments to Form N–1A would apply to all mutual funds. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[215] Approximately 145 investment companies registered on Form N–1A meet this definition.[216]

*D. Reporting, Recordkeeping and Other Compliance Requirements*

As described above, proposed rule 15c2–2 and the amendments to rule 10b–10 would require additional information to be provided to investors in transaction confirmations. Proposed rule 15c2–3 would require information to be delivered to customers at the time they make investment decisions in connection with transactions involving mutual fund shares, UIT interests and 529 plan securities.

For purposes of the Paperwork Reduction Act, the Commission staff has estimated that the proposed disclosure requirements under proposed rule 15c2–2 would result in a one-time burden of 15 million hours and an annual burden of 18.7 million hours[217] to brokers, dealers and municipal securities dealers, and their vendors, in connection with delivering confirmations in for transactions in mutual fund shares and UIT interests. The Commission staff estimates that the one-time burden would result in total internal costs of $850 million, or approximately $157,407, on average, per broker, dealer and municipal securities dealer, and that the annual burden would result in total internal costs of $1.99 billion,[218] or approximately $367,593, on average, per broker, dealer and municipal securities dealer. As discussed above, as a general matter medium-sized and smaller firms, and also some larger firms, use third-party service providers, or vendors, to generate the data necessary to send confirmations. They may also use vendors to actually send confirmations to investors. Therefore, the firms' vendors would be required to reprogram their software and update their systems to generate the data that would allow their clients to comply with proposed rule 15c2–2. The staff understands from discussions with vendors that the allocation of costs would coincide roughly with the volume of the client's transactions, so that a broker, dealer or municipal securities dealer that executes fewer transactions involving covered securities would be allocated less of its vendor's costs than a broker, dealer or municipal securities dealer that executes more transactions.

The Commission staff has further estimated that the disclosure requirements of rule 15c2–3 would result in a one-time burden of 7 million hours and an annual burden of 18.7 million hours to brokers, dealers and municipal securities dealers, and their vendors, in connection with delivering point of sale disclosure for transactions in mutual fund shares and UIT interests. The Commission staff estimates that the one-time burden would result in total internal costs of $450 million, or approximately $83,333, on average, per broker, dealer and municipal securities dealer, and that the annual burden would result in total internal costs of $935 million, or approximately $173,148, on average, per broker, dealer and municipal securities dealer.

In addition, the Commission staff has further estimated that the disclosure requirements of rule 10b–10, including the proposed amendments, would result in an annual burden of 42.3 million hours to brokers, dealers and municipal securities dealers, and their vendors, in connection with delivering confirmations in connection with securities transactions. The Commission staff estimates that this burden would result in total internal costs of $1.91 billion annually, or approximately $773,000, on average, per affected entity. We note that this is a net reduction in the annual costs for complying with rule 10b–10, as transactions that would otherwise be required to be delivered pursuant to rule to 10b–10 would be delivered pursuant to rule 15c2–2.

Finally, the Commission staff has further estimated that the disclosure requirements of the proposed amendments to Form N–1A would increase the hour burden of prospectus disclosure by 1,968 hours. The Commission staff has estimated that this additional burden would increase total internal costs of filing an initial registration statement or post-effective amendment by $98,400 annually, or $14.01 per affected mutual fund portfolio.

• The Commission requests comment on the effect proposed new rules 15c2–2 and 15c2–3 and the proposed amendments to rule 10b–10 and Form N–1A would have on small entities. The Commission specifically requests data and analysis of the costs to implement and comply with the proposals, including expenditures of time and money for: any employee training; attorney, computer programmer or other professional time; preparing and processing relevant materials; and recordkeeping.

*E. Duplicative, Overlapping or Conflicting Federal Rules*

There are currently no rules that conflict with proposed new rules 15c2–2 and 15c2–3 or the amendments to rule 10b–10. The Commission notes, however, that MSRB rule G–15 is a separate confirmation rule that governs member transactions in municipal securities, including municipal fund securities. Furthermore, NASD Rule 2230 requires broker-dealers that are members of NASD to deliver a written notification containing certain information, including whether the member is acting as a broker for the customer or is working as a dealer for its own account. Brokers and dealers typically deliver this information in confirmations that fulfill the requirements of rule 10b–10. The Commission staff believes that, where required, brokers and dealers would incorporate such information into confirmations delivered pursuant to rule 15c2–2.

In addition, the Commission notes that information required for the point of sale disclosures pursuant to proposed rule 15c2–3 would also be required in confirmations delivered pursuant to

[213] 17 CFR 240.0–10.

[214] This estimate is based on information provided by registered broker-dealers to the Commission in FOCUS Reports.

[215] 17 CFR 270.0–10.

[216] This estimate is based on analysis by the Division of Investment Management staff of information from databases compiled by third-party information providers, including Morningstar, Inc., and Lipper.

[217] It is important to note, however, that confirmations for transactions in covered securities are currently required to be delivered pursuant to rule 10b–10 or MSRB rule G–15, as applicable. As a result, the burden for generating and sending confirmations would not be entirely new, but would reflect a shift of a burden of 16.7 million hours from rule 10b–10 to proposed rule 15c2–2.

[218] The staff has estimated for purposes of the Paperwork Reduction Act that these external costs would reflect an increase of $160 million over the external cost of delivering the confirmations were they to be delivered pursuant to rule 10b–10.

proposed rule 15c2–2. The Commission believes that this overlap is appropriate because the information to be provided to investors at point of sale is helpful for the customer when making his or her investment decision. Confirmation disclosure of this information would serve to alert the customer to any misunderstandings about the rights associated with his or her investment in a security, promote the timely resolution of problems, and better enable the investor to evaluate potential future transactions involving that security.

Finally, there are no rules that duplicate, overlap, or conflict with the proposed amendments to Form N–1A.

*F. Significant Alternatives*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the proposed amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. Different disclosure requirements for brokers, dealers, or municipal securities dealers that are small entities may create the risk that the investors who effect securities transactions through such small entities would not be as able as investors who effect transactions through larger such entities to assess information, including the distribution-related costs or conflicts of interest. Moreover, different disclosure requirements could create investor confusion if it creates the impression that small brokers, dealers or municipal securities dealers do not engage in the arrangements that are addressed by the proposals, while large such entities do. We believe, therefore, that it is important for the disclosure that would be required by the proposed amendments to be provided to shareholders by all brokers, dealers and municipal securities dealers, not just those that are not considered small entities.

We have endeavored through proposed new rules 15c2–2 and 15c2–3 and the amendments to rule 10b–10 and Form N–1A to minimize the regulatory burden on all brokers, dealers and municipal securities dealers, including small entities, while meeting our regulatory objectives. Small entities should benefit from the Commission's reasoned approach to the proposed new rules and proposed amendments to the same degree as other brokers, dealers and municipal securities dealers. Further consolidation or simplification of the proposals for brokers, dealers and municipal securities dealers that are small entities would be inconsistent with the Commission's goals for fostering investor protection. Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

*G. Solicitation of Comments*

The Commission encourages the submission of written comments with respect to any aspect of this analysis. Comment is specifically requested on the number of small entities that would be affected by proposed new rules 15c2–2 and 15c2–3 and the proposed amendments to rule 10b–10 and Form N–1A and the likely impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposals themselves. Commenters should provide empirical data to support their views. Comments should be submitted in triplicate to Jonathan G. Katz, 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 comment letters should refer to File No. S7–06–04; this file number should be included on the subject line if E-mail is used. Comment letters will be available for inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov*).[219]

**XIII. Statutory Authority**

The Commission is proposing new rule 15c2–2, new rule 15c2–3 and amendments to rule 10b–10 under the Exchange Act pursuant to the authority conferred by the Exchange Act, including Sections 10, 11, 15, 17, 23(a), and 36 [15 U.S.C. 78j, 78k, 78o, 78q, 78w(a), and 78mm] and Sections 12(b) and 38 of the Investment Company Act [15 U.S.C. 80a–12(b) and 80a–37]. The Commission is proposing amendments to Form N–1A pursuant to authority set forth in Sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)], and Sections 8, 12(b), 24(a), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–12(b), 80a–24(a), 80a–29, and 80a–37].

**Text of Proposed Rules**

**List of Subjects**

*17 CFR Part 239*

Reporting and recordkeeping requirements, Securities.

*17 CFR Part 240*

Broker-dealers, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 274*

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

## PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. The authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

2. The authority citation for Part 240 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j,

[219] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

78j–l, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

3. Section 240.10b–10 is amended by:

a. Revising the Preliminary Note;

b. Revising the introductory text of paragraph (a) and paragraphs (a)(4), (a)(6), (a)(9) and (b);

c. Removing paragraph (d)(6);

d. Redesignating paragraphs (d)(7), (d)(8), (d)(9) and (d)(10) as paragraphs (d)(6), (d)(7), (d)(8) and (d)(9);

e. Revising paragraph (e); and

f. Adding paragraph (g).

The additions and revisions read as follows:

**§ 240.10b–10 Confirmation of transactions.**

**Preliminary Note.** This section requires broker-dealers to disclose specified information in writing to customers at or before completion of a transaction. Section 240.15c2–2 sets forth the confirmation requirements that apply to broker-dealer transactions in certain investment company securities or municipal fund securities. The requirements under this section that particular information be disclosed at or before completion of a transaction are not determinative of, and do not exhaust, a broker's, dealer's or municipal securities dealer's obligations under the general antifraud provisions of the federal securities laws, or under any other legal requirements, to disclose additional information to a customer at the time of the customer's investment decision.

(a) *Disclosure requirement.* It shall be unlawful for any broker or dealer to effect for or with an account of a customer any transaction in, or to induce the purchase or sale by such customer of, any security (other than securities exempted by paragraph (g) of this section) unless such broker or dealer, at or before completion of such transaction, gives or sends to such customer written notification disclosing:

* * * * *

(4) (i) In the case of any transaction in a debt security subject to redemption before maturity, a statement to the effect that such debt security may be redeemed in whole or in part before maturity, that such a redemption could affect the yield represented and the fact that additional information is available upon request;

(ii) In the case of any transaction in preferred stock that is subject to repurchase by the issuer at a specified price, a statement to the effect that such preferred stock may be repurchased at the election of the issuer at any time; and

* * * * *

(6) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (*e.g.*, current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and, if different, the first date upon which the security may be called, and call price; and

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; *provided, however,* that this paragraph (a)(6)(iii) shall not apply to a transaction in a debt security that either:

(A) Has a maturity date that may be extended by the issuer thereof, with a variable interest rate payable thereon; or

(B) Is an asset-backed security, that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment; and

* * * * *

(9) That the broker or dealer is not a member of the Securities Investor Protection Corporation (SIPC), or that the broker or dealer clearing or carrying the customer account is not a member of SIPC, if such is the case.

(b) *Alternative periodic reporting.* A broker or dealer may effect transactions for or with the account of a customer without giving or sending to such customer the written notification described in paragraph (a) of this section if:

(1) Such transactions are effected pursuant to a periodic plan; and

(2) Such broker or dealer gives or sends to such customer within five business days after the end of each quarterly period, a written statement disclosing each purchase or redemption, effected for or with, and each dividend or distribution credited to or reinvested for, the account of such customer during the month; the date of such transaction; the identity, number, and price of any securities purchased or redeemed by such customer in each such transaction; the total number of shares of such securities in such customer's account; any remuneration received or to be received by the broker or dealer in connection therewith; and that any other information required by paragraph (a) of this section will be furnished upon written request; *provided, however,* that the written statement may be delivered to some other person designated by the customer for distribution to the customer; and

(3) Such customer is provided with prior notification in writing disclosing the intention to send the written information referred to in paragraph (b)(1) of this section in lieu of an immediate confirmation.

* * * * *

(e) *Security futures products.* The provisions of paragraphs (a) and (b) of this section shall not apply to a broker or dealer registered pursuant to section 15(b)(11)(A) of the Act (15 U.S.C. 78*o*(b)(11)(A)) to the extent that it effects transactions for customers in security futures products in a futures account (as that term is defined in § 240.15c3–3(a)(15)) and a broker or dealer registered pursuant to section 15(b)(1) of the Act (15 U.S.C. 78*o*(b)(1)) that is also a futures commission merchant registered pursuant to section 4f(a)(1) of the Commodity Exchange Act (7 U.S.C. 6f(a)(1)), to the extent that it effects transactions for customers in security futures products in a futures account (as that term is defined in § 240.15c3–3(a)(15)); *provided that* the broker or dealer that effects any transaction for a customer in security futures products in a futures account gives or sends to the customer no later than the next business day after execution of any futures securities product transaction, written notification disclosing:

(1) The date the transaction was executed, the identity of the single security or narrow-based security index underlying the contract for the security futures product, the number of contracts of such security futures product purchased or sold, the price, and the delivery month;

(2) The source and amount of any remuneration received or to be received by the broker or dealer in connection with the transaction, including, but not limited to, markups, commissions, costs, fees, and other charges incurred in connection with the transaction; *provided that* if no remuneration is to be paid for an initiating transaction until the occurrence of the corresponding liquidating transaction, that the broker or dealer shall disclose the amount of remuneration only on the confirmation for the liquidating transaction;

(3) The fact that information about the time of the execution of the transaction, the identity of the other party to the contract, and whether the broker or dealer is acting as agent for such customer, as agent for some other person, as agent for both such customer and some other person, or as principal for its own account, and if the broker or

dealer is acting as principal, whether it is engaging in a block transaction or an exchange of security futures products for physical securities, will be available upon written request of the customer; and

(4) Whether payment for order flow is received by the broker or dealer for such transactions, the amount of this payment and the fact that the source and nature of the compensation received in connection with the particular transaction will be furnished upon written request of the customer; *provided that* brokers or dealers that do not receive payment for order flow have no disclosure obligation under this paragraph.

* * * * *

(g) This section does not apply to transactions in any of the following securities:

(1) U.S. Savings Bonds;

(2) Municipal securities; and

(3) Any other security that is a "covered security" as provided in § 240.15c2–2.

4. Section 240.15c2–2 is added to read as follows:

**§ 240.15c2–2 Confirmation of transactions in open-end management investment company shares, unit investment trust interests, and municipal fund securities used for education savings.**

**Preliminary Note.** This section requires brokers (including municipal securities brokers), dealers and municipal securities dealers to disclose specified information in writing to customers at or before completion of a transaction in certain investment company securities or municipal fund securities, while § 240.10b–10 sets forth the confirmation requirements that apply to other transactions. The requirements under this section that particular information be disclosed at or before completion of a transaction are not determinative of, and do not exhaust, a broker's, dealer's or municipal securities dealer's obligations under the general antifraud provisions of the federal securities laws, or under any other legal requirements, to disclose additional information to a customer at the time of the customer's investment decision.

(a) *Disclosure requirement.* It shall be unlawful for any broker, dealer or municipal securities dealer to effect for or with an account of a customer any transaction in, or to induce the purchase or sale by such customer of, any covered security unless the broker, dealer or municipal securities dealer complies with the requirements set forth in paragraphs (b), (c), (d) and (e) of this section. All disclosures made pursuant to paragraphs (b) and (c) of this section shall be made in a manner consistent with Schedule 15C (§ 240.15c–100).

(b) *General disclosure requirement.* At or before the completion of a transaction in any covered security, the broker, dealer or municipal securities dealer shall give or send to such customer written notification disclosing:

(1) The date of the transaction;

(2) The issuer and class of the covered security;

(3) The net asset value of the shares or units and, if different, the public offering price of the shares or units;

(4) The number of shares or units of the security purchased or sold by the customer, the total dollar amount paid or received in the transaction and the net amount of the investment bought or sold in the transaction (equal to the number of shares or units bought or sold multiplied by the net asset value of those shares or units);

(5) Any commission, markup or other remuneration received or to be received by the broker, dealer or municipal securities dealer from the customer in connection with the transaction;

(6) In the case of transactions in which a customer sells shares or units of a covered security, the amount of any deferred sales load that the customer has incurred or will incur in connection with the transaction; and

(7) That the broker, dealer or municipal securities dealer (other than a municipal securities dealer that is a bank) is not a member of the Securities Investor Protection Corporation (SIPC), or that the broker, dealer or municipal securities dealer clearing or carrying the customer account is not a member of SIPC, if such is the case; *provided, however, that* this paragraph (b)(7) shall not apply in the case of a transaction in shares or units of a covered security if:

(i) The customer sends funds or securities directly to, or receives funds or securities directly from, the issuer of the covered security, its transfer agent, its custodian, or other designated agent, and such person is not an associated person of the broker or dealer required by paragraph (a) of this section to send written notification to the customer; and

(ii) The written notification required by paragraph (a) of this section is sent on behalf of the broker or dealer to the customer by a person described in paragraph (b)(7)(i) of this section.

(c) *Additional disclosure requirement for purchases.* At or before the completion of any transaction in which a customer purchases a covered security, the broker, dealer or municipal securities dealer also shall give or send to such customer written notification that discloses the following information:

(1) The amount of any sales load that the customer has incurred or will incur at the time of purchase, expressed in dollars and as a percentage of the net amount invested, together with:

(i) If the customer will incur a sales load at the time of sale, information about the availability of breakpoints as reflected in Schedule 15C (§ 240.15c–100). with regard to the covered security, including a statement of the applicable sales load as set forth in the prospectus, reflecting any breakpoint discount and the value of the securities position (based on net asset value, public offering price, or other applicable value) to which the sales load is applied; or

(ii) If the customer will not incur a sales load at the time of sale, information about the availability of breakpoints as reflected in Schedule 15C (§ 240.15c–100) with regard to a different class of the covered security, including a statement of the sales load that the customer would have incurred at the time of sale if the transaction had been in that different class of the covered security.

(2) An explanation of the potential amount of any deferred sales load that the customer may incur in connection with any subsequent sale of the shares or units purchased in the transaction (other than deferred sales loads of no more than one percent that expire no later than one year after purchase, when no other sales load would be incurred on that transaction), including, for each year that the deferred sales load may be in effect:

(i) The maximum amount of the deferred sales load that would be associated with the sale of those shares or units, expressed in dollars; and

(ii) The maximum amount of the deferred sales load that would be associated with the sale of those shares or units, expressed as a percentage of the net asset value at the time of purchase or at the time of sale, as applicable.

(3) An explanation of any asset-based sales charges and asset-based service fees incurred, or to be incurred, by the issuer of the covered security in connection with the customer's purchase of the shares or units. Based on the issuer's policies at the time of the purchase, this explanation shall state:

(i) The annual amount of asset-based sales charges and asset-based service fees incurred in connection with the shares or units purchased, as a percentage of net asset value; and

(ii) The total annual dollar amount of asset-based sales charges and asset-based service fees incurred in connection with the shares or units purchased in the transaction, if the net asset value does not change.

(4) The amount of any dealer concession that the broker, dealer or municipal securities dealer will earn in

connection with the transaction, expressed in dollars and as a percentage of the net amount invested.

(5)(i) The amount directly or indirectly earned from the fund complex by:

(A) The broker, dealer or municipal securities dealer; and

(B) Any associated person that is a broker, dealer or municipal securities dealer; and

(C) If the covered security is not a proprietary covered security, any other associated person of the broker, dealer or municipal securities dealer.

(ii) The broker, dealer or municipal securities dealer may disclose the information required to be disclosed pursuant to paragraphs (c)(5)(i)(A), (B) and (C) of this section as a percentage of the total cumulative net asset value of the covered securities issued by the fund complex that are sold by such broker, dealer or municipal securities dealer over the four most recent calendar quarters (or over the four calendar quarters preceding the most recent calendar quarter if the date of the transaction is less than 30 days after the end of the most recent calendar quarter), in connection with the following types of arrangements:

(A) Revenue sharing payments from persons within the fund complex; or

(B) Commissions associated with portfolio securities transactions, including markups or other remuneration associated with transactions effected on a riskless principal basis, on behalf of the issuer of the covered security, or issuers of other covered securities within the fund complex.

(iii) For each of the types of arrangements described in paragraph (c)(5)(ii) of this section, the broker, dealer or municipal securities dealer shall disclose the percentage required pursuant to that paragraph and the total dollar amount of remuneration it may expect to receive in connection with the transaction, calculated by multiplying that percentage by the net amount invested in the transaction. In addition, to the extent that the broker, dealer or municipal securities dealer has entered into a revenue sharing arrangement or understanding that would result in a specific amount of remuneration in connection with purchases of the covered security, the broker, dealer or municipal securities dealer shall also disclose that remuneration as a percentage of the net amount invested and the total dollar amount of remuneration it may expect to receive in connection with the transaction.

(6) If applicable, that the broker, dealer or municipal securities dealer engages in the following types of differential compensation practices related to the covered security purchased:

(i) Payment of differential compensation to any associated persons in connection with the sale of a class of covered securities that charges a deferred sales load (other than deferred sales loads of no more than one percent that expire no later than one year after purchase, when no other sales load would be incurred on that transaction), if the customer purchased a covered security that charges that type of sales load; and

(ii) Payment of differential compensation to any associated persons in connection with the sale of a proprietary covered security, if the customer purchased a proprietary covered security; and

(iii) For each of the types of differential compensation described in paragraphs (c)(6)(i) and (ii) of this section, the broker, dealer or municipal securities dealer shall disclose whether it provides differential compensation by means of a series of three checkboxes, associated with a yes, no or "not applicable" response.

(d) *Alternative periodic reporting.* A broker, dealer or municipal securities dealer may effect transactions for or with the account of a customer without giving or sending to such customer the written notification described in paragraphs (b) and (c) of this section if:

(1) The broker, dealer or municipal securities dealer:

(i) Effects such transactions pursuant to a covered securities plan, or

(ii) Effects such transactions in shares of any open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (the "Investment Company Act") that holds itself out as a money market fund and attempts to maintain a stable net asset value per share if no sales load is deducted upon the purchase or redemption of shares in the money market fund; and

(2) The broker, dealer or municipal securities dealer gives or sends to the customer within five business days after the end of each quarterly period, for transactions involving covered securities plans, and after the end of each monthly period for other transactions described in paragraph (d)(1) of this section, a written statement disclosing:

(i) Each purchase or redemption, effected for or with, and each dividend or distribution credited to or reinvested for, the account of such customer during the period;

(ii) The total number of shares or units of the covered security in the customer's account;

(iii) The information required by paragraph (b) of this section and, to the extent applicable, paragraphs (c)(1) and (c)(4) of this section, related to each purchase, redemption, credit or reinvestment;

(iv) The information required by paragraphs (c)(5) and (c)(6) of this section, as of the date of the final purchase or reinvestment during the period;

(v) The information required by paragraph (c)(2) of this section, based on the total value of the purchases or reinvestments during the period; and

(vi) The information required by paragraph (c)(3) of this section, based on the total purchases or reinvestments during the period and on the net asset value of the covered security at the end of the period; and

(3) The broker, dealer or municipal securities dealer provides prior notification to the customer, in writing, disclosing the intention to send the written information referred to in paragraph (d)(1) of this section in lieu of an immediate confirmation, and provides to the customer at least one written disclosure document consistent with paragraphs (b) and (c) of this section prior to relying on this paragraph (d) for any transaction in which the customer purchases a covered security.

(e) *Comparison ranges.* (1) For the following disclosures required by paragraphs (b), (c) and (d) of this section, the broker, dealer or municipal securities dealer also shall disclose the median information and comparison ranges for the following:

(i) Front-end sales loads (paragraph (c)(1) of this section)—the median and 95th percentile range of front-end sales loads involving the same category of covered security (*i.e.*, mutual fund, unit investment trust or municipal fund security);

(ii) Deferred sales loads (paragraph (c)(2) of this section)—the median and 95th percentile range of deferred sales loads involving the same category of covered security, for each year in which the sales load may be in effect;

(iii) Annual asset-based sales charges and service fees (paragraph (c)(3)(iv) of this section)—the median and 95th percentile range of asset-based distribution and service fees involving the same category of covered security;

(iv) Dealer concession or other sales fees (paragraph (c)(4) of this section)—the median and 95th percentile range of dealer concessions or other sales fees

involving the same category of covered security;

(v) Revenue sharing (paragraph (c)(5)(i) of this section)—the median and 95th percentile range of revenue sharing involving transactions by all brokers, dealers or municipal securities dealers that distribute that category of covered security; and

(vi) Portfolio brokerage commissions (paragraph (c)(5)(ii) of this section)—the median and 95th percentile range of portfolio brokerage commissions involving transactions by all brokers, dealers or municipal securities dealers that distribute that category of covered security.

(2) The median information and comparison ranges will be published from time to time by the Commission as percentages; *provided, however, that* this paragraph (e) will not be effective until 90 days after the Commission publishes the initial schedule of comparison ranges in the **Federal Register**. The Commission will publish revised ranges in the **Federal Register**. When a range is revised, all disclosures pursuant to this section that are provided to customers more than 90 days following the publication of the revised ranges shall conform to the revised ranges.

(f) *Definitions.* For purposes of this section:

(1) Asset-based sales charges means all asset-based charges incurred in connection with the distribution of a covered security, paid by the issuer or paid out of the assets of covered securities owned by the issuer.

(2) *Asset-based service fee* means all asset-based amounts for personal service and/or the maintenance of shareholder accounts, paid by the issuer or paid out of the assets of covered securities owned by the issuer.

(3) *Completion of the transaction* has the meaning provided in § 240.15c1–1.

(4) *Consistent with Schedule 15C* means using Schedule 15C (§ 240.15c–100), or using a similar layout of disclosure so long as:

(i) All information specified in Schedule 15C is set forth in the confirmation;

(ii) Information specified in Sections B through F of Schedule 15C are included with no change, including the use of bold print for data items printed in bold in Schedule 15C, and in the order set forth in Schedule 15C; and

(iii) Information specified in Section A of Schedule 15C is displayed prominently.

(5) *Covered securities plan* means any plan under which covered securities are purchased by a customer (the payments being made directly to, or made payable to, the issuer of the securities, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company), or sold by a customer pursuant to:

(i) An individual retirement or individual pension plan qualified under the Internal Revenue Code (26 U.S.C. *et seq.* (1986));

(ii) A contractual or systematic agreement under which the customer purchases at the applicable public offering price, or redeems at the applicable redemption price, such securities in specified amounts (calculated in security units or dollars or by reference to dividends or other distributions paid by the issuer) at specified time intervals, or at the time dividends or other distributions are paid by the issuer, and setting forth the commissions or charges to be paid by such customer in connection therewith (or the manner of calculating them); or

(iii) Any other arrangement involving a group of two or more customers and contemplating periodic purchases of such securities by each customer through a person designated by the group; *provided that* such arrangement requires the issuer of the covered security or its agent:

(A) To give or send to the designated person, at or before the completion of the transaction for the purchase of such securities, a written notification of the receipt of the total amount paid by the group;

(B) To send to anyone in the group who was a customer in the prior quarter and on whose behalf payment has not been received in the current quarter a quarterly written statement reflecting that a payment was not received on his behalf; and

(C) To advise each customer in the group if a payment is not received from the designated person on behalf of the group within 10 days of a date certain specified in the arrangement for delivery of that payment by the designated person and thereafter to send to each such customer the written notification described in paragraph (a) of this section for the next three succeeding payments.

(6) *Covered security* means:

(i) Any security issued by an *open-end company,* as defined by section 5(a)(1) of the Investment Company Act (15 U.S.C. 80a–5(a)(1)), that is not traded on a national securities exchange or a facility of a national securities association;

(ii) Any security issued by a *unit investment trust* as that term is defined by section 4(2) of the Investment Company Act (15 U.S.C. 80a–4(2)), but is not an exchange-traded fund that is traded on a national securities exchange; *provided, however, that* an interest in a unit investment trust that is the subject of a secondary market transaction is not a covered security for purposes of this section; and

(iii) Any municipal fund security.

(7) *Customer* shall not include a broker, dealer or municipal securities dealer.

(8) *Dealer concession* means any fees that the broker, dealer or municipal securities dealer will earn at the time of the sale, in connection with the transaction, from the issuer of the covered security, an agent of the issuer, the primary distributor, or any other broker, dealer or municipal securities dealer.

(9) *Differential compensation* means:

(i) In the case of transactions involving the purchase of a class of covered security that is associated with a deferred sales load (other than classes associated with a deferred sales load of no more than one percent that expires no later than one year after purchase for certain transactions, when no other sales load would be incurred on that transaction), any form of higher compensation (including total commissions, reimbursement of charges or expenses, avoidance of charges or expenses, other cash compensation, or non-cash compensation) that a broker, dealer or municipal securities dealer can be expected to pay to any of its associated persons over the next year (assuming no change in net asset value if applicable) in connection with the sale of a stated dollar amount of that class of covered security, compared with the compensation that would have been paid to the associated person over the next year in connection with the sale of the same dollar amount of another class of the same covered security that is associated with a sales load at the time of purchase; and

(ii) In the case of transactions involving the purchase of a proprietary covered security:

(A) Any practice by which a broker, dealer or municipal securities dealer pays an associated person a higher percentage of the firm's gross dealer concession in connection with the sale of a proprietary covered security than the percentage of the gross dealer concession that firm would pay in connection with the sale of the same dollar amount of any non-proprietary covered security offered by the firm; and

(B) Other practices of a broker, dealer or municipal securities dealer that cause an associated person to earn a higher rate of compensation in connection with the sale of a proprietary covered security, including but not limited to

additional cash compensation or the imposition, allocation or waiver of expenses, overhead costs or ticket charges.

(10) *Fund complex* shall include the issuer of the covered security (including the sponsor, depositor or trustee of a unit investment trust, and any insurance company issuing a variable annuity contract or variable life insurance policy), the issuer of any other covered security that holds itself out to investors as a related company for purposes of investment or investor services, any agent of any such issuer, any investment adviser for any such issuer, and any affiliated person (as defined by section 2(a)(3) of the Investment Company Act (15 U.S.C. 80a–2(a)(3))) of any such issuer or any such investment adviser.

(11) *Gross dealer concession* means the total amount of any discounts, concessions, fees, service fees, commissions or asset-based sales charges provided by the issuer of a covered security to the broker, dealer or municipal securities dealer in connection with the sale and distribution of the covered security; but does not include any commissions associated with portfolio securities transactions on behalf of the issuer.

(12) *Municipal fund security* means any municipal security that is issued pursuant to a qualified State tuition program as defined by section 529 of the Internal Revenue Code (26 U.S.C. 529), and that is issued by an issuer that, but for the application of section 2(b) of the Investment Company Act (15 U.S.C. 80a–2(b)), would constitute an investment company within the meaning of section 3 of the Investment Company Act (15 U.S.C. 80a–3).

(13) *Net amount invested* means the price paid to purchase the covered securities less any applicable sales load.

(14) *Portfolio securities transaction* means any transaction involving securities owned by the issuer of a covered security, or owned by any other issuer within the same fund complex.

(15) *Proprietary covered security* means any covered security as to which the broker, dealer or municipal securities dealer is an affiliated person (as defined by section 2(a)(3) of the Investment Company Act (15 U.S.C. 80a–2(a)(3))) of the issuer, or is an associated person of the issuer's investment adviser or principal underwriter, or, in the case of a covered security that is an interest in a unit investment trust, is an associated person of a sponsor, depositor or trustee of the covered security.

(16) *Revenue sharing* means any arrangement or understanding by which a person within a fund complex, other than the issuer of the covered security, makes payments to a broker, dealer or municipal securities dealer, or any associated person of the broker, dealer or municipal securities dealer, excluding amounts earned at the time of the sale that constitute a dealer concession or other sales fee and that are disclosed pursuant to paragraph (b)(4) of this section.

(17) *Sales load* has the meaning set forth in section 2(a)(35) of the Investment Company Act (15 U.S.C. 80a–2(a)(35)).

(18) *Securities position* means the value of the purchase of covered securities; the value of securities that are subject to rights of accumulation under the terms of the prospectus with respect to the covered security or a related class of the covered security, to the extent known by the broker, dealer or municipal securities dealer, including the value of such securities purchased in other accounts or by other persons; and the value of any such securities that are the subject of letters of intent that may be considered in computing a breakpoint with respect to the covered security or a related class of the covered security.

(g) *Exemptions.* The Commission may exempt any broker, dealer or municipal securities dealer from the requirements of paragraphs (b), (c) (d) and (e) of this section with regard to specific transactions or specific classes of transactions for which the broker, dealer or municipal securities dealer will provide alternative procedures to effect the purposes of this section; any such exemption may be granted subject to compliance with such alternative procedures and upon such other stated terms and conditions as the Commission may impose.

5. Section 240.15c2–3 is added to read as follows:

**§ 240.15c2–3 Point-of-sale disclosure for purchase transactions in open-end management investment company shares, unit investment trust interests, and municipal fund securities used for education savings.**

**Preliminary Note.** This section requires brokers (including municipal securities brokers), dealers and municipal securities dealers to disclose specified information in writing to customers prior to transactions in certain investment company securities or municipal fund securities. The requirements under this section that particular information be disclosed at the point of sale are not determinative of, and do not exhaust, a broker's, dealer's or municipal securities dealer's obligations under the general antifraud provisions of the federal securities laws, or under any other legal requirements, to disclose additional information to a customer at the time of the customer's investment decision.

(a) *Requirement.* Except as provided in paragraph (e) of this section, it shall be unlawful for any broker, dealer or municipal securities dealer to effect a purchase of a covered security for a customer without disclosing information consistent with this paragraph at the point of sale.

(1) The broker, dealer or municipal securities dealer shall separately disclose each of the following categories of information by reference to the value of the purchase, or, if that value is not reasonably estimable at the time of disclosure, by reference to a model investment of $10,000:

(i) The amount of any sales load that the customer would incur at the time of purchase;

(ii) An estimate of the amount of any asset-based sales charge and asset-based service fees that, in the year following the purchase, would be incurred by the issuer of the covered security in connection with the shares or units purchased over the next year if net asset value does not change;

(iii) An estimate of the maximum amount of any deferred sales load that would be associated with the shares or units purchased if those shares or units are sold within one year (other than deferred sales loads of no more than one percent that expire no later than one year after purchase, when no other sales load would be incurred on that transaction), along with a statement informing the customer about how many years a deferred sales load may be in effect; and

(iv) The amount of any dealer concession that the broker, dealer or municipal securities dealer would earn at the time of sale in connection with the transaction; and

(2) The broker, dealer or municipal securities dealer also shall disclose:

(i) Whether the broker, dealer or municipal securities dealer, or any affiliate, receives revenue sharing from the fund complex;

(ii) Whether the broker, dealer or municipal securities dealer, or any affiliate, receives portfolio brokerage commissions from the fund complex; and

(iii) If applicable, whether the broker, dealer or municipal securities dealer engages in the following types of differential compensation practices related to the covered security purchased:

(A) Payment of differential compensation to any associated persons in connection with the sale of a class of covered securities that charges a

deferred sales load (other than deferred sales loads of no more than one percent that expire no later than one year after purchase, when no other sales load would be incurred on that transaction), if the customer purchased a covered security that charges that type of sales load; and

(B) Payment of differential compensation to any associated persons in connection with the sale of a proprietary covered security, if the customer purchased a proprietary covered security.

(b) *Customers' right to terminate orders made prior to disclosure.* An order received by the broker, dealer or municipal securities dealer prior to the disclosure required by this section shall be treated as an indication of interest until after the information required by paragraph (a) of this section is disclosed to the customer, and, following disclosure, the customer has had an opportunity to determine whether to place an order. The broker, dealer or municipal securities dealer shall disclose this right to the customer at the time it discloses the information required by this paragraph (b).

(c) *Manner of disclosure*—(1) *Generally.* The information required to be disclosed pursuant to paragraph (a) or (b) of this section shall be given or sent to the customer in writing using Schedule 15D (§ 240.15c–101); *provided, however, that* if the point of sale occurs at an in-person meeting, the information shall also be disclosed orally to the customer at the in-person meeting.

(2) *Exception for oral communication.* Notwithstanding paragraph (c)(1) of this section, if the point of sale occurs through means of oral communication other than at an in-person meeting, the information shall be disclosed orally to the customer at the point of sale.

(d) *Recordkeeping.* A broker, dealer or municipal securities dealer, at the time of disclosing information pursuant to this section, shall make records of communications and records of such disclosure sufficient to demonstrate compliance with the requirements of paragraphs (a) and (b) of this section. The broker, dealer or municipal securities dealer shall preserve such records for the period specified in § 240.17a–4(b). Records of oral communications and records of disclosure of oral communications shall be kept in accordance with § 240.17a–4(f) and for the period specified in § 240.17a–4(b) with regard to similar written communications and records.

(e) *Exceptions.* This section shall not apply to the following transactions in a covered security, or participants in a transaction:

(1) Transactions resulting from orders received from the customer via U.S. mail, messenger delivery or similar third-party delivery service if:

(i) The broker, dealer or municipal securities dealer meets the requirements of paragraph (e)(1)(ii) of this section and, within the previous six months, has provided the following information to the customer:

(A) A statement of the maximum front-end and deferred sales loads that may be associated with investments in covered securities offered by the broker, dealer or municipal securities dealer, expressed as a percentage of net asset value, along with an explanation of how sales loads can reduce investment returns;

(B) A statement of the maximum asset-based sales charge or asset-based service fees that may directly or indirectly be paid out of the assets of issuers of covered securities offered by the broker, dealer or municipal securities dealer, expressed as a percentage of net asset value, along with an explanation of how asset-based charges can reduce investment returns;

(C) A statement about whether the broker, dealer or municipal securities dealer receives revenue sharing or portfolio brokerage commissions from any fund complex, along with an explanation of how those arrangements pose conflicts of interest; and

(D) A statement about whether the broker, dealer or municipal securities dealer pays differential compensation in connection with transactions in covered securities, along with an explanation of how differential compensation pose conflicts of interest; and

(ii) The broker, dealer or municipal securities dealer is not compensated for effecting transactions for customers that do not have accounts with that broker, dealer or municipal securities dealer;

(2) A broker, dealer or municipal securities dealer that clears transactions on behalf of another broker, dealer or municipal securities dealer, or that serves as the primary distributor of a covered security, with respect to transactions in which:

(i) The broker, dealer or municipal securities dealer did not communicate with the customer about the transaction other than to accept the customer's order; and

(ii) The broker, dealer or municipal securities dealer reasonably believes that another broker, dealer or municipal securities dealer has delivered the information to the customer as required by this section;

(3) Transactions as part of a covered securities plan; *provided, however, that* the broker, dealer or municipal securities dealer provides disclosure consistent with this section prior to the first transaction in any covered security that is purchased as part of a covered securities plan;

(4) Reinvestments of dividends earned; or

(5) Transactions in which the broker, dealer or municipal securities dealer is exercising investment discretion.

(f) *Definitions.*

(1) *Point of sale* shall mean:

(i) Except as provided by paragraph (f)(1)(ii) of this section, immediately prior to the time that the broker, dealer or municipal securities dealer accepts the order from the customer.

(ii) As to transactions for customers who have not opened an account with the broker, dealer or municipal securities dealer, and transactions in which the broker, dealer or municipal securities dealer does not accept the order from the customer, the time that the broker, dealer or municipal securities dealer first communicates with the customer about the covered security, specifically or in conjunction with other potential investments.

(2) The terms *asset-based sales charges, asset-based service fee, covered securities plan, covered security, customer, dealer concession, differential compensation, fund complex, portfolio securities transaction, revenue sharing* and *sales load* shall have the meanings provided in § 240.15c2–2.

6. Section 240.15c–100 is added to read as follows:

**§ 240.15c–100 Schedule 15C.**

Securities and Exchange Commission, Washington, DC 20549.

Schedule 15C

BILLING CODE 8010–01–P

SCHEDULE 15C - FRONT PAGE

**<Name of broker, dealer or municipal securities dealer >**
**Fees and Payments Associated with Your Investment**

**A. General information**

Customer: _____
Account Number: _____
Date of transaction: _____
Type of transaction: _____
No. shares bought/sold: _____
Security issuer: _____
Class (if applicable): _____

Symbol: _____
CUSIP number: _____
Type of security: _____
Net Asset Value (NAV): _____
Price (NAV plus load): _____
Amount paid/received: _____
Amount of your investment/sale: _____

Commission/other compensation: _____
Other charges: _____

<If applicable> *Note: even if there is no commission or other charge, you may be paying for distribution through loads or asset-based fees, as described below.*

**B. What you pay (directly or indirectly) for purchases**

**Front-end sales load**

<amount> <if applicable> *which is equivalent to ___% of your investment*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

**Back-end sales load**

<if applicable> *If you sell these shares in ___ year[s], you will pay*

<amount> <if applicable> *or _ % of your investment, whichever is less*
<or if applicable> *(which equals __% of your investment)*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

<repeated as necessary>

**Estimated first-year asset-based sales charges**

<amount> <if applicable> *which is equivalent to ___% of your investment*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

**Estimated first-year asset-based service fees**

<amount> <if applicable> *which is equivalent to ___% of your investment*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

**C. Amounts that your broker, <broker, dealer or municipal securities dealer>, will receive from the fund or its affiliates**

**Sales fee** <broker, dealer or municipal securities dealer> received for your purchase:

<amount> <if applicable> *which is equivalent to ___% of your investment*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

**Revenue sharing** <broker, dealer or municipal securities dealer> may receive in connection with your purchase:

<amount> <if applicable> *which is equivalent to ___% of your investment*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

**Portfolio brokerage commissions** <broker, dealer or municipal securities dealer> may receive in connection with your purchase:

<amount> <if applicable> *which is equivalent to ___% of your investment*
<if applicable> *Industry norms: Range x.xx - x.xx%; median x.xx%.*

**Additional disclosures:**

**D. Payment of special compensation to personnel of your broker, <broker, dealer or municipal securities dealer>**

If you bought a security of an fund affiliated with <broker, dealer or municipal securities dealer>: Does <broker, dealer or municipal securities dealer> pay its personnel more to sell securities of affiliated funds?

Yes ☐ No ☐ NA ☐

If you bought a share class with a back-end sales load: Does <broker, dealer or municipal securities dealer> pay its personnel more to sell this class than to sell front-end sales load share classes of the same fund?

Yes ☐ No ☐ NA ☐

**E. Breakpoint discount information**

<If applicable because a front-end sales load was paid> Many mutual fund companies offer sales load discounts to customers that have invested over a certain dollar amount. These discounts may be calculated based on your current purchase or on your aggregate holdings, and may also include the holdings of your family or household members. To ensure that you are obtaining all available discounts, you should talk with your broker or financial advisor, or check the fund's prospectus or website. According to the fund's prospectus, the amount you invested (together with any holdings of which we are aware) entitles you to a sales load of ____%. You were charged a sales load of ____%, which may vary from the sales load disclosed in the prospectus due to rounding to the nearest penny in the transaction.

<if applicable because no front-end sales load was paid> Many mutual fund companies offer sales load discounts to customers that have invested over a certain dollar amount. These discounts may be calculated based on your current purchase or your aggregate holdings, and may also include the holdings of your family or household members. To ensure that you are obtaining all available discounts, you should talk with your broker or financial advisor, or check the fund's prospectus or website. According to the fund's prospectus, the amount you invested (together with any holdings of which we are aware) would have entitled you to a sales load of ___% of NAV had you bought a share class that is subject to a front-end sales load. Instead, you bought a share class that is not subject to a front-end sales load, but is subject to annual asset-based sales charges of ___ percent of net asset value for a period of ___ years.

SCHEDULE 15C - CONTINUED

**F. Explanations and Definitions**

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Amount of your investment - when you buy a share class that has a front-end sales lead, the "net amount invested" equals what you paid for the shares minus the sales load. That is the value of the shares.*
- *Dollar and percentage values - This document provides information about what you pay and what your broker-dealer will receive. Some of that information is set forth in dollar amounts and as percentages of "your investment." In general , those percentages are based on the net amount of your investment (which is the current value of the shares you are purchasing). Information about back-end sales loads and first year sales charges and service fees may be based on the value of your investment at some point in the future.*
- *Timing of sales loads - If you buy shares with a front-end sales loads, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If these shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets to market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that otherwise would be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often will have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *Disclosure of revenue sharing and portfolio brokerage commissions - This disclosure document provides information about revenue sharing that the broker-dealer has received from the fund or its affiliates, and portfolio brokerage commissions that the broker-dealer has received from the fund or its affiliates. Those amounts are stated as a percentage of the broker-dealer's sales on behalf of the fund complex - consisting of the fund or its affiliates - over a recent 12 month period. For example, if a broker-dealer received $1 million in revenue sharing from a fund complex over that period, and the broker-dealer sold $50 million worth of shares for the fund complex over that period, then revenue sharing represents 2 percent of total sales. Based on that percentage, this confirmation also states the amount of that compensation that may be associated with this transaction. These are estimates only, and your broker-dealer can provide you with more specific information.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to the fund, or another affiliate of the fund, makes payments to a broker-dealer. In some cases, the investment advisor may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments - regardless if they are labeled as reimbursements - may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation for proprietary sales - This document states whether your broker-dealer pays its salespersons or other associated persons a higher compensation rate for selling securities of affiliated funds (proprietary sales) than the rate that the broker-dealer pays for selling securities of non-affiliated funds. In some cases, a broker-dealer pays its personnel a higher percentage of the broker-dealer's own compensation for the sale of securities of affiliated funds than it pays for the sale of securities of non-affiliated funds. This may give your broker a greater incentive to sell the shares of affiliated funds than non-affiliated funds.*
- *Special compensation for shares with a back-end sales load - This document states whether your broker-dealer pays its salespersons or other associated persons higher compensation, in actual dollars, for selling a security with a back-end sales load than your broker-dealer pays its personnel for the sale of the same dollar amount of shares in a share classes with a front-end sales load. Some share classes without front-end sales loads (such as class B shares) may require you to pay higher asset-based fees than share classes with front-end sales loads (typically class A shares). Broker-dealer personnel may earn more when they sell classes with a back-end sales load, and therefore your broker may have a greater incentive to sell shares with a back-end sales load.*
- *Comparison ranges - The "comparison ranges" provide additional information about your purchase. These are expressed as a percentage of NAV. In the case of sales loads, asset-based fees and sales fees received by the broker-dealer, those comparison ranges represent the range of charges and fees associated with 95 percent of comparable securities. For example, a comparison range of "0-4%" means that 95 percent of comparable securities would charge between zero and 4 percent of NAV for a sale of that size. In the case of revenue sharing and portfolio brokerage commissions earned by the broker-dealer, the comparison range represents the range associated with the activity of 95 percent of other firms that distribute comparable securities.*

7. Section 240.15c–101 is added to read as follows:

**§ 240.15c–101 Schedule 15D.**

Schedule 15D

Securities and Exchange Commission, Washington, DC 20549.

**SCHEDULE 15D - FRONT PAGE**

**<Name of broker, dealer or municipal securities dealer>**

Name _____
Account number _____
Date _____
Security under consideration _____
Class _____
Amount of contemplated transaction _____

**Sales load and what we will be paid up front**

| | |
|---|---|
| Front-end sales load | ____ |
| Back-end sales load | ____ |
| Amount of sales load we will receive from the fund | ____ |
| Estimated first year asset-based distribution or service fees that we will receive from the fund | ____ |

**Potential conflicts of interest**

| | |
|---|---|
| Do the fund or its affiliates pay us brokerage commissions for buying or selling fund assets, such as stocks and bonds? | ____ |
| Do the fund's affiliates make additional payments to us, such as revenue sharing? | ____ |

**Special compensation for our personnel - potential conflicts of interest**

| | |
|---|---|
| If this is a "proprietary" security issued by an affiliate, would we pay more to our personnel for selling it to you? | ____ |
| If this security carries a back-end sales load, would we pay more to our personnel for selling it to you? | ____ |

ASK BEFORE YOU BUY! This document contains information that your broker-dealer is required to provide you about potential transactions in certain investments, such as mutual funds, variable annuities or "529 plans." It tells you about the investment's sales-related costs, and about the incentives your broker-dealer and its personnel have to sell you this investment. YOU HAVE A RIGHT TO CONSIDER THE COSTS OF THE INVESTMENT AND YOUR BROKER-DEALER'S INCENTIVES BEFORE YOU DECIDE WHETHER TO MAKE THE INVESTMENT.

SOME THINGS TO KNOW ABOUT LOADS: Sometimes shares that do not have a front-end load have high fees -- which makes them more expensive for the long-term investor. Also, many mutual fund companies offer sales load discounts to investors over a certain level. Sometimes family or household holdings can count toward these discounts. To find out more, talk with your broker or financial adviser, or check the fund's prospectus or website.

**SCHEDULE 15D - CONTINUED**

*Explanations and Definitions*

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Timing of sales loads - If you buy shares with a front-end sales load, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If the shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that would otherwise be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees generally is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to a fund, or another affiliate of a fund, makes payments to a broker-dealer. In some cases, the investment advisor may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments -- regardless if they are labeled as reimbursements -- may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation - This document states whether your broker-dealer would pay its salespersons or other associated persons higher compensation if you decide to buy the security you are considering. Some broker-dealers pay their personnel higher compensation, as a percentage of the broker-dealer's own compensation, for selling their affiliates' securities. In addition, some broker-dealers pay their personnel higher compensation, in actual dollars, for selling a security that has a back-end sales load, because broker-dealers themselves may earn more when they sell those share classes.*

**PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940**

8. The authority citation for part 274 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

9. Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:

a. In the table entitled "Fees and expenses of the Fund" in Item 3, revising the caption "Maximum Sales Charge (Load) Imposed on Purchases (as a percentage of offering price)" to read "Maximum Sales Charge (Load)

Imposed on Purchases (as a percentage of net asset value)";

b. In Item 3, revising the first sentence of Instruction 2(a)(i);

c. In Item 3, revising Instruction 2(a)(ii);

d. In Item 3, adding a new Instruction 2(a)(iv);

e. In Item 8, adding new Instruction 4 to paragraph (a)(1);

f. In Item 8, redesignating paragraph (c) as paragraph (d); and

g. In Item 8, adding new paragraph (c).

These additions and revisions read as follows:

**Note:** The text of Form N–1A does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N–1A

* * * * *

Item 3. Risk/Return Summary: Fee Table

* * * * *

*Instructions.*

* * * * *

2. *Shareholder Fees.*

(a)(i) "Maximum Deferred Sales Charge (Load)" includes the maximum total deferred sales charge (load) payable upon redemption, in installments, or both, expressed as a percentage of the amount or amounts stated in response to Item 8(a), except that, for a sales charge (load) based on offering price at the time of purchase, show the sales charge (load) as a percentage of the *net asset value* at the time of purchase. * * *

(ii) If more than one type of sales charge (load) is imposed (*e.g.*, a deferred sales charge (load) and a front-end sales charge (load)), the first caption in the table should read "Maximum Sales Charge (Load) (as a percentage of net asset value)" and show the maximum cumulative percentage of net asset value. Show the percentage amounts and the terms of each sales charge (load) comprising that figure on separate lines below.

* * * * *

(iv) If applicable, disclose in a footnote that the maximum sales charge (load) that may be paid by an investor as a percentage of the net amount invested may be higher than the maximum sales charge (load) shown as a percentage of net asset value in the fee table, and briefly explain the reason for this variation. The footnote, if applicable, should disclose the maximum sales charge (load) that may be paid by an investor as a percentage of the net amount invested. This footnote requirement applies to all types of sales charges (loads) (*e.g.*, front-end and deferred), as well as cumulative sales charges (loads) disclosed pursuant to Instruction 2(a)(ii).

* * * * *

Item 8. Distribution Arrangements

(a)(1) * * *

*Instructions.*

* * * * *

4. If applicable, disclose in a footnote that the actual front-end sales load that may be paid by an investor as a percentage of the gross or net amount invested at any breakpoint may be higher or lower than the applicable sales load in the table of front-end sales loads, and briefly explain the reason for this variation. The footnote, if applicable, should disclose the range of the actual front-end sales loads that may be paid by an investor at each sales load breakpoint, as a percentage of the gross and net amount invested.

* * * * *

(c) *Revenue Sharing Arrangements.* If any person within the fund complex that includes the Fund makes revenue sharing payments, disclose that fact and disclose that specific information about revenue sharing payments to an investor's financial intermediary, if any, is included in the written notification or periodic statement required under rule 15c2–2 under the Securities Exchange Act and in the disclosure provided at the point of sale required under rule 15c2–3 under the Securities Exchange Act. For purposes of this Item 8(c), "fund complex" and "revenue sharing" have the meanings set forth in rule 15c2–2(f)(10) and (15) under the Securities Exchange Act.

* * * * *

Dated: January 29, 2004.

By the Commission.

**J. Lynn Taylor,**

*Assistant Secretary.*

**Note:** Attachments 1–5 to the preamble will not appear in the Code of Federal Regulations.

BILLING CODE 8010–01–P

Attachment 1 - Confirmation example for hypothetical class A share purchase

## Acme Clearing, Inc.

### Fees and Payments Associated with Your Investment

**A. General information**

| | | | |
|---|---|---|---|
| Customer: | John Doe | Symbol: | |
| Account Number: | 1234-5678 | CUSIP number: | |
| Date of transaction: | 1/1/05 | Type of security: | Mutual fund |
| Type of transaction: | You bought | Net Asset Value (NAV): | $18.17 |
| No. shares bought/sold: | 422.610 | Price (NAV plus load): | $18.93 |
| Security issuer: | BBB Equity Fund | Amount paid/received: | $8,000.00 |
| Class (if applicable): | A | Amount of your investment/sale: | $7,678.82 |

Commission/other compensation: $0.00
Other charges: $0.00

*Note: even if there is no commission or other charge, you may be paying for distribution through loads or asset-based fees, as described below.*

**B. What you pay (directly and indirectly) for purchases**

| | | |
|---|---|---|
| **Front-end sales load** | **$321.18** | *which is equivalent to* 4.18% *of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Back-end sales load** | NA | |
| **Estimated first-year asset-based sales charges** | NA | |
| **Estimated first-year asset-based service fees** | **$19.20** | *which is equivalent to* 0.25% *of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |

**C. Amounts that your broker, AAA Introducing, Inc., will receive from the fund or its affiliates**

| | | |
|---|---|---|
| **Sales fee** AAA Introducing received for your purchase: | **$300.00** | *which is equivalent to* 3.91% *of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Revenue sharing** AAA Introducing may receive in connection with your purchase: | **$30.72** | *which is equivalent to* 0.40% *of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Portfolio brokerage commissions** AAA Introducing may receive in connection with your purchase: | **$15.36** | *which is equivalent to* 0.20% *of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |

Additional disclosures:

**D. Payment of special compensation to personnel of your broker, AAA Introducing, Inc.**

| | Yes | No | NA |
|---|---|---|---|
| If you bought a security of a fund affiliated with AAA Introducing: Does AAA Introducing pay its personnel more to sell securities of affiliated funds? | | X | |
| If you bought a share class with a back-end sales load: Does AAA Introducing pay its personnel more to sell this class than to sell front-end sales load share classes of the same fund? | | | X |

**E. Breakpoint discount information**

Many mutual fund companies offer sales load discounts to customers that have invested over a certain dollar amount. These discounts may be calculated based on your current purchase or on your aggregate holdings, and may also include the holdings of your family or household members. To ensure that you are obtaining all available discounts, you should talk with your broker or financial advisor, or check the fund's prospectus or website. According to the fund's prospectus, the amount you invested (together with any holdings of which we are aware) entitles you to a sales load of 4.17%. You were charged a sales load of 4.18%, which may vary from the sales load disclosed in the prospectus due to rounding to the nearest penny in the transaction.

**F. Explanations and definitions**

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Amount of your investment - When you buy a share class that has a front-end sales load, the "net amount invested" equals what you paid for the shares minus the sales load. That is the value of the shares.*
- *Dollar and percentage values - This document provides information about what you pay and what your broker-dealer will receive. Some of that information is set forth in dollar amounts and as percentages of "your investment." In general, those percentages are based on the net amount of your investment (which is the current value of the shares you are purchasing). Information about back-end sales loads and first year sales charges and service fees may be based on the value of your investment at some point in the future.*
- *Timing of sales loads - If you buy shares with a front-end sales load, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If these shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets to market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that otherwise would be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often will have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *Disclosure of revenue sharing and portfolio brokerage commissions - This document provides information about revenue sharing that the broker-dealer has received from affiliates of the fund, and portfolio brokerage commissions that the broker-dealer has received from the fund or its affiliates. Those amounts are stated as a percentage of the broker-dealer's sales on behalf of the fund complex - consisting of the fund or its affiliates - over a recent 12 month period. For example, if a broker-dealer received $1 million in revenue sharing from a fund complex over that period, and the broker-dealer sold $50 million worth of shares for the fund complex over that period, then revenue sharing represents 2 percent of total sales. Based on that percentage, this confirmation also states the amount of that compensation that may be associated with this transaction. These are estimates only, and your broker-dealer can provide you with more specific information.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to the fund, or another affiliate of the fund, makes payments to a broker-dealer. In some cases, the investment adviser may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments - regardless if they are labeled as reimbursements - may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation for proprietary sales - This document states whether your broker-dealer pays its salespersons or other associated persons a higher compensation rate for selling securities of affiliated funds (proprietary sales) than the rate that the broker-dealer pays for selling securities of non-affiliated funds. In some cases, a broker-dealer pays its personnel a higher percentage of the broker-dealer's own compensation for the sale of securities of affiliated funds than it pays for the sale of securities of non-affiliated funds. This may give your broker a greater incentive to sell the shares of affiliated funds than non-affiliated funds.*
- *Special compensation for shares with a back-end sales load - This document states whether your broker-dealer pays its salespersons or other associated persons higher compensation, in actual dollars, for selling a security with a back-end sales load than your broker-dealer pays its personnel for the sale of the same dollar amount of shares in a share class with a front-end sales load. Some share classes without front-end sales loads (such as class B shares) may require you to pay higher asset-based fees than share classes with front-end sales loads (typically class A shares). Broker-dealer personnel may earn more when they sell classes with a back-end sales load, and therefore your broker may have a greater incentive to sell shares with a back-end sales load.*
- *Comparison ranges - The "comparison ranges" provide additional information about your purchase. These are expressed as a percentage of NAV. In the case of sales loads, asset-based fees and sales fees received by the broker-dealer, those comparison ranges represent the range of charges and fees associated with 95 percent of comparable securities. For example, a comparison range of "0-4%" means that 95 percent of comparable securities would charge between zero and 4 percent of NAV for a sale of that size. In the case of revenue sharing and portfolio brokerage commissions earned by the broker-dealer, the comparison range represents the range associated with the activity of 95 percent of other firms that distribute comparable securities.*

Attachment 2 - Confirmation example for hypothetical class B share purchase (back-end load as minimum of present or future NAV)

## Acme Clearing, Inc.

### Fees and Payments Associated with Your Investment

**A. General information**

| | | | |
|---|---|---|---|
| Customer: | John Doe | Symbol: | |
| Account Number: | 1234-5678 | CUSIP number: | |
| Date of transaction: | 1/1/05 | Type of security: | Mutual fund |
| Type of transaction: | You bought | Net Asset Value (NAV): | $18.17 |
| No. shares bought/sold: | 440.286 | Price (NAV plus load): | $18.17 |
| Security issuer: | BBB Equity Fund | Amount paid/received: | $8,000.00 |
| Class (if applicable): | B | Amount of your investment/sale: | $8,000.00 |

Commission/other compensation: $0.00
Other charges: $0.00

*Note: even if there is no commission or other charge, you may be paying for distribution through loads or asset-based fees, as described below.*

**B. What you pay (directly and indirectly) for purchases**

| | | |
|---|---|---|
| **Front-end sales load** | NA | |
| **Back-end sales load** | | |
| *If you sell these shares in one year, you will pay* | $400.00 | *or 5% of your investment, whichever is less. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in two years, you will pay* | $320.00 | *or 4% of your investment, whichever is less. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in three years, you will pay* | $240.00 | *or 3% of your investment, whichever is less. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in four years, you will pay* | $240.00 | *or 3% of your investment, whichever is less. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in five years, you will pay* | $160.00 | *or 2% of your investment, whichever is less. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in six years, you will pay* | $80.00 | *or 1% of your investment, whichever is less. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Estimated first-year asset-based sales charges** | $60.00 | *which is equivalent to 0.75% of your investment. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Estimated first-year asset-based service fees** | $20.00 | *which is equivalent to 0.25% of your investment. Industry norms: Range x.xx - x.xx%; median x.xx%.* |

**C. Amounts that your broker, AAA Introducing, Inc., will receive from the fund or its affiliates**

| | | |
|---|---|---|
| **Sales fee** AAA Introducing received for your purchase: | $320.00 | *which is equivalent to 4.00% of your investment. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Revenue sharing** AAA Introducing may receive in connection with your purchase: | $32.00 | *which is equivalent to 0.40% of your investment. Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Portfolio brokerage commissions** AAA Introducing may receive in connection with your purchase: | $16.00 | *which is equivalent to 0.20% of your investment. Industry norms: Range x.xx - x.xx%; median x.xx%.* |

Additional disclosures:

**D. Payment of special compensation to personnel of your broker, AAA Introducing, Inc.**

| | Yes | No | NA |
|---|---|---|---|
| If you bought a security of a fund affiliated with AAA Introducing: Does AAA Introducing pay its personnel more to sell securities of affiliated funds? | | X | |
| If you bought a share class with a back-end sales load: Does AAA Introducing pay its personnel more to sell this class than to sell front-end sales load share classes of the same fund? | X | | |

**E. Breakpoint discount information**

Many mutual fund companies offer sales load discounts to customers that have invested over a certain dollar amount. These discounts may be calculated based on your current purchase or on your aggregate holdings, and may also include the holdings of your family or household members. To ensure that you are obtaining all available discounts, you should talk with your broker or financial advisor, or check the fund's prospectus or website. According to the fund's prospectus, the amount you invested (together with any holdings of which we are aware) would have entitled you to a sales load of 4.17% of NAV had you bought a share class that is subject to a front-end sales load. Instead, you bought a share class that is not subject to a front-end sales load, but is subject to annual asset-based sales charges of 0.75% of net asset value for a period of 6 years.

**F. Explanations and definitions**

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Amount of your investment - When you buy a share class that has a front-end sales load, the "net amount invested" equals what you paid for the shares minus the sales load. That is the value of the shares.*
- *Dollar and percentage values - This document provides information about what you pay and what your broker-dealer will receive. Some of that information is set forth in dollar amounts and as percentages of "your investment." In general, those percentages are based on the net amount of your investment (which is the current value of the shares you are purchasing). Information about back-end sales loads and first year sales charges and service fees may be based on the value of your investment at some point in the future.*
- *Timing of sales loads - If you buy shares with a front-end sales load, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If these shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets to market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that otherwise would be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often will have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *Disclosure of revenue sharing and portfolio brokerage commissions - This document provides information about revenue sharing that the broker-dealer has received from affiliates of the fund, and portfolio brokerage commissions that the broker-dealer has received from the fund or its affiliates. Those amounts are stated as a percentage of the broker-dealer's sales on behalf of the fund complex - consisting of the fund or its affiliates - over a recent 12 month period. For example, if a broker-dealer received $1 million in revenue sharing from a fund complex over that period, and the broker-dealer sold $50 million worth of shares for the fund complex over that period, then revenue sharing represents 2 percent of total sales. Based on that percentage, this confirmation also states the amount of that compensation that may be associated with this transaction. These are estimates only, and your broker-dealer can provide you with more specific information.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to the fund, or another affiliate of the fund, makes payments to a broker-dealer. In some cases, the investment adviser may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments - regardless if they are labeled as reimbursements - may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation for proprietary sales - This document states whether your broker-dealer pays its salespersons or other associated persons a higher compensation rate for selling securities of affiliated funds (proprietary sales) than the rate that the broker-dealer pays for selling securities of non-affiliated funds. In some cases, a broker-dealer pays its personnel a higher percentage of the broker-dealer's own compensation for the sale of securities of affiliated funds than it pays for the sale of securities of non-affiliated funds. This may give your broker a greater incentive to sell the shares of affiliated funds than non-affiliated funds.*
- *Special compensation for shares with a back-end sales load - This document states whether your broker-dealer pays its salespersons or other associated persons higher compensation, in actual dollars, for selling a security with a back-end sales load than your broker-dealer pays its personnel for the sale of the same dollar amount of shares in a share class with a front-end sales load. Some share classes without front-end sales loads (such as class B shares) may require you to pay higher asset-based fees than share classes with front-end sales loads (typically class A shares). Broker-dealer personnel may earn more when they sell classes with a back-end sales load, and therefore your broker may have a greater incentive to sell shares with a back-end sales load.*
- *Comparison ranges - The "comparison ranges" provide additional information about your purchase. These are expressed as a percentage of NAV. In the case of sales loads, asset-based fees and sales fees received by the broker-dealer, those comparison ranges represent the range of charges and fees associated with 95 percent of comparable securities. For example, a comparison range of "0-4%" means that 95 percent of comparable securities would charge between zero and 4 percent of NAV for a sale of that size. In the case of revenue sharing and portfolio brokerage commissions earned by the broker-dealer, the comparison range represents the range associated with the activity of 95 percent of other firms that distribute comparable securities.*

Attachment 3 - Confirmation example for hypothetical class B share purchase (back-end load as a function of present NAV)

## Acme Clearing, Inc.

### Fees and Payments Associated with Your Investment

**A. General information**

| | | | |
|---|---|---|---|
| Customer: | John Doe | Symbol: | |
| Account Number: | 1234-5678 | CUSIP number: | |
| Date of transaction: | 1/1/05 | Type of security: | Mutual fund |
| Type of transaction: | You bought | Net Asset Value (NAV): | $18.17 |
| No. shares bought/sold: | 440.286 | Price (NAV plus load): | $18.17 |
| Security issuer: | BBB Equity Fund | Amount paid/received: | $8,000.00 |
| Class (if applicable): | B | Amount of your investment/sale: | $8,000.00 |

Commission/other compensation: $0.00
Other charges: $0.00

*Note: even if there is no commission or other charge, you may be paying for distribution through loads or asset-based fees, as described below.*

**B. What you pay (directly and indirectly) for purchases**

| | | |
|---|---|---|
| **Front-end sales load** | NA | |
| **Back-end sales load** | | |
| *If you sell these shares in one year, you will pay* | **$400.00** | *(which equals 5% of your investment)*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in two years, you will pay* | **$320.00** | *(which equals 4% of your investment)*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in three years, you will pay* | **$240.00** | *(which equals 3% of your investment)*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in four years, you will pay* | **$240.00** | *(which equals 3% of your investment)*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in five years, you will pay* | **$160.00** | *(which equals 2% of your investment)*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| *If you sell these shares in six years, you will pay* | **$80.00** | *(which equals 1% of your investment)*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Estimated first-year asset-based sales charges** | **$60.00** | *which is equivalent to 0.75% of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Estimated first-year asset-based service fees** | **$20.00** | *which is equivalent to 0.25% of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |

**C. Amounts that your broker, AAA Introducing, Inc., will receive from the fund or its affiliates**

| | | |
|---|---|---|
| **Sales fee** AAA Introducing received for your purchase: | **$320.00** | *which is equivalent to 4.00% of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Revenue sharing** AAA Introducing may receive in connection with your purchase: | **$32.00** | *which is equivalent to 0.40% of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |
| **Portfolio brokerage commissions** AAA Introducing may receive in connection with your purchase: | **$16.00** | *which is equivalent to 0.20% of your investment*<br>*Industry norms: Range x.xx - x.xx%; median x.xx%.* |

Additional disclosures:

**D. Payment of special compensation to personnel of your broker, AAA Introducing, Inc.**

| | Yes | No | NA |
|---|---|---|---|
| If you bought a security of a fund affiliated with AAA Introducing: Does AAA Introducing pay its personnel more to sell securities of affiliated funds? | | X | |
| If you bought a share class with a back-end sales load: Does AAA Introducing pay its personnel more to sell this class than to sell front-end sales load share classes of the same fund? | X | | |

**E. Breakpoint discount information**

Many mutual fund companies offer sales load discounts to customers that have invested over a certain dollar amount. These discounts may be calculated based on your current purchase or on your aggregate holdings, and may also include the holdings of your family or household members. To ensure that you are obtaining all available discounts, you should talk with your broker or financial advisor, or check the fund's prospectus or website. According to the fund's prospectus, the amount you invested (together with any holdings of which we are aware) would have entitled you to a sales load of 4.17% of NAV had you bought a share class that is subject to a front-end sales load. Instead, you bought a share class that is not subject to a front-end sales load, but is subject to annual asset-based sales charges of 0.75% of net asset value for a period of 6 years.

**F. Explanations and definitions**

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Amount of your investment - When you buy a share class that has a front-end sales load, the "net amount invested" equals what you paid for the shares minus the sales load. That is the value of the shares.*
- *Dollar and percentage values - This document provides information about what you pay and what your broker-dealer will receive. Some of that information is set forth in dollar amounts and as percentages of "your investment." In general, those percentages are based on the net amount of your investment (which is the current value of the shares you are purchasing). Information about back-end sales loads and first year sales charges and service fees may be based on the value of your investment at some point in the future.*
- *Timing of sales loads - If you buy shares with a front-end sales load, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If these shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets to market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that otherwise would be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often will have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *Disclosure of revenue sharing and portfolio brokerage commissions - This document provides information about revenue sharing that the broker-dealer has received from affiliates of the fund, and portfolio brokerage commissions that the broker-dealer has received from the fund or its affiliates. Those amounts are stated as a percentage of the broker-dealer's sales on behalf of the fund complex - consisting of the fund or its affiliates - over a recent 12 month period. For example, if a broker-dealer received $1 million in revenue sharing from a fund complex over that period, and the broker-dealer sold $50 million worth of shares for the fund complex over that period, then revenue sharing represents 2 percent of total sales. Based on that percentage, this confirmation also states the amount of that compensation that may be associated with this transaction. These are estimates only, and your broker-dealer can provide you with more specific information.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to the fund, or another affiliate of the fund, makes payments to a broker-dealer. In some cases, the investment adviser may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments - regardless if they are labeled as reimbursements - may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation for proprietary sales - This document states whether your broker-dealer pays its salespersons or other associated persons a higher compensation rate for selling securities of affiliated funds (proprietary sales) than the rate that the broker-dealer pays for selling securities of non-affiliated funds. In some cases, a broker-dealer pays its personnel a higher percentage of the broker-dealer's own compensation for the sale of securities of affiliated funds than it pays for the sale of securities of non-affiliated funds. This may give your broker a greater incentive to sell the shares of affiliated funds than non-affiliated funds.*
- *Special compensation for shares with a back-end sales load - This document states whether your broker-dealer pays its salespersons or other associated persons higher compensation, in actual dollars, for selling a security with a back-end sales load than your broker-dealer pays its personnel for the sale of the same dollar amount of shares in a share class with a front-end sales load. Some share classes without front-end sales loads (such as class B shares) may require you to pay higher asset-based fees than share classes with front-end sales loads (typically class A shares). Broker-dealer personnel may earn more when they sell classes with a back-end sales load, and therefore your broker may have a greater incentive to sell shares with a back-end sales load.*
- *Comparison ranges - The "comparison ranges" provide additional information about your purchase. These are expressed as a percentage of NAV. In the case of sales loads, asset-based fees and sales fees received by the broker-dealer, those comparison ranges represent the range of charges and fees associated with 95 percent of comparable securities. For example, a comparison range of "0-4%" means that 95 percent of comparable securities would charge between zero and 4 percent of NAV for a sale of that size. In the case of revenue sharing and portfolio brokerage commissions earned by the broker-dealer, the comparison range represents the range associated with the activity of 95 percent of other firms that distribute comparable securities.*

Attachment 4 - Point of sale example for hypothetical class A share purchase

**AAA Introducing, Inc.**

| | |
|---|---|
| Name | John Doe |
| Account number | 1234-5678 |
| Date | 1/1/05 |
| Security under consideration | BBB Equity Fund |
| Class | A |
| Amount of contemplated transaction | $8,000.00 |

**Sales load and what we will be paid up front**

| | |
|---|---|
| Front-end sales load | $321.18 |
| Back-end sales load - maximum first year | NA |
| Amount of sales fee we will receive from the fund | $300.00 |
| Estimated first year asset-based distribution or service fees that we will receive from the fund | $19.20 |

**Potential conflicts of interest**

| | |
|---|---|
| Do the fund or its affiliates pay us brokerage commissions for buying or selling fund assets, such as stocks and bonds? | Yes |
| Do the fund's affiliates make additional payments to us, such as revenue sharing? | Yes |

**Special compensation for our personnel - potential conflicts of interest**

| | |
|---|---|
| If this is a "proprietary" security issued by an affiliate, would we pay more to our personnel for selling it to you? | No |
| If this security carries a back-end sales load, would we pay more to our personnel for selling it to you? | NA |

ASK BEFORE YOU BUY! This document contains information that your broker-dealer is required to provide you about potential transactions in certain investments, such as mutual funds, variable annuities or "529 plans." It tells you about the investment's sales-related costs, and about the incentives your broker-dealer and its personnel have to sell you this investment. YOU HAVE A RIGHT TO CONSIDER THE COSTS OF THE INVESTMENT AND YOUR BROKER-DEALER'S INCENTIVES BEFORE YOU DECIDE WHETHER TO MAKE THE INVESTMENT.

SOME THINGS TO KNOW ABOUT LOADS: Sometimes shares that do not have a front-end load have high fees -- which makes them more expensive for the long-term investor. Also, many mutual fund companies offer sales load discounts to investors over a certain level. Sometimes family or household holdings can count toward these discounts. To find out more, talk with your broker or financial adviser, or check the fund's prospectus or website.

*Explanations and Definitions*

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Timing of sales loads - If you buy shares with a front-end sales load, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If the shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets to market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that would otherwise be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees generally is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to a fund, or another affiliate of a fund, makes payments to a broker-dealer. In some cases, the investment adviser may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments -- regardless if they are labeled as reimbursements -- may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a higher incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation - This document states whether your broker-dealer would pay its salespersons or other associated persons higher compensation if you decide to buy the security you are considering. Some broker-dealers pay their personnel higher compensation, as a percentage of the broker-dealers' own compensation, for selling their affiliates' securities. In addition, some broker-dealers pay their personnel higher compensation, in actual dollars, for selling a security that has a back-end sales load, because broker-dealers themselves may earn more when they sell those share classes.*

Attachment 5 - Point of sale example for hypothetical class B share purchase

**AAA Introducing, Inc.**

| | |
|---|---|
| Name | John Doe |
| Account number | 1234-5678 |
| Date | 1/1/05 |
| Security under consideration | BBB Equity Fund |
| Class | B |
| Amount of contemplated transaction | $8,000.00 |

**Sales load and what we will be paid up front**

| | |
|---|---|
| Front-end sales load | NA |
| Back-end sales load - maximum first year<br>*- back-end sales loads terminate after six years* | $400.00 |
| . Amount of sales fee we will receive from the fund | $320.00 |
| Estimated first year asset-based distribution or service fees that we will receive from the fund | $80.00 |

**Potential conflicts of interest**

| | |
|---|---|
| Do the fund or its affiliates pay us brokerage commissions for buying or selling fund assets, such as stocks and bonds? | Yes |
| Do the fund's affiliates make additional payments to us, such as revenue sharing? | Yes |

**Special compensation for our personnel - potential conflicts of interest**

| | |
|---|---|
| If this is a "proprietary" security issued by an affiliate, would we pay more to our personnel for selling it to you? | No |
| If this security carries a back-end sales load, would we pay more to our personnel for selling it to you? | Yes |

ASK BEFORE YOU BUY! This document contains information that your broker-dealer is required to provide you about potential transactions in certain investments, such as mutual funds, variable annuities or "529 plans." It tells you about the investment's sales-related costs, and about the incentives your broker-dealer and its personnel have to sell you this investment. YOU HAVE A RIGHT TO CONSIDER THE COSTS OF THE INVESTMENT AND YOUR BROKER-DEALER'S INCENTIVES BEFORE YOU DECIDE WHETHER TO MAKE THE INVESTMENT.

SOME THINGS TO KNOW ABOUT LOADS: Sometimes shares that do not have a front-end load have high fees -- which makes them more expensive for the long-term investor. Also, many mutual fund companies offer sales load discounts to investors over a certain level. Sometimes family or household holdings can count toward these discounts. To find out more, talk with your broker or financial adviser, or check the fund's prospectus or website.

*Explanations and Definitions*

- *Net asset value (NAV) - Net asset value is the approximate value of one share of a fund, and is determined by dividing the fund's net assets by the number of shares outstanding. When you sell your shares, their NAV may differ from the price you paid for the shares.*
- *Price and NAV - Securities that have front-end sales loads are sold at the public offering price. That price includes the sales load and therefore is higher than the NAV.*
- *Timing of sales loads - If you buy shares with a front-end sales load, you pay a fee at the time of purchase. If you buy shares with a back-end sales load (sometimes called a deferred sales load), you may pay a fee when you sell your shares, depending on how long you hold them. If the shares have a back-end sales load, the amount of the fee you pay will depend on when you sell the shares and their NAV at the time.*
- *Asset-based fees - Asset-based sales charges and service fees (such as 12b-1 fees) are annual fees that the fund pays out of its assets to market its shares to potential investors or to compensate brokers for maintaining the accounts of current shareholders. By reducing the amount of a fund's assets (that would otherwise be available for investment), the fees may reduce the return on your investment. The amount of future asset-based fees generally is not predictable because these fees are a percentage of NAV, which can fluctuate over time. Share classes that have a back-end sales load often have higher asset-based fees than comparable share classes with a front-end sales load. However, share classes with a back-end sales load may, in some later year, convert to a share class with lower asset-based fees.*
- *What is revenue sharing? - Revenue sharing occurs when the investment adviser to a fund, or another affiliate of a fund, makes payments to a broker-dealer. In some cases, the investment adviser may describe those payments as reimbursing the broker-dealer for expenses it incurs in selling the shares. Those payments -- regardless if they are labeled as reimbursements -- may give the broker-dealer a greater incentive to sell the shares of that fund or affiliated funds.*
- *What are portfolio brokerage commissions? - Portfolio brokerage commissions are payments that a fund makes to broker-dealers for helping the fund buy or sell securities in the fund's portfolio. Portfolio brokerage commissions may give the broker-dealer a higher incentive to sell the shares of that fund or affiliated funds.*
- *Special compensation - This document states whether your broker-dealer would pay its salespersons or other associated persons higher compensation if you decide to buy the security you are considering. Some broker-dealers pay their personnel higher compensation, as a percentage of the broker-dealers' own compensation, for selling their affiliates' securities. In addition, some broker-dealers pay their personnel higher compensation, in actual dollars, for selling a security that has a back-end sales load, because broker-dealers themselves may earn more when they sell those share classes.*

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Federal Register

Tuesday,
February 10, 2004

Part IV

# Department of the Interior

**Bureau of Indian Affairs**

**25 CFR Part 162**

**Trust Management Reform: Residential Leases and Business Leases; Proposed Rule**

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 162**

**RIN 1076–AE36**

## Trust Management Reform: Residential Leases and Business Leases

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Bureau of Indian Affairs (BIA) proposes to revise its regulations in the area of residential leases and business leases on trust and restricted land. The revisions would further fulfill the Secretary's fiduciary responsibility to federally recognized tribes and individual Indians. These regulations currently have reserved subparts for Residential Lease and Business Lease. These subparts, along with a subpart for General Provisions, will eventually provide regulations for residential and business leases on trust and restricted land. When we publish these changes as a final rule, we will remove the current subpart for Non-Agricultural Leases.

**DATES:** Written comments must be submitted no later than May 10, 2004.

**ADDRESSES:** Comments on this proposed rule should be addressed to: Ben Burshia, Chief, Division of Real Estate Services, Office of Trust Responsibilities, Bureau of Indian Affairs, 1849 C Street NW., MS 4513–MIB, Washington, DC 20240. Submissions by facsimile should be sent to (202) 219–1255. Electronic comment submission is not available at this time.

DOI invites comments on the information collection requirements in the proposed regulation. You may submit comments by telefacsimile at (202) 395–5806 or by e-mail at *Ruth_Solomon@omb.eop.gov.* Please also send a copy of your comments to BIA at the location specified above. Note that requests for comments on the rule and the information collection are separate.

**FOR FURTHER INFORMATION CONTACT:** Ben Burshia, 202–219–1195.

**SUPPLEMENTARY INFORMATION:**



### I. Background

As part of trust reform initiatives, in January of 2001, the Bureau of Indian Affairs issued final Leasing and Permitting Regulations, 25 CFR part 162 (66 FR 7109, January 22, 2001). This final rule replaced the existing part 162 in its entirety. At that time, we reserved Subpart C, Residential Leases, and Subpart D, Business Leases, for future rulemaking to include the Indian Land Consolidation Act Amendments of 2000 and all other issues related to residential and business leases.

This proposed rule provides guidance for processing individual Indian and tribal residential and business leases on trust and restricted land. Subpart F, Non-agricultural Leases, currently provides general leasing regulations for all non-agricultural leases, which includes residential and business leases. The current Subpart F is general and does not differentiate between business and residential leases. Therefore, with text added to reserved Subparts C and D, Subpart F will be removed.

This proposed rule addresses the specific needs of residential and business leases and thus, will facilitate streamlining the processing of residential and business leases. This proposed rule will strengthen the services that we provide to federally recognized tribes and individual Indians. The rule is consistent with our fiduciary responsibility to individual Indians and tribes and reflects the provisions of the Departmental Manual, Part 303, Chapter 2, Principles for Managing Indian Trust Assets.

### II. Subpart-by-Subpart Analysis

25 CFR part 162, Subpart C, Residential Leases, and Subpart D, Business Leases, will replace Subpart F, Non-Agricultural Leases. The consent requirements in the proposed regulations are consistent with the Indian Land Consolidation Act Amendments (ILCA) of 2000. Because the ILCA Amendments of 2000 do not apply to tribes in Alaska, the consent requirements for Alaska will remain the same as the previous regulations governing leasing. The proposed regulations provide for recognition and accommodation of tribal laws regulating activities for residential and business leases, unless prohibited by federal law. The proposed regulations provide procedures for lease amendments, assignments, subleases and leasehold mortgages.

Under Subpart C, Residential Leases, of the proposed regulation, the definition for Residential Leases covers both ground leases and leases for residential development on tribal and allotted land. The definition of Residential Lease is defined as single-family homes and housing for public purposes. This definition was developed in order to provide regulations that streamline the processing of residential leases for Indian housing; leases not meeting this definition will be processed under Subpart D, Business Leases. The proposed regulations provide for a 30-day time-frame under which the Secretary or her designee must issue a decision on a complete residential lease application. Residential leases for nominal rent will be approved on tribal land if the rent is established by the tribe or on individual Indian land when the tenant is a member of the landowner's immediate family or a co-owner in the tract. Rental adjustments are not required for a residential lease unless negotiated in the lease. Also, bonds may not be required, if specified in the lease and upon a determination that it is in the best interest of the landowner(s). Subpart C also includes provisions for enforcement of lease violations.

Subpart D, Business Leases, of the proposed regulations covers both ground leases (undeveloped land) and leases of developed land (together with improvements thereon) on tribal or allotted land, authorizing the development or use of the leased premises. Leases covered by this subpart may authorize the construction of single-purpose or mixed use projects designed for use by any number of tenants or occupants. The leases may include: (1) Leases for residential purposes that are not covered in Subpart C; (2) Leases for public, religious, educational, and recreational purposes; and (3) Commercial or industrial leases for retail, office, manufacturing, storage, and/or other business purposes. The potential lessee may negotiate a lease with an Indian landowner. The lease is subject to the review and approval of the Secretary. Generally, business leases will not be advertised for competitive bid. A potential lessee may request, in writing, the names and addresses of the Indian landowners or their representatives for the purposes of negotiating a lease. The proposed

business lease regulations provide for the following when considering approval, disapproval or when requesting additional document information: When we receive a business lease and all of the supporting documents that conform to this part, we will approve, disapprove, or return for additional documents/corrections/modifications to the lease within 60 days of the date of our receipt of the documents. If we do not act within 60 days, the Indian landowner may take appropriate action under part 2 of this chapter. If we approve or disapprove a lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter. Copies of business leases that have been granted or approved will be provided to the tenant, and made available to the Indian landowners upon request.

**III. Public Comments**

The Bureau of Indian Affairs, with tribal participation, formulated a team to draft regulations for residential and business leases. On June 5, 2002, the initial draft Residential Lease and Business Lease regulations were distributed to the Regional Offices, the National Congress of American Indians, and the Inter-Tribal Monitoring Association, requesting comments. The comments received through that distribution were considered in the development of the final draft regulations as were the comments received from Tribal Consultations (meetings) in Portland, Oregon; Phoenix, Arizona; and Nashville, Tennessee, in September of 2002. In addition, the comments received from further consultation sessions in November of 2002 were taken into consideration in the formulation of the following proposed Residential and Business Leasing regulations. The consideration of comments has resulted in refinement, clarification and restructuring of the residential and business lease provisions.

In response to comments received, in Subpart C, Residential Leases, the definition of "immediate family" has been expanded to include "or when some other special relationship exists between the lessor and the lessee or special circumstances exists that in the opinion of the Secretary warrant the approval of the residential lease," based on 25 CFR 152.25(d). The definition of "single-family home" has been amended to include "a building with one to four dwelling units on a tract of land under a single lease" and a definition for "tribal land assignment" is provided.

The consent requirements were amended to clarify that the applicable percent for consent pertains to the amount of undivided interest owned and not the amount of owners. Language was provided to clarify who can represent the Indian landowners in negotiating or granting a residential lease. The environmental requirements were amended to include an explicit commitment to adopt tribal environmental reviews, to the extent such adoption is allowed under our procedures implementing the National Environmental Policy Act of 1969 (NEPA).

Comments were received requesting clarification on whether or not a 30-year lease can be paid in full at one time. Consistent with 25 U.S.C. 415b, the proposed regulations allow for payment in full only if it is provided for in the lease, otherwise rental payments may not be made or accepted more than one year in advance of the due date. Comments were received requesting more than one option to renew a residential lease. The proposed regulations have been amended to allow for more than one option to renew a residential lease provided the lease authority is the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. 4211. Comments were received from the Department of Housing and Urban Development (HUD) requesting that we provide language for the approval of leasehold mortgages on a residential lease for the purposes of refinancing a loan. The proposed regulations have been amended to expand the scope for approval of leasehold mortgages on residential leases, which would include refinancing. The Secretary will approve a leasehold mortgage under a residential lease when the required consents have been obtained from the Indian landowners and the Secretary finds that it is in the best interest of the landowner. HUD requested that along with the landowner's approval for cancellation of a lease, that we require the approval of the leasehold mortgagee. The proposed regulations were amended to include a requirement for approval from the mortgagee before cancellation of the residential lease. Comments were received requesting clarification of what would happen in the instance that a tenant does not diligently develop or abandons the leased premises. The proposed regulations were amended providing language to clarify this section of the regulation.

In the consideration of comments received, Subpart D, Business Leases, we are adding to the proposed regulations the key terms under § 162.101 "Approval which means written authorization by the Secretary or his/her delegated official and must be a part of the instrument being approved." Also, under this same section we are proposing to add for clarification, the term "Fair annual rental or fair market rental means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market." The term Fair Annual Rental will be removed. Fair market rental relates to a period of time which may be more or less than one year, whereas, fair annual rental is for a one year period. We received comments on approvals and the proposed regulations were changed to add to § 162.107 paragraph "(c) All approvals must be in writing for permits, leases, subleases, assignments, modifications, amendments, etc., unless otherwise provided in the master lease." During consultations, there was a comment about *Who can represent the Indian landowners in negotiating or granting a lease?* The proposed regulations include paragraph "(d) Any person who is authorized to practice before the Department of the Interior under 43 CFR part 1 and has been given written authorization for representation." A comment was received about the requirement of appraisals on tribal land being unduly burdensome to tribal business and economic development. The proposed regulations include under § 162.407 paragraph "(d) Upon a duly adopted Tribal Resolution, we will use some other type of valuation for a business lease on tribal land, subject to our approval." A comment was received on NEPA compliance. We address this concern in requiring that the tenant should provide any environmental, archaeological reports and other documents, as determined by us to be necessary to facilitate our compliance with federal and tribal and/or local land use requirements, if applicable. We will adopt any tribal environmental review as our NEPA review, to the extent such adoption meets our standards in implementing NEPA. We received a comment inquiring on, *May a lease be mortgaged without the consent of the Indian landowners?* The proposed regulations include under § 162.430, "* * * provided, if the approved lease includes the following: (a) The lease may be mortgaged without the further consent of the Indian landowners for the purpose of borrowing capital for commercially reasonable purposes defined in the lease if the lease contains a general authorization for such a

mortgage; (b) The mortgage cannot secure any unrelated debts owed by the lessee to the mortgagee; (c) The mortgage may be refinanced; and (d) The encumbrance instrument must be approved by us." A comment was received on *What happens if the lessee abandons the lease?* The proposed regulations include under § 162.457, "(a) If the lessee abandons the leased premises, the lessee and its sureties will not be relieved of the obligations contained in the lease; and (b) We may cancel the lease, effective immediately, and attempt to find a new lessee for the property." There were other comments on the typographical, grammatical and punctuation of the draft regulation, they were duly noted and changed appropriately. Other comments were acknowledged, considered and duly noted when we felt those items were either already addressed or were statutorily resolved.

## IV. Procedural Requirements

### *A. Regulatory Planning and Review (Executive Order 12866)*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the BIA must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

This proposed rule describes how the BIA will administer residential and business leases on trust and restricted land. Thus, the impact of the rule is confined to the Federal Government and individual Indian and tribal landowners and does not impose a compliance burden on the economy generally. Accordingly, it has been determined that this rule is not a "significant regulatory action" from an economic standpoint, or otherwise creates any inconsistencies or budgetary impacts to any other agency or federal program.

### *B. Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*e.g.*, small businesses, small organizations, and small government jurisdictions). Indian tribes are not considered to be small entities for purposes of the Act and, consequently, no regulatory flexibility analysis has been done.

This proposed implementation guidance 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. Accordingly, this proposed regulation will not have an economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

### *C. Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996*

Under 5 U.S.C. 804(2), SBREFA, a rule is major if OMB finds that it results in (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This proposed rule is not a major rule as defined by section 804 of the SBREFA. This rule is uniquely confined to the Federal Government, individual Indians and tribal landowners, thus, it will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. This proposed rule provides regulatory guidance for residential and business leases on trust and restricted lands owned by individual Indians and tribes.

### *D. Unfunded Mandates Reform Act*

The proposed implementation guidance would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (2 U.S.C. 1532). The impact of this proposed rule is confined to residential and business lease on land held in trust for individual Indians and tribes. Accordingly, this proposed rule will not result in the expenditure of $100 million or more in any one year.

### *E. Takings Implication Assessment (Executive Order 12630)*

This proposed implementation guidance does not have significant "takings" implications. Policies that have taking implications do not include actions affecting properties that are held in trust by the United States. The residential and business leasing regulations provide specific regulatory guidance on trust lands.

### *F. Energy Effects (Executive Order 13211)*

On May 18, 2001, the President issued Executive Order 13211 which speaks to regulations that significantly affect energy supply, distribution, and use. The Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is restricted to 25 CFR part 162, subpart C, Residential Leases, and subpart D, Business Leases, on lands held in trust for individual Indians and tribes. Mineral development on lands held in trust for individual Indians and tribes is regulated under the Indian Mineral Development Act. Regulations for mineral development are provided under a separate part in 25 CFR parts 211, 212 and 225. This proposed implementation guidance is not expected to significantly affect energy supplies, distribution, or use. Therefore, no Statement of Energy Effects has been prepared.

### *G. Federalism (Executive Order 13132)*

This proposed implementation guidance does not have significant Federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of States. While this proposed rule will impact tribal governments, there is no federalism impact on the trust relationship or balance of power between the United States government and the various tribal governments affected by this rulemaking. Therefore, in accordance with Executive Order 13132, it is determined that this rule will not have sufficient federalism implications to

warrant the preparation of a federalism assessment.

*H. Civil Justice Reform (Executive Order 12988)*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729, February 7, 1996, imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for effective conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3 (a), section (b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to insure that the regulations: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing federal law or regulation; (3) provides a clear legal standard for affecting conduct while promoting simplification and burden reduction; (4) specifies the retroactive affect if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of the applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. This proposed implementation guidance does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Executive Order 12988.

*I. National Environmental Policy Act (NEPA)*

This proposed rule is categorically excluded from the preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, because its environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and the Federal actions under the proposed rule (*i.e.*, approval or disapproval of leases of Indian lands) will be subject at the time of the action itself to the National Environmental Policy Act process, either collectively or case-by-case. Further, no extraordinary circumstances exist to require preparation of an environmental assessment or environmental impact statement.

*J. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)*

Pursuant to Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments, the Department has determined that because the proposed rulemaking will uniquely affect tribal governments it will follow Department and Administrative protocols in consulting with tribal governments on the rulemaking. Consequently, tribal governments will be notified through this **Federal Register** notice and through the BIA field offices, of the ramifications of this rulemaking. This will enable tribal officials and the affected tribal constituency throughout Indian country to have meaningful and timely input in the development of the final rule. This will reinforce good intergovernmental relations with tribal governments and better inform, educate and advise such tribal governments on compliance requirements of the rule making. We consulted with tribal representatives during the formulation of this proposed regulation. On June 5, 2002, the initial draft Residential Lease and Business Lease regulations were distributed to the Bureau of Indian Affairs' Regional Offices, the National Congress of American Indians, and the Inter-Tribal Monitoring Association, requesting comments. The comments received through that distribution were considered in the development of the final draft regulations. We held Tribal Consultations (meetings) in Portland, Oregon, Phoenix, Arizona and Nashville, Tennessee, in September 2002. The comments received from these consultations were taken into consideration in the formulation of the following proposed Residential and Business Leasing regulations. We have committed to consulting with tribal representatives in the formulation of a final rule for the Residential and Business Lease regulations.

*K. Paperwork Reduction Act (44 U.S.C. 3501)*

This regulation requires an information collection from 10 or more parties, and therefore is subject to review under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Because the sections where the information collections occur has changed from the proposed rule of July 14, 2000 (65 FR 43918) and the final rule of January 22, 2001, we are including a table showing the section changes.

TABLE SHOWING CHANGES IN INFORMATION COLLECTION

| Old CFR cite | New CFR cite | Section title | Change in collection | Explanation of change |
|---|---|---|---|---|
| 162.7 ..... | 162.301 | May individual Indian landowners exempt their land from tribal policies for leasing on Indian Agricultural lands? | No Change ..... | There is no change in collection of information. The regulatory requirements have been separated and clarified by providing separate regulations for Residential and Business Leases. |
| 162.205* ..... | 162.401 | | | |
| 162.8 ..... | 162.301 | What notifications are required that tribal law applies to a lease on Indian Agricultural lands? | No Change ..... | There is no change in collection of information. The regulatory requirements have been separated and clarified by providing separate regulations for Residential and Business Leases. |
| 162.109* ..... | 162.401 | | | |
| 162.204* ..... | | | | |
| 162.12 ..... | 162.309 | How will the Secretary decide whether to grant and/or approve a lease? | No Change ..... | There is no change in collection of information. The regulatory requirements have been separated and clarified by separate regulations. |
| 162.241* ..... | 162.409 | | | |
| 162.14 ..... | 162.312 | Must a lease be recorded? ..... | No Change ..... | There is no change in collection of information. The regulatory requirements have been separated and clarified by providing separate regulations for Residential and Business Leases. |
| 162.246* ..... | 162.412 | | | |
| 162.18 ..... | 162.313 | Is there a standard lease form? ..... | No Change ..... | Same as above. |
| 162.218* ..... | 162.413 | | | |
| 162.20 ..... | 162.316 | How is leased land described? ..... | No Change ..... | Same as above. |
| | 162.416 | | | |

TABLE SHOWING CHANGES IN INFORMATION COLLECTION—Continued

| Old CFR cite | New CFR cite | Section title | Change in collection | Explanation of change |
|---|---|---|---|---|
| 162.22 ..... | 162.325 | May a lease be used as collateral for a leasehold? | No Change ..... | Same as above. |
| 162.610(c) * ..... | 162.425 | | | |
| 162.30 ..... | 162.334 | What happens to improvements constructed on Indian lands when the lease has been terminated? | No Change ..... | Same as above. |
| 162.608 * ..... | 162.437 | | | |
| 162.32 ..... | 162.319 | When must a lease payment be made? | No Change ..... | Same as above. |
| 162.613 * ..... | 162.419 | | | |
| 162.37 ..... | 162.320 | Is there a penalty for late payment on a lease? | No Change ..... | Same as above. |
| 162.614–616 * ... | 162.420 | | | |
| 162.47 ..... | 162.339 | What forms of bonds will the BIA accept? | No Change ..... | There is no change in collection of information. The regulatory requirements have been separated and clarified by providing separate regulations for Residential and Business Leases. |
| 162.604 * ..... | 162.442 | | | |
| 162.52 ..... | 162.341 | What types of insurance may be required? | No Change ..... | Same as above. |
| 162.604 * ..... | 162.444 | | | |
| 162.61 ..... | 162.302 | How do I acquire a lease on Indian land? | No Change ..... | Same as above. |
| 162.605–606 * ... | 162.402 | | | |
| 162.68 ..... | 162.305 | Must the parents or guardians of minors who own Indian land obtain a lease before using the land? | No Change ..... | Same as above. |
| 162.603 * ..... | 162.405 | | | |
| 162.82 ..... | 162.314 | What supporting documents must I provide? | No Change ..... | Same as above. |
| 162.604 * ..... | 162.414 | | | |
| 162.213 * ..... | | | | |
| 162.83 ..... | 162.317 | How much rent must a lessee pay? | No Change ..... | Same as above. |
| 162.604 * ..... | 162.417 | | | |
| 162.113 ..... | 162.348 | May the Secretary waive administrative fees? | No Change ..... | Same as above. |
| 162.611 * ..... | 162.451 | | | |
| 162.126 ..... | 162.348 | What happens if you do not cure a lease violation? | No Change ..... | Same as above. |
| 162.619 * ..... | 162.451 | | | |
| 162.164 ..... | 162.352 | What can I do if I receive a trespass notice? | No Change ..... | Same as above. |
| 162.251 * ..... | 162.455 | | | |

**Note:** Section numbers followed by an * are from final rule.

The table showing the burden of the information collection is included below for your information.

TABLE OF BURDEN FOR 25 CFR PART 162 (1076–0155)

| CFR section | Number of respondents | Number of annual responses | Hourly burden per response | Total annual hourly burden | Salary [1] | Federal burden per response | Total Federal annual burden hours | Salary [2] |
|---|---|---|---|---|---|---|---|---|
| 162.301 ..... 162.401 | 500 | 500 | 30 min ..... | 250 | $4,630 | 30 min ..... | 250 | $4,630 |
| 162.309 ..... 162.409 | 14,500 | 14,500 | 2 hrs ..... | 29,000 | 537,080 | 2 hrs ..... | 29,000 | 537,080 |
| 162.312 ..... 162.412 | 14,500 | 14,500 | 1 hr ..... | 14,500 | 268,540 | 1 hr ..... | 14,500 | 268,540 |
| 162.313 ..... 162.413 | 0 | 0 | 0 ..... | 0 | 0 | 0 ..... | 0 | 0 |
| 162.316 ..... 162.416 | 14,500 | 14,500 | 30 min ..... | 7,250 | 134,270 | 30 min ..... | 7,250 | 134,270 |
| 162.325 ..... 162.425 | 0 | 0 | 0 ..... | 0 | 0 | 0 ..... | 0 | 0 |
| 162.334 ..... 162.437 | 0 | 0 | 0 ..... | 0 | 0 | 0 ..... | 0 | 0 |
| 162.319 ..... 162.419 | 14,500 | 14,500 | 15 min ..... | 3,625 | 66,156 | 15 min ..... | 3,625 | 66,156 |
| 162.320 ..... 162.420 | 3,625 | 3,625 | 15 min ..... | 906 | 16,779 | 15 min ..... | 906 | 16,779 |
| 162.339 ..... 162.442 | 14,500 | 14,500 | 30 min ..... | 7,250 | 134,270 | 30 min ..... | 7,250 | 134,270 |
| 162.341 ..... 162.444 | 14,500 | 14,500 | 15 min ..... | 3,625 | 66,156 | 15 min ..... | 3,625 | 66,156 |
| 162.302 ..... 162.402 | 14,500 | 14,500 | 1 hrs ..... | 14,500 | 268,540 | 1 hrs ..... | 14,500 | 268,540 |

TABLE OF BURDEN FOR 25 CFR PART 162 (1076–0155)—Continued

| CFR section | Number of respondents | Number of annual responses | Hourly burden per response | Total annual hourly burden | Salary [1] | Federal burden per response | Total Federal annual burden hours | Salary [2] |
|---|---|---|---|---|---|---|---|---|
| 162.305 ..... 162.405 | 0 | 0 | 0 ..... | 0 | 0 | 0 ..... | 0 | 0 |
| 162.314 ..... 162.414 | 7,250 | 7,250 | 3 hrs ..... | 21,750 | 402,810 | 3 hrs ..... | 21,750 | 402,810 |
| 162.317 ..... 162.417 | 725 | 725 | 30 min ..... | 1,450 | 26,854 | 30 min ..... | 1,450 | 26,854 |
| 162.342 ..... 162.445 | 7,250 | 7,250 | 15 min ..... | 1,813 | 33,576 | 15 min ..... | 1,813 | 33,576 |
| 162.348 ..... 162.451 | 145 | 145 | 30 min ..... | 73 | 1,352 | 30 min ..... | 73 | 1,352 |
| 162.352 ..... 162.455 | 145 | 145 | 30 min ..... | 73 | 1,352 | 30 min ..... | 73 | 1,352 |
| Totals | 14,500 | 121,140 | | 106,065 | 1,962,365 | | 106,065 | 1,962,365 |

[1] $18.52 × total hourly burden = total hourly burden cost.
[2] $18.52 × total hourly burden = total Federal burden cost.

In addition, BIA collects fees for processing submitted documents, as set forth in sections 162.342 and 162.445, which can be considered as part of the information collection burden.

DOI invites comments on the information collection requirements in the proposed regulation. You may submit comments by telefacsimile at (202) 395–5806 or by e-mail at *Ruth_Solomon@omb.eop.gov*. Please also send a copy of your comments to BIA at the location specified under the heading **ADDRESSES.** Note that requests for comments on the rule and the information collection are separate.

You can receive a copy of BIA's submission to OMB by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section, or by requesting the information from the BIA Information Collection Clearance Officer, 1951 Constitution Avenue, NW., Mail Stop 52 SIB, Washington, DC 20240.

Comments should address: (1) Whether the proposed collection of information is necessary for the proper performance of the Program, including the practical utility of the information to BIA; (2) the accuracy of BIA's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. The valid OMB Control Number for this information collection is 1076–0155. However, OMB will assign a different temporary control number until the final rule is approved. At that time, the OMB Control Number will revert to 1076–0155.

OMB must make a decision concerning the collection of information requirements in this proposed rule no sooner than 30 days, and no later than 60 days, after it is published in the **Federal Register**. Therefore, a comment is best assured of having its maximum effect if OMB receives it within 30 days of publication. Comments on information collection requirements do not relate, however, to the deadline for general public comments on the proposed rule, indicated in the **DATES** section.

Organizations and individuals who submit comments on the information collection requirements should be aware that BIA keeps such comments available for public inspection during regular business hours. If you wish to have your name and address withheld from public inspection, you must state this prominently at the beginning of any comments you make. BIA will honor your request to the extent allowable by law.

**List of Subjects in 25 CFR Part 162**

Indians—lands.

Dated: January 6, 2004.

**Aurene M. Martin,**

*Deputy Assistant Secretary—Indian Affairs.*

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to amend part 162 in Title 25 of the Code of Federal Regulations as follows:

## PART 162—LEASES AND PERMITS

1. The authority citation for part 162 is revised to read as follows:

**Authority:** 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 477, 635, 2218, 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733, 4211; 44 U.S.C. 3101 *et seq.*

2. Revise paragraphs (b) and (c) and add paragraph (d) to § 162.100 to read as follows:

**§ 162.100 What are the purposes of this part?**

* * * * *

(b) This part includes five subparts, including separate, self-contained subparts relating to Agricultural Leases (Subpart B), Residential Leases (Subpart C), Business Leases (Subpart D), and Special Requirements for Certain Reservations (Subpart E). Subpart E identifies special provisions applicable only to leases made under special acts of Congress that apply only to certain Indian reservations. Leases covered by subpart E are also subject to subparts A through D, except to the extent that subpart A through D are inconsistent with:

(1) The provisions in subpart E; or

(2) Any act of Congress under which the leases are made.

(c) These regulations apply to all leases in effect when the regulations are promulgated.

(d) Unless otherwise agreed by the parties, this part will not affect the validity or terms of any existing lease or any restatement of an existing lease.

3. Amend § 162.101 by:

A. Revising the terms of "Immediate family;" "Lease;" "Life Estate;" "Mortgage;" "Permit;"and "Tribal land;" and

B. Removing the term "Fair annual rental;" and

C. Adding in alphabetical order the terms "Approval;" "Fair annual rental or fair market rental;" "Consent or consenting;" "Grant or granting;" "Housing for public purposes;" "Single-family home;" and "Tribal land assignment," to read as follows:

**§ 162.101 What key terms do I need to know?**

* * * * *

*Approval* means written authorization by the Secretary or a delegated official that is a part of the instrument being approved.

* * * * *

*Consent* or *consenting* means the execution of a lease by the Indian landowner or by the Secretary on behalf of an individual Indian landowner.

*Fair annual rental* or *fair market rental* means the amount of rental income that a leased tract of Indian land would most probably command in a comparable open and competitive market.

* * * * *

*Grant* or *granting* means the process of consenting to a lease.

*Housing for public purposes* means multi-family developments and single family residential developments administered by a Tribal Housing Authority (or other Tribally-Designated Housing Entity) or financed by a tribal/federal/state housing program.

*Immediate family* means a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or when some other special relationship exists between the lessor and lessee or special circumstances exist that in the opinion of the Secretary warrant the approval of the residential lease.

* * * * *

*Lease* means a written contract between Indian landowner(s) and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land, for a specified purpose and duration. Unless otherwise provided, the use of this term will also include permits, as appropriate.

* * * * *

*Life estate* means an interest in Indian land that expires upon the death of the interest holder(s) or some other person. A life estate is also referred to as "life use."

* * * * *

*Mortgage* means a mortgage, deed of trust or other instrument that pledges a tenant's leasehold interest as security for a debt or other obligation owed by the tenant to a lender or other mortgagee. A mortgage of a leasehold of Indian land cannot pledge the beneficial or restricted title to the land.

* * * * *

*Permit* means a written, non-assignable, contract between Indian landowners and the applicant for the permit, also referred to as a permittee, whereby the permittee is granted a revocable privilege to use Indian land or government land, for a specified purpose.

* * * * *

*Single-family home* means a building with one to four dwelling units on a tract of land under a single lease (also referred to as a homesite lease).

* * * * *

*Tribal land* means the surface estate of land, or any interest therein, held by the United States in trust for, or for the use and benefit of, a tribe, band, community, group or pueblo of Indians, or an Indian corporation chartered under 25 U.S.C. 477. The term also includes the surface estate of land or any interest therein held by a tribe, band, community, group or pueblo of Indians that is subject to federal restrictions against alienation or encumbrance.

*Tribal land assignment* means a contract or agreement that conveys to tribal members any rights for temporary use of tribal lands, assigned by the Indian tribes in accordance with tribal laws or customs.

* * * * *

4. Revise § 162.102 to read as follows:

**§ 162.102 What land, or interests in land, are subject to this part?**

(a) This part applies to Indian land and government land, including any tract in which an individual Indian or tribe owns an interest in trust or restricted status.

(b) Where a life estate and remainder interest are both owned in trust or restricted status, the life estate and remainder interest must both be leased under this part, unless the lease is for less than one year in duration. Unless otherwise provided by the document creating the life estate or by agreement, rent payable under the lease must be paid to the life tenant under part 179 of this chapter.

(c) In approving a lease under this part, we will not lease any fee interest in Indian land, nor will we collect rent on behalf of any fee owners. The leasing of the trust and restricted interests of the Indian landowners will not be conditioned on a lease having been obtained from the owners of any fee interests. Where all of the trust or restricted interests in a tract are subject to a life estate held in fee status, we will approve a lease of the remainder interests only if such action is necessary to preserve the value of the land or protect the interests of the Indian landowners.

(d) This section applies to tribal land leased under a corporate charter that we issue under 25 U.S.C. 477, or under a special act of Congress authorizing leases without our approval. This part does not apply to these leases except to the extent that the authorizing statutes require us to enforce the leases on behalf of the Indian landowners.

5. Revise § 162.105 to read as follows:

**§ 162.105 Can BIA combine for leasing purposes tracts that have different Indian landowners?**

(a) A lease negotiated by Indian landowners may cover more than one tract of Indian land, but the minimum consent requirements for leases granted by Indian landowners will apply to each tract separately. We may combine multiple tracts into a unit for leases negotiated by us, if we determine that unitization is in the Indian landowners' best interests and consistent with the efficient administration of the land.

(b) Unless otherwise provided in the lease, the rent or other consideration derived from a unitized lease will be distributed based on the size of each owner's interest in proportion to the acreage within the entire unit. Unless otherwise agreed upon by the Indian landowners, market rent will be based on the value of the entire leased unit, without any consideration being given to the relative or contributive values of the individual tracts within the unit.

6. Revise §§ 162.108, 162.109, and 162.110 to read as follows:

**§ 162.108 What are BIA's responsibilities in administering and enforcing leases?**

(a) We will make reasonable efforts to see that lessees meet their payment obligations to Indian landowners through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and

enforcement actions. Upon actual notice of a violation, we will also assist landowners in the enforcement of direct payment obligations, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or other regulations.

(b) We will make reasonable efforts to see that lessees comply with the requirements in their leases through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take emergency action as needed to preserve the value of the land.

(c) In those cases where tribal law or ordinances are in place we may defer enforcement responsibilities to the tribe.

**§ 162.109 What laws apply to leases granted or approved under this part?**

(a) Leases granted or approved under this part are subject to Federal laws of general applicability and any specific federal statutory requirements that are not incorporated in this part.

(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws, except to the extent that those tribal laws are substantially and materially inconsistent with this part or other applicable Federal law. This part may be superseded or modified by tribal laws, so long as:

(1) The tribal laws are consistent with the enacting tribe's governing documents;

(2) The tribe has notified us of the superseding or modifying effect of the tribal laws;

(3) The superseding or modifying of the regulation would not violate a Federal statute or judicial decision, or conflict with our general trust responsibility under Federal law; and

(4) The superseding or modifying of the regulation applies only to tribal land.

(c) Tribal laws may include laws assigning the responsibility for leasing to a Division, Department, or local governmental unit of a tribe, and any lease with that Division, Department, or local governmental unit is considered to be a lease with that tribe.

(d) State laws may apply to a lease of Indian land if the laws are expressly agreed to by the parties to the lease, and by the tribe, if the lease is for individually-owned land. Unless expressly provided in the lease of tribal land, or the tribe's consent for a lease of individually owned land, the agreement does not waive the tribe's sovereign immunity or provide its consent to state civil regulatory jurisdiction.

**§ 162.110 Can tribes administer this part on behalf of the Secretary or BIA?**

Any tribe or tribal organization that is administering programs or services under 25 CFR part 900:

(a) Can administer the provisions in this part that authorize or require us to take certain actions; and

(b) Cannot administer the provisions of this part relating to the granting, approval, or enforcement of leases and permits.

7. Add § 162.114 to read as follows:

**§ 162.114 Who should I contact with questions concerning the leasing process?**

The Indian landowner or prospective tenant should contact the local BIA Realty Office or any tribal realty office for answers to questions about the leasing process.

8. Add § 162.115 to read as follows:

**§ 162.115 Does the information submission require approval by the Office of Management and Budget?**

Yes, information as requested in Subparts B, C, D and E requires approval by the Office of Management and Budget. OMB has assigned OMB Control Number 1076–0155. Please note that, as a federal agency, we may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

9. Add subparts C and D to read as follows:

**Subpart C—Residential Leases**

**General Provisions**



**How To Obtain a Lease**



**Lease Requirements**



**Lease Administration**

## Subpart C—Residential Leases

### General Provisions

#### § 162.300 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the improvements thereon) on tribal or allotted land, for the purposes of Indian housing. The regulations in this subpart also apply to permits made for Indian housing purposes, if appropriate. Leases covered by this subpart would authorize the construction or use of:

(1) A single-family home; and

(2) Housing for public purposes.

(b) Leases for other residential development (for example, multi-family developments and single family residential developments for profit) are covered under subpart D of this part.

#### § 162.301 How will BIA accommodate tribal laws on land under a residential lease?

(a) Unless prohibited by Federal law, we will recognize and accommodate tribal laws regulating activities on land under a residential lease, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.

(b) This paragraph applies when this subpart is inconsistent with a tribal law and § 162.109 prohibits tribal law to supersede or modify this subpart. We may waive provisions of this subpart

under 25 CFR part 1, if the waiver does not:

(1) Violate a Federal statute or judicial decision; or

(2) Conflict with our general trust responsibility under Federal law.

## How To Obtain a Lease

### § 162.302 Can a tenant negotiate a residential lease with the Indian landowners?

Yes, a tenant can obtain a residential lease through direct negotiation. We will assist prospective tenants in contacting the Indian landowners or their representatives to negotiate a lease, including providing the names and addresses of the Indian landowners upon written request. We will assist the Indian landowners in those negotiations upon request.

### § 162.303 When can the Indian landowners grant a residential lease?

(a) Tribes may grant residential leases of tribally-owned land, including any tribally-owned undivided interest(s) in a fractionated tract, as evidenced by an appropriate tribal authorization and subject to our approval. Where tribal land is subject to a land assignment made to a tribal member or some other individual under tribal law or custom, the individual and the tribe must both grant the lease, subject to our approval.

(b) Adult Indian landowners, or emancipated minors, may grant residential leases of their land, including undivided interests in fractionated tracts, subject to our approval.

(c) In order to grant a residential lease of a fractionated tract, the Indian landowners must:

(1) Obtain approval of the required percentage of the owners of the undivided interest in the tract as required by § 162.304; and

(2) Obtain our approval.

(d) The proceeds from a residential lease that we approve under paragraph (c) of this section must be distributed to all owners of undivided interests in the tract covered by the lease.

(1) The amount of the proceeds distributed to each owner must be determined in accordance with the portion of the undivided interest in the tract covered under the lease owned by that owner.

(2) This paragraph applies where the owners of the applicable percentage of interests under § 162.304 grant a residential lease on behalf of all of the Indian owners of a fractionated tract. The non-consenting Indian landowners (including those on whose behalf we have granted consent under § 162.304(c)) must receive a fair market rental, even if the land is being leased at less than a fair market rental under § 162.317.

(e) Upon request of the Indian landowner, we will assist the tenant in obtaining the grant of the applicable percentage of interests under § 162.304 of this subpart.

### § 162.304 What are the consent requirements for a residential lease on a fractionated tract?

(a) Except for Alaska, the Indian landowners must determine the percentage referred to in the Indian Land Consolidation Act Amendments of 2000, 25 U.S.C. section 2218, as follows:

| If the number of owners of the undivided interest in the tract is. . . | Then the percentage of owners who must approve of the lease is. . . |
|---|---|
| (1) Five or fewer ..... | 100 percent. |
| (2) More than five but less than 11. | 80 percent. |
| (3) More than 10 but fewer than 20. | 60 percent. |
| (4) Twenty or more ... | Over 50 percent. |

(b) In Alaska, residential leases of Indian lands may be negotiated by the Indian landowners, or their representatives who may execute leases under § 162.305, provided:

(1) The owners of a majority of the interests have negotiated a lease satisfactory to us;

(2) We grant the lease on behalf of those persons for whom we are authorized to grant leases under paragraph (c) of this section; and

(3) The total combined consent of the owners and us provides 100 percent consent.

(c) We may give written consent to a lease, and that consent must be counted in the percentage ownership described in paragraphs (a) or (b) of this section, on behalf of:

(1) The individual owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

(2) Individuals whose whereabouts are unknown to us, after reasonable attempts are made to locate such individuals;

(3) Individuals who are found to be non compos mentis, or determined to be an adult in need of assistance or under legal disability as defined in part 115 of this chapter;

(4) Orphaned minors;

(5) Individuals who have given us a written power of attorney to lease their land; and

(6) The individual landowners of a fractionated tract where:

(i) We have given the Indian landowners written notice of our intent to grant a lease on their behalf;

(ii) The Indian landowners are unable to agree upon a lease during a 3-month negotiation period following the notice; and

(iii) The land is not being used by an Indian landowner.

### § 162.305 Who can represent the Indian landowners in negotiating or granting a residential lease?

The following individuals or entities may represent an individual Indian landowner:

(a) An adult acting on behalf of his or her minor children;

(b) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;

(c) An adult or legal entity who has been given a written power of attorney that:

(1) Meets all of the formal requirements of any applicable Federal, tribal, or state law;

(2) Identifies the attorney-in-fact and the land to be leased; and

(3) Describes the scope of the power granted and any limits thereon.

(d) Any person who is authorized to practice before the Department of the Interior under 43 CFR Part 1.

### § 162.306 When can BIA grant a permit for residential use?

(a) We may grant a permit for residential use in the same manner as we would grant a residential lease under § 162.304(c), for example, to keep an Indian landowner's house occupied while the landowner's estate is going through probate. We may also grant a permit on behalf of individual Indian landowners, without prior notice, if it is impractical to provide notice to the owners and no substantial injury to the land will occur, or to protect the trust resource, but we must give the Indian landowners subsequent immediate notice and advise them of their right to appeal the decision under part 2 of this chapter. If the permit is granted to protect the trust resource, the permit will be effective immediately under part 2 of this chapter.

(b) We may grant a permit for residential use on government land.

(c) A tribe may grant a permit, subject to our approval, in the same manner as it would grant a lease under § 162.303.

(d) Permits may be revoked upon reasonable notice to the permittee, as specified in the permit.

**§ 162.307 Must the land be appraised before BIA's grant or approval of a residential lease?**

(a) To support the Indian landowners in their negotiations, and to assist in our consideration of whether a residential lease is in the Indian landowners' best interest, we must determine the fair market rental of the land before our grant or approval of the lease, even if the land may be leased at less than a fair market rental under § 162.317, except as provided in paragraph (c) of this section.

(b) A fair market rental may be determined by referral to published residential rental rates in the area, appraisal, or any other appropriate valuation method. Where an appraisal or other valuation is needed to determine the fair market rental, the appraisal or valuation must be prepared in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP).

(c) Upon receipt of an appropriate Tribal Resolution, we may not require an appraisal for a lease on tribal land.

**§ 162.308 What documents must BIA review before granting or approving a residential lease?**

(a) The Indian landowner and the tenant must provide an executed lease that complies with the requirements of this part. We will assist the Indian landowner in this process upon request.

(b) In addition to the executed lease, the parties must provide the following supporting documents:

(1) If the tenant is a corporation, partnership or other legal entity, it must provide organizational and financial documents, as needed to show that the lease will be enforceable against the tenant and the tenant will be able to perform all of its lease obligations.

(2) Where a bond is required under § 162.338, the bond must be furnished before we consider the lease application complete under § 162.309(b).

(3) The tenant should provide environmental and archaeological reports, surveys, and site assessments, as needed to facilitate BIA compliance with NEPA and other applicable Federal and tribal land use requirements. We will adopt any tribal environmental review as our NEPA review, to the extent such adoption is allowed under our procedure implementing NEPA.

(4) The tenant may be required to provide proof that the proposed use is in conformance with applicable tribal ordinances.

**§ 162.309 How and when will BIA decide whether to grant or approve a residential lease?**

(a) Before we grant or approve a lease, we must determine in writing that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances (including approval of the appropriate review documents under NEPA);

(3) Assure ourselves that adequate consideration has been given, as appropriate, to:

(i) The relationship between the use of the leased premises and the use of neighboring lands;

(ii) The height, quality, and safety of any structures or other facilities to be constructed on the leased premises;

(iii) The availability of police and fire protection, utilities, and other essential community services;

(iv) The availability of judicial forums for all criminal and civil matters arising on the leased premises; and

(v) The effect on the environment of the proposed land use.

(4) Require any lease modifications or mitigation measures that are needed to satisfy any requirements, or any other Federal or tribal land use requirements.

(b) We will take action on the lease within 30 days of the date of our receipt of the lease and supporting documents. (This deadline applies only if the lease is in an approved form and we have received all of the documents that we need to support the findings required by paragraph (a) of this section.) If we do not act within 30 days, the Indian landowner may take appropriate action under part 2 of this chapter.

(c) If we approve or disapprove a lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter. Upon grant or approval of a residential lease, we will provide a copy to the tenant and make the lease available to the Indian landowner(s) upon request.

**§ 162.310 When will a residential lease be effective?**

Unless otherwise provided in the lease, a residential lease will be effective on the date on which the lease is granted or approved by us. A residential lease may be made effective on some past or future date, by agreement, but such a lease may not be granted or approved more than one year before the date on which the lease term is to commence. All approvals must be in writing.

**§ 162.311 When is a decision to grant or approve a residential lease effective?**

Our decision to grant or approve a residential lease will be effective immediately, notwithstanding any appeal that may be filed under part 2 of this chapter.

**§ 162.312 Must a residential lease or permit be recorded?**

(a) A residential lease or permit must be recorded in our Land Titles and Records Office with jurisdiction over the land. We will record the lease or permit immediately following our grant or approval under this subpart.

(b) Residential leases of tribal land that do not require our approval, under § 162.102 of this part, must be recorded by the tribe in our Land Titles and Records Office with jurisdiction over the land.

**Lease Requirements**

**§ 162.313 Is there a standard residential lease form?**

No, there is no standard residential lease form. We will assist the Indian landowners in drafting lease provisions that conform to the requirements of this part.

**§ 162.314 Are there any provisions that must be included in a residential lease?**

Yes, in addition to the other requirements of this part, all residential leases must include the following provisions.

(a) The obligations of the tenant and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status.

(b) Nothing in the lease must delay or prevent termination of Federal trust responsibilities for the land during the lease's term.

(c) Termination of Federal trust responsibilities for the land does not abrogate the lease.

(d) The owners of the land and the tenant and its surety or sureties must be notified of any change in the status of the land.

(e) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises.

(f) The tenant must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies.

**§ 162.315 What requirements must be satisfied in executing a residential lease?**

(a) A residential lease must identify the Indian landowners and their respective interests in the leased premises, and the lease must be granted by or on behalf of each of the Indian landowners. One who executes a lease in a representative capacity under § 162.305 must identify the owner being represented and the authority under which such action is being taken.

(b) A residential lease must be executed by individuals having the necessary capacity and authority to bind the tenant under applicable law.

(c) A residential lease must include a citation of the provisions in this subpart that authorize our grant or approval, along with a citation of the formal documents by which such authority has been delegated to the official taking such action.

**§ 162.316 How should a residential lease describe the land?**

A residential lease should describe the leased premises by reference to a public survey, if possible. The lease must include a legal description or other description that is sufficient to identify the leased premises. Where there are undivided interests owned in fee status, the aggregate percentage of trust and restricted interests should be identified in the description of the leased premises.

**§ 162.317 How much rent must be paid under a residential lease?**

(a) A residential lease must provide for the payment of a fair market rental at the beginning of the lease term and at specified times during the term of the lease, unless a lesser amount is permitted under paragraphs (b) or (c) of this section. The tenant's rent payments will be in fixed amounts.

(b) We will approve a residential lease of tribal land at a nominal rent, or at less than a fair market rental, if such a rent is negotiated or established by the tribe.

(c) We will approve a residential lease of individually-owned land at a nominal rent or at less than a fair market rental, if the tenant is a member of the Indian landowner's immediate family; a co-owner in the lease tract; when some other special relationship exists between the lessor and lessee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

**§ 162.318 Must the rent be adjusted under a residential lease?**

(a) A residential lease is not required to allow for rental adjustments, unless the parties agree to provide for periodic adjustments in the lease.

(b) If rental adjustments are provided for, the lease must specify:

(1) How adjustments are made;

(2) Who makes the adjustments;

(3) When the adjustments are effective; and

(4) How disputes about the adjustments are resolved.

**§ 162.319 When are rental payments due under a residential lease?**

A residential lease must specify the dates on which all rental payments are due. Unless otherwise provided in the lease, rental payments may not be made or accepted more than one year in advance of the due date. Rent payments are due at the time specified in the lease, regardless of whether the tenant receives an advance billing or other notice that a payment is due.

**§ 162.320 Will untimely rental payments incur interest charges or penalties?**

A residential lease must specify the rate at which interest will accrue on any rental payment not made by the due date or any other date specified in the lease. A lease may also identify additional late payment penalties that will apply if a rental payment is not made by a specified date. Unless otherwise provided in the lease, such interest charges and late payment penalties will apply in the absence of any specific notice to the tenant from us or the Indian landowners, and the failure to pay such amounts will be treated as a lease violation under § 162.347.

**§ 162.321 To whom can rental payments be made under a residential lease?**

(a) A residential lease must specify whether rental payments will be made directly to the Indian landowners or to us on behalf of the Indian landowners. If the lease provides for payment to be made directly to the Indian landowners, the lease must also require that the tenant retain specific documentation evidencing proof of payment, such as canceled checks, cash receipt vouchers, or copies of money orders or cashier's checks.

(b) Rental payments made directly to the Indian landowners must be made to the parties and addresses specified in the lease, unless the tenant receives notice of a change of ownership or address. Unless otherwise provided in the lease, rental payments may not be made payable directly to anyone other than the Indian landowners.

(c) A lease that provides for rental payments to be made directly to the Indian landowners must also provide for such payments to be suspended and the rent thereafter paid to us, rather than directly to the Indian landowners, if:

(1) An Indian landowner dies;

(2) An Indian landowner requests that payment be made to us;

(3) An Indian landowner is found by us to be in need of assistance in managing his/her financial affairs; or

(4) We determine, in our discretion and after consultation with the Indian landowner(s), that direct payment should be discontinued.

**§ 162.322 What form of rental payment can be accepted under a residential lease?**

(a) When rental payments are made directly to the Indian landowners, a residential lease must specify the type of payment that is acceptable to the owners.

(b) Payments made to us may be delivered in person or by mail. We will not accept cash, foreign currency, or third-party checks. We will accept:

(1) Personal or business checks drawn on the account of the tenant;

(2) Money orders;

(3) Cashier's checks;

(4) Certified checks; or

(5) Electronic funds transfer payments.

**§ 162.323 What other types of payments are required under a residential lease?**

(a) The tenant may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by the tribe having jurisdiction over the land. The tenant must pay these amounts to the appropriate tribal office.

(b) Except as otherwise provided in part 171 of this chapter, if the leased premises are within an Indian irrigation project or drainage district, the tenant must pay all operation and maintenance charges that accrue during the lease term. Payment must be to the appropriate office in charge of the irrigation project or drainage district.

**§ 162.324 How long can the term of a residential lease run?**

(a) A residential lease must provide for a definite lease term, specifying the commencement date. The commencement date of the lease may not be more than one year after the date on which the lease is granted or approved.

(b) The lease term must be reasonable, given the purpose of the lease and the level of investment required. Unless otherwise provided by statute, the maximum term may not exceed 50 years. The lease may provide for a primary term of less than 50 years with a provision for renewal(s), so long as the maximum term, including the renewal(s), does not exceed 50 years. A residential lease may not be extended by holdover.

(c) Where the Secretary grants a lease under § 162.304(c)(1) on behalf of undetermined heirs or devisees of an individual Indian decedent owning 100 percent interest in the land, the maximum term of that lease may not exceed 2 years.

(d) If an option to renew is provided, the lease must specify:

(1) The time and manner in which the option must be exercised; and

(2) Any additional consideration which will be due upon the exercise of the option or the commencement of the renewal period.

**§ 162.325 Can a residential lease be amended, assigned, sublet, or mortgaged?**

Yes, a residential lease can be amended, assigned, sublet, or mortgaged in accordance with §§ 162.326 to 162.331.

**§ 162.326 How will BIA decide whether to approve an amendment to a residential lease?**

We will approve a residential lease amendment if:

(a) The required consents have been obtained from the Indian landowners (under § 162.304) and any mortgagee or any other sureties; and

(b) We find the amendment to be in the best interest of the Indian landowners, under the standards set forth in § 162.309.

**§ 162.327 Can a residential lease be assigned without the consent of the Indian landowners?**

(a) The lease may be assigned without the consent of the Indian landowners if the assignee agrees in writing to assume all of the tenant's obligations under the lease, including bonding requirements, and:

(1) The lease provides for assignments without further consent of the landowners;

(2) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance; or

(3) As specified in the lease.

(b) If the owners' consent is required, it must be obtained in the same manner as a new lease, unless the lease authorizes one or more of the Indian landowners to consent on behalf of all such owners.

(c) Consent must be obtained from the holders of any bonds or mortgages.

(d) Except as provided in paragraph (e) of this section, the assignment must be approved by the Secretary. Such approval will not be withheld providing that our approval will protect the best interests of the Indian landowners. To make that determination we will consider whether:

(1) The tenant is not in default, and will remain liable under the lease;

(2) The assignee agrees to be bound by the terms of the lease;

(3) The proposed use by the assignee will require an amendment of the lease;

(4) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(5) The assignee has provided supporting documents which demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease.

(e) The lease may be assigned without our approval if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations under the lease; and

(3) The assignee agrees in writing that any tenant to whom it transfers the lease will be another member of the tribe, a person who is eligible to be a member, a Tribal Housing Authority (or other Tribally-Designated Housing Entity), or the tribe. If no tribal member or person who is eligible to be a member or Tribal Housing Authority (or other Tribally-Designated Housing Entity) or the tribe wishes to lease the property, the lease may be transferred to another Indian, consistent with tribal law. If no Indian wishes to lease the property, the lease may be transferred to a non-Indian, consistent with tribal law.

(f) The assignment must be recorded under § 162.312.

(g) If the lease was approved at less than fair market rent under § 162.317(c), and the assignee is not a co-owner or a member of the Indian landowner's immediate family, the assignment must provide for the assignee to pay fair market rent to the Indian landowner.

**§ 162.328 May a residential lease be sublet without the consent of the Indian landowners?**

(a) The lease may provide for subleasing without the consent of the Indian landowners when the sublease is part of a housing development for public purposes for which a general plan has been submitted and approved and we have approved a sublease form for use in the project. Unless otherwise specified in the lease, the Indian landowners must consent to a sublease of a single-family home in the same manner as the initial lease.

(b) Consent to the sublease must be obtained from any sureties.

(c) The subtenant must agree to be bound by the terms of the lease.

(d) If the lease was approved at less than fair market rent under § 162.317(c), and the subtenant is not a co-owner or a member of the Indian landowner's immediate family, the sublease must provide for the subtenant to pay fair market rent to the Indian landowner.

(e) Except as provided in paragraph (e) of this section or as provided in the lease, we must approve the sublease. We will not withhold approval providing that our approval will protect the best interests of the Indian landowners. To make that determination we will consider whether:

(1) The tenant is not in default, and will remain liable under the lease;

(2) The subtenant agrees to be bound by the terms of the lease;

(3) The Indian landowner should receive some or all of any income received by the tenant for the sublease;

(4) The proposed use by the subtenant will require an amendment of the lease;

(5) The value of any part of the leased premises not covered by the sublease would be adversely affected; and

(6) The subtenant has provided supporting documents which demonstrate that the sublease will be enforceable against the subtenant, and that the subtenant will be able to perform its obligations under the sublease.

(f) Part of the leased premises may be sublet without our approval when:

(1) The sublease is for housing for public purposes; and

(2) We have approved a sublease form and rent schedule for use in the project.

(g) The sublease should be recorded under § 162.312.

(h) A sublease under paragraph (f) of this section should be recorded under § 162.312. All other subleases must be recorded.

**§ 162.329 May a residential lease be mortgaged without the consent of the Indian landowners?**

(a) The residential lease may be mortgaged without further consent of the Indian landowners if the lease contains a general authorization for such a mortgage, and it states what law would apply in case of foreclosure.

(b) We must approve the leasehold mortgage. We will approve a leasehold mortgage under a residential lease if:

(1) The required consents have been obtained from the Indian landowners and the holders of the tenant's bond; and

(2) We find that our approval is in the best interests of the Indian landowners.

(c) In making the finding required by paragraph (b)(4) of this section, we will consider whether:

(1) The tenant's ability to comply with the lease would be adversely affected by any new loan obligations;

(2) Any lease provisions would require modification to be consistent with the mortgage;

(3) The remedies available to us or to the Indian landowners would be limited (beyond any additional notice and cure rights to be afforded to the mortgagee) in the event of a lease violation; and

(4) Any rights of the Indian landowners would be subordinated or adversely affected in the event of a loan default by the tenant.

**§ 162.330 May Indian landowners withhold their consent to an assignment, sublease, or mortgage?**

Yes, Indian landowners may withhold their consent to an assignment, sublease, or mortgage. However, Indian landowners are encouraged not to withhold their consent unreasonably.

(a) A lease may require that:

(1) The Indian landowners specify their reasons for withholding consent; and

(2) The owners' consent will be deemed granted if a response to a request for consent is not given within a time period specified in the lease.

(b) An attempt by the tenant to mortgage the leasehold interest or authorize possession by another party, without the necessary consent and approval, will be treated as a lease violation under § 162.347.

(c) A residential lease may authorize us, one or more of the Indian landowners, or a designated representative of the Indian landowners, to consent to an amendment, assignment, sublease, mortgage, or other type of agreement, on the landowners' behalf. A designated landowner or representative may not negotiate or consent to an amendment, assignment, or sublease that would:

(1) Reduce the rentals payable to the other Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or modify the term of the lease.

(d) Where the Indian landowners have not designated a representative for the purpose of consenting to an amendment, assignment, sublease, mortgage, or other type of agreement, such consent may be granted by or on behalf of the landowners in the same manner as a new lease, under § 162.304.

**§ 162.331 When will a decision to approve an amendment, assignment, sublease, or mortgage under a residential lease be effective?**

Our decision to grant or approve an amendment, assignment, sublease, or mortgage under a residential lease will be effective immediately, notwithstanding any appeal that may be filed under part 2 of this chapter. Copies of approved documents will be provided to the party requesting approval, and made available to the Indian landowners upon request.

**§ 162.332 How can the leased premises be used under a residential lease?**

A residential lease must describe the authorized uses of the leased premises. Any use of the leased premises for an unauthorized purpose, will be treated as a lease violation under § 162.347.

**§ 162.333 Can improvements be made under a residential lease?**

(a) A residential lease must generally describe the type and location of any improvements to be constructed by the tenant. Unless otherwise provided in the lease, any specific plans for the construction of those improvements will not require the consent of the Indian landowners or our approval.

(b) Construction of any improvements not described in the lease must be approved as an amendment to the lease under § 162.326. An attempt by the tenant to construct improvements, without the necessary consent and approval, will be treated as a lease violation under § 162.347.

**§ 162.334 Who will own the improvements made under a residential lease?**

(a) A residential lease may specify who will own any improvements constructed by the tenant, during the lease term. The lease must indicate whether any improvements constructed by the tenant will remain on the leased premises upon the expiration or termination of the lease, providing for the improvements to either:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and us; or

(2) Be removed within a time period specified in the lease, at the tenant's expense, with the leased premises to be restored as close as possible to their condition before construction of such improvements.

(b) If the lease allows the tenant to remove the improvements, it must also provide the Indian landowners with an option to waive the removal requirement and take possession of the improvements if they are not removed within the specified time period. If the Indian landowners choose not to exercise this option, we will take appropriate enforcement action to ensure removal at the tenant's expense. This obligation survives the termination or expiration of the lease.

**§ 162.335 What indemnities are required under a residential lease?**

(a) A residential lease must require that the tenant indemnify and hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the tenant's use or occupation of the leased premises, unless the tenant would be prohibited by law from making such an agreement.

(b) Unless the tenant would be prohibited by law from making such an agreement, a residential lease must specifically require that the tenant indemnify the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault.

**§ 162.336 How will payment rights and obligations relating to residential land be allocated between the Indian landowners and the tenant?**

Unless otherwise provided in a residential lease, the Indian landowners will be entitled to receive any settlement funds or other payments arising from certain actions that diminish the value of the land or the improvements thereon. The amount of the payments that are distributed to each owner must be determined in accordance with the portion of the undivided interests in the tract covered under the lease owned by the land owner. Such payments may include:

(a) Insurance proceeds;

(b) Trespass damages; and

(c) Condemnation awards.

**§ 162.337 Can a residential lease provide for negotiated remedies in the event of a violation?**

(a) A residential lease of tribal land may provide the tribe with certain negotiated remedies in the event of a lease violation, including the power to terminate the lease. A residential lease of individually owned land may provide the individual Indian landowners with similar remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the landowners.

(b) The negotiated remedies described in paragraph (a) of this section will apply in addition to the cancellation remedy available to us under § 162.349. If the lease specifically authorizes us to exercise any negotiated remedies on behalf of the Indian landowners, the exercise of such remedies may substitute for cancellation.

(c) A residential lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, or through arbitration or some other alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us under § 162.349.

**§ 162.338 Must a tenant provide a bond under a residential lease?**

(a) Except as provided in paragraph (b) of this section, the tenant must provide a bond to secure:

(1) At least one rental payment under the terms of the lease;

(2) The construction of any required improvements;

(3) The performance of any additional lease obligations, including the payment of operation and maintenance charges under § 162.323(b); and

(4) The restoration and reclamation of the leased premises, to their condition at the commencement of the lease term or some other specified condition.

(b) A bond may not be required, if specified in the lease and upon a determination under § 162.309 that such a waiver is in the best interest of the Indian landowner(s).

**§ 162.339 What forms of bonds can be accepted under a residential lease?**

(a) Except as provided in paragraph (b) of this section, a bond must be deposited with us and made payable only to us, and the bond may not be modified or withdrawn without our approval. We will only accept a bond in one of the following forms.

(1) Cash.

(2) Negotiable Treasury securities that:

(i) Have a market value at least equal to the bond amount; and

(ii) Are accompanied by a statement granting full authority to us to sell them if the terms of the lease are violated.

(3) Certificates of deposit that:

(i) Indicate on their face that our approval is required before redemption by any party;

(ii) Have a face value at least equal to the bond amount, plus any penalties for early redemption; and

(iii) Are accompanied by a statement granting full authority to us to sell them in case of a violation of the terms of the lease.

(4) Irrevocable letters of credit issued by Federally-insured financial institutions authorized to do business in the United States. A letter of credit must:

(i) Contain a clause that grants us the authority to demand immediate payment if the tenant violates the lease or fails to replace the letter of credit at least 30 days before its expiration date;

(ii) Be payable to BIA (or tribe if the bond is held by the tribe under paragraph (b) of this section);

(iii) Be irrevocable during its term and have an initial expiration date of not less than one year following the date BIA receives it; and

(iv) Be automatically renewable for a period of not less than one year, unless the issuing financial institution provides us with written notice that it will not be renewed, at least 90 calendar days before the letter of credit's expiration date.

(5) A surety bond issued by a company approved by the U.S. Department of the Treasury.

(6) Assignment of a savings account.

(7) Any other form of highly liquid, non-volatile security subsequently approved by us that is easily convertible to cash and for which our approval is required before redemption by any party.

(b) A tribe may accept and hold any form of bond described in paragraph (a) of this section, to secure performance under a residential lease of tribal land.

**§ 162.340 How will a bond be administered?**

(a) If a cash bond is submitted, we will retain the funds in an account established in the name of the tenant.

(b) We will not pay interest on a cash performance bond.

(c) If the bond is not forfeited under §§ 162.344 or 162.348, we will refund the bond to the tenant upon the expiration or termination of the lease.

**§ 162.341 Is insurance required under a residential lease?**

When necessary to protect the interests of the Indian landowners, a residential lease must require that a tenant provide insurance. Such insurance should include property, liability and/or casualty insurance, depending on the interests to be protected. If insurance is required, it must identify both the Indian landowners and the United States as additional insured parties, and be sufficient to protect all insurable improvements on the leased premises.

**Lease Administration**

**§ 162.342 Are there administrative fees for actions relating to residential leases?**

(a) We will charge an administrative fee each time we approve a residential lease, amendment, assignment, sublease, mortgage, or related document. These fees will be paid by the tenant, assignee, or subtenant, to cover our costs in preparing or processing the documents and administering the lease.

(b) Except as provided in paragraph (c) of this section, we will charge administrative fees based on the rent payable under the lease. The fee will be 3 percent of the annual rent.

(c) The minimum administrative fee is $10.00 and the maximum administrative fee is $500.00, and any administrative fees that have been paid will be non-refundable. However, we may waive all or part of these administrative fees, in our discretion.

(d) If all or part of the costs in preparing or processing the documents and administering the lease are paid from tribal funds, the tribe may establish an additional or alternate schedule of fees.

**§ 162.343 Will BIA notify a tenant when a rental payment is due under a residential lease?**

We may issue bills or invoices to a tenant in advance of the dates on which rental payments are due under a residential lease, but the tenant's obligation to make such payments in a timely manner will not be excused if such bills or invoices are not delivered or received.

**Lease Enforcement**

**§ 162.344 What will BIA do if rental payments are not made as required by a residential lease?**

(a) A tenant's failure to pay rent in the time and manner required by a residential lease is a violation of the lease, and with will issue a notice of violation under § 162.347.

(1) If the lease requires that rental payments be made to us, we will send the tenant and its sureties a notice of violation within 10 business days of the date on which the rental payment was due.

(2) If the lease provides for payment directly to the Indian landowners, we will send the tenant and its sureties a notice of violation within 10 business days of the date on which we receive actual notice of non-payment from the landowners.

(b) If a tenant fails to provide adequate proof of payment or cure the violation within the period required by § 162.347, and the amount due is not in dispute, we may take any of the actions in this paragraph.

(1) We may:

(i) Take action to recover the unpaid rent and any associated interest charges or late payment penalties;

(ii) Cancel the lease under § 162.348; or

(iii) Invoke any other remedies available under the lease or applicable

law, including collection on any available bond or referral of the debt to the Department of the Treasury for collection.

(2) We do not have to cancel the lease or give any further notice to the tenant before taking action to recover any unpaid rent.

(3) If we cancel the lease, we can still take action to recover any unpaid rent.

(c) We or the Indian landowners may accept partial payments and underpayments, but acceptance does not waive any amounts remaining unpaid or any other existing lease violations. Unless otherwise provided in the lease, overpayments may be credited as an advance against future rent payments.

(d) If a personal or business check is dishonored, and a rental payment is therefore not made by the due date, the failure to make the payment in a timely manner will be a violation of the lease, and a notice of violation will be issued under § 162.347. Any payment made to cure such a violation, and any future payments by the same tenant, must be made by one of the alternative payment methods listed in § 162.322.

**§ 162.345 What fees are assessed on delinquent rental payments due under a residential lease?**

(a) The following special fees will be assessed if rent is not paid in the time and manner required, in addition to any interest or late payment penalties that must be paid to the Indian landowners under a residential lease. The following special fees will be assessed to cover administrative costs incurred by the United States in the collection of the debt:

| The tenant will pay . . . | For . . . |
|---|---|
| (1) $50.00 | Administrative fee for dishonored checks. |
| (2) $15.00 | Administrative fee for BIA processing of each notice or demand letter. |
| (3) 18 percent of balance due. | Administrative fee charged by Treasury following referral for collection of delinquent debt. |

(b) If all or part of the costs incurred in collection of the debt are paid from tribal funds, the tribe may establish an additional or alternate schedule of fees.

**§ 162.346 How will BIA determine whether the activities of a tenant under a residential lease comply with the terms of the lease?**

(a) Unless a residential lease provides otherwise, we may enter the leased premises at any reasonable time, without prior notice, to protect the interests of the Indian landowners and ensure that the tenant is in compliance with the operating requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will initiate an appropriate investigation within 10 business days of that notification. If we find out from another source that a specific lease violation has occurred, we will initiate an appropriate investigation and make a reasonable attempt to notify the Indian landowners.

**§ 162.347 What will BIA do about a violation under a residential lease?**

(a) If we determine that a residential lease has been violated, we will send the tenant and its sureties and any mortgagee a notice of violation within 5 business days of that determination. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within 10 business days of the receipt of a notice of violation, the tenant must:

(1) Cure the violation and notify us in writing that the violation has been cured;

(2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or

(3) Request additional time to cure the violation.

**§ 162.348 What will BIA do if a violation of a residential lease is not cured on time?**

(a) If the tenant does not cure a violation of a residential lease within the requisite time period, we will consult with the Indian landowners, as appropriate, and determine whether:

(1) We should cancel the lease under paragraph (c) of this section and §§ 162.350 through 162.354;

(2) We should invoke any other remedies available to us under the lease, including collecting on any available bond;

(3) The Indian landowners wish to invoke any remedies available to them under the lease; or

(4) The tenant should be granted additional time in which to cure the violation.

(b) If we decide to grant a tenant additional time in which to cure a violation, the tenant must proceed diligently to complete the necessary corrective actions within a reasonable or specified time period from the date on which the extension is granted.

(c) If we decide to cancel the lease, we will send the tenant and its sureties and any mortgagee a cancellation letter within 5 business days of that decision. The cancellation letter must be sent to the tenant by certified mail, return receipt requested. We will also provide actual or constructive notice of a cancellation decision to the Indian landowners, as appropriate. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) Notify the tenant of the amount of any unpaid rent, interest charges, or late payment penalties due under the lease;

(3) Notify the tenant of its right to appeal under part 2 of this chapter, as modified by § 162.349, including the amount of any appeal bond that must be posted to perfect an appeal of the cancellation decision;

(4) Order the tenant to vacate the property within 30 days of the date of receipt of the cancellation letter, if an appeal is not perfected by that time; and

(5) If the lease so provides, cancellation will be subject to the approval of the holder of any outstanding leasehold mortgage.

**§ 162.349 Will BIA's appeal bond rules apply to cancellation decisions?**

(a) The appeal bond provisions of part 2 of this chapter will not apply to appeals from lease cancellation decisions made under § 162.348. Instead, when BIA decides to cancel a residential lease, we may require that the tenant post an appeal bond in order to perfect an appeal of the cancellation decision. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) An appeal bond should be set in an amount necessary to protect the Indian landowners against financial losses that will likely result from the delay caused by an appeal. Appeal bond requirements will not be separately appealable, but may be contested during the appeal of the lease cancellation decision.

(c) If the appeal bond is not posted, BIA can dismiss the appeal. That dismissal will be final for the Department of the Interior.

**§ 162.350 When is a cancellation of a residential lease effective?**

A cancellation decision involving a residential lease becomes stayed and not effective 30 days after either the tenant receives a cancellation letter from us, or 40 days from the date the letter is mailed, whichever is earlier. The cancellation decision will be further stayed if the tenant perfects an appeal under §§ 162.348 and 162.349 and part 2 of this chapter, unless the decision is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the tenant must

continue to pay rent and comply with the other terms of the lease. If an appeal is not perfected in accordance with § 162.350 and part 2 of this chapter, the cancellation decision will be effective 31 days after either the tenant receives a cancellation letter from us, or 41 days from the date the letter is mailed, whichever is earlier.

**§ 162.351 Can BIA take emergency action if leased premises are threatened?**

We may take appropriate emergency action if there is a natural disaster or if a tenant or any other party causes or threatens to cause immediate and significant harm to the leased premises during the term of a residential lease. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm. We will make reasonable efforts to notify the Indian landowners, either before or after the emergency action is taken.

**§ 162.352 What will BIA do if a tenant remains in possession after a lease expires or is canceled?**

If a tenant remains in possession after the expiration or cancellation of a residential lease, we will treat the unauthorized use as a trespass. Unless we have been advised in writing by the applicable percentage of Indian landowners under § 162.304 that they are engaged in negotiations with the tenant to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action.

**§ 162.353 May a lease be terminated before its expiration date?**

(a) The lease may provide either party with one or more options to terminate, for any reason. If an option to terminate is provided, the lease must specify the time and manner in which the option must be exercised.

(b) The lease may be mutually terminated by agreement between the lessee and the applicable percentage of Indian landowners under § 162.304, subject to our approval and notice to any approved encumbrancer.

(c) If the lease so provides, termination will be subject to the approval of the holder of any outstanding leasehold mortgage.

**§ 162.354 What happens if the tenant abandons or does not diligently develop the leased premises?**

(a) If the tenant does not diligently develop the leased premises or abandons the leased premises before expiration of the lease term, the tenant and its sureties continue to be responsible for the obligations contained in the lease. The lease may specify a time after which the leased premises must be developed or a period of non-use after which the lease premises will be considered abandoned.

(b) We will treat the non-use as a violation of the lease under § 162.346, and may cancel the lease under §§ 162.347–162.350.

## Subpart D—Business Leases

### General Provisions

**§ 162.400 What types of leases are covered by this subpart?**

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with any improvements) on Indian land, authorizing the development or use of the leased premises.

(b) Leases covered by this subpart may authorize the construction of single-purpose or mixed use projects designed for use by any number of tenants or occupants. These leases may include:

(1) Leases for residential purposes that are not covered in subpart C;

(2) Leases for public, religious, educational, and recreational purposes; and

(3) Commercial or industrial leases for retail, office, manufacturing, storage, and/or other business purposes.

**§ 162.401 How will BIA accommodate tribal laws on land under a business lease?**

(a) Unless prohibited by Federal law, we will recognize and accommodate tribal laws regulating activities on land under a residential lease, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.

(b) This paragraph applies when this subpart is inconsistent with a tribal law and § 162.109 prohibits tribal law to supersede or modify this subpart. We may waive provisions of this subpart under 25 CFR part 1, if the waiver does not:

(1) Violate a Federal statute or judicial decision; or

(2) Conflict with our general trust responsibility under Federal law.

### How To Obtain a Lease

**§ 162.402 How and when can a business lease be obtained?**

If you are a potential lessee, you may negotiate a lease with an Indian landowner. The lease is subject to review and approval by the Secretary. Generally, business leases will not be advertised for competitive bid. You may request, in writing, the names and addresses of the Indian landowners or their representatives for the purpose of negotiating a lease.

**§ 162.403 When can the Indian landowners grant a business lease?**

(a) We can approve business leases on tribal land only with the written consent of the tribe, as evidenced by an appropriate tribal resolution. Tribal written consent is also required for a lease of any tribally-owned undivided interest(s) in a fractionated tract, subject to our approval, except when the individual owners have consented in the percentages indicated in § 162.404. Where a tribal land assignment has been made to a tribal member or some other individual under tribal law or custom, and the assignee subsequently leases to another party, the assignee and the tribe must both consent to the lease, subject to our approval.

(b) Adult Indian landowners, or emancipated minors, may consent to business leases of their land, including undivided interests in fractionated tracts, subject to our approval.

**§ 162.404 What are the consent requirements for a business lease on a fractionated tract?**

(a) Except for Alaska, the Indian landowners must determine the percentage referred to in the Indian Land Consolidation Act Amendments of 2000, 25 U.S.C. section 2218, as follows:

| If the number of owners of the undivided interest in the tract is. . . | Then the percentage of owners who must approve of the lease is. . . |
|---|---|
| (1) Five or fewer ..... | 100 percent. |
| (2) More than five but less than 11. | 80 percent. |
| (3) More than 10 but fewer than 20. | 60 percent. |
| (4) Twenty or more ... | Over 50 percent. |

(b) In Alaska, Indian landowners, or their representatives who may execute leases under § 162.405 of this part may negotiate business leases of Indian land only if:

(1) The owners of a majority of the interests have negotiated a lease that we approve;

(2) We grant the lease on behalf of those persons for whom we are authorized to grant leases under § 162.404(c); and

(3) Our consent when combined with the consent of the owners provides 100 percent consent.

(c) We may give written consent to a lease, and that consent must be counted in the percentage ownership described in paragraphs (a) and (b) of this section, on behalf of:

(1) The individual owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

(2) Any heir or devisee if the heir or devisee has been determined but after reasonable attempts have been made, cannot be located;

(3) Individuals who are found to be non compos mentis, or determined to be an adult in need of assistance or under legal disability as defined in part 115 of this chapter;

(4) Orphaned minors who do not have guardians duly appointed by a court of competent jurisdiction;

(5) Individuals who have given us a written power of attorney to lease their land; and

(6) The individual landowners of a fractionated tract where we have provided the Indian landowners with written notice of our intent to grant a lease on their behalf, but the Indian landowners are unable to agree upon a lease during a 3-month negotiation period immediately following such notice, and the land is not being used by an Indian landowner.

**§ 162.405 Who can represent the Indian landowners in negotiating or granting a business lease?**

The following individuals or entities may represent an individual Indian landowner, provided that there are no Federal or tribal laws prohibiting this activity:

(a) An adult with custody acting on behalf of his or her minor children;

(b) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;

(c) An adult, legal entity who has been given a written power of attorney that:

(1) Meets all of the formal requirements of any applicable Federal, tribal or state law;

(2) Identifies the attorney-in-fact and the land to be leased; and

(3) Describes the scope of the power granted and any limits thereon.

(d) Any representative who is authorized to practice before the Department of the Interior under 43 CFR part 1.3.

**§ 162.406 When can BIA grant a permit for business use?**

(a) We may grant a permit for business use in the same manner as we would grant a business lease under § 162.404(c) of this part. We may also grant a permit on behalf of individual Indian landowners, without prior notice, if it is impractical to provide notice to the owners and no substantial injury to the land will occur, or to protect the trust resource, but we must give the Indian landowners subsequent immediate notice and advise them of their right to appeal the decision under part 2 of this chapter. If the permit is granted to protect the trust resource, the permit will be effective immediately under part 2 of this chapter.

(b) We may grant a permit for business use on government land.

(c) We will not grant a permit for business use on tribal land, but a tribe may grant a permit, subject to our approval, in the same manner as it would grant a lease under § 162.403.

(d) Permits may be revoked upon reasonable notice to the permittee, as specified in the permit. Decisions to revoke a permit may not be appealed under part 2 of this chapter.

(e) Permits may not be assigned.

**§ 162.407 How will BIA estimate the fair market rental of Indian land?**

We will use an appraisal to determine the fair market rental of land before we grant or approve a lease, except as provided in paragraph (d) of this section.

(a) The purpose of the appraisal is to support the Indian landowners in their negotiations, and to assist in our consideration of whether a business lease is in the Indian landowners' best interest.

(b) We will either prepare the appraisal ourselves or use an appraisal from the Indian landowner or lessee subject to our approval.

(c) The appraisal must be prepared in accordance with USPAP.

(d) Upon a duly adopted Tribal Resolution, we will use some other type of valuation for a business lease on tribal land, subject to our approval.

**§ 162.408 What documents must BIA review before granting or approving a business lease?**

If you are a lessee, you must submit the documents required by this section, unless we decide otherwise.

(a) If you are a corporation, limited liability company, partnership, joint venture, or other legal entity, you must be in good standing, authorized to conduct business in the state where the land is located, or on the reservation, if applicable. You must provide organizational documents, certificates, filing records, and resolutions or other authorization documents, as needed to show that the lease will be enforceable against you and that you will be able to perform all of your lease obligations.

(b) We may require you to pay for an independent appraisal, which we must review and approve, to support the negotiated rent and term provisions in the lease.

(c) We may require you to provide, at a minimum, financial statements and credit reports or, where such records are not available, other appropriate documentation to show that you can meet the monetary obligations under the lease.

(d) We may require you to provide proof that the proposed use is in conformance with applicable tribal ordinances.

(e) If the proposed lease will authorize new construction, we may require you to provide:

(1) Environmental reports, archaeological reports and other documents that we need to comply with environmental laws and land use requirements (if possible, we will adopt any tribal environmental review as our NEPA review);

(2) A preliminary site plan identifying the proposed location of any new buildings, roads and utilities, and a construction schedule showing the tentative commencement and completion dates for those improvements; and

(3) A certified survey plat of the leased premises that includes the legal description of the land encumbered by the lease, and a description of each tract of trust/restricted land in the lease and the acreage of each. Plats should show the tie-in to the nearest corner of a public survey, all courses and distances, exceptions, and tract acreages.

(f) We may require you to provide additional documentation to demonstrate its ability to perform all of the lease obligations.

**§ 162.409 How and when will BIA decide whether to approve a business lease?**

(a) Before we approve a business lease, we must determine in writing that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances (including preparation of the appropriate review documents under NEPA);

(3) Assure ourselves that adequate consideration has been given to:

(i) The relationship between the use of the leased premises and the use of neighboring lands;

(ii) The height, quality, and safety of any structures or other facilities to be constructed on the leased premises;

(iii) The availability of police and fire protection, utilities, and other essential community services;

(iv) The availability of judicial forums for all criminal and civil matters arising on the leased premises; and

(v) The effect on the environment of the proposed land use.

(4) Require any lease modifications or mitigation measures that are needed to satisfy any requirements, or any other Federal or tribal land use requirements; and

(5) Receive notice from the tribe that all tribal procedures regarding tribal land development and land use have been satisfied.

(b) When we receive a business lease and all of the supporting documents that conform to this part, we will approve, disapprove, or return the submission for revision within 60 days of the date of our receipt of the documents. If we do not act within 60 days, the Indian landowner may take appropriate action under part 2 of this chapter. If we approve or disapprove a lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter. Copies of business leases that have been granted or approved will be provided to the tenant, and made available to the Indian landowners upon request.

**§ 162.410 When will a business lease be effective?**

Unless otherwise provided in the lease, a business lease will be effective on the date on which the lease is granted or approved by us. A business lease may be made effective on some past or future date, by agreement, but such a lease may not be granted or approved more than one year before the date on which the lease term is to commence. All approvals must be in writing.

**§ 162.411 For purposes of appeal, when will a BIA decision to grant or approve a business lease be effective?**

Our decision to grant or approve a business lease will be effective immediately, notwithstanding any appeal that may be filed under part 2 of this chapter.

**§ 162.412 Must a business lease or permit be recorded?**

(a) A business lease or permit must be recorded in the Land Titles and Records Office with jurisdiction over the land. We will record the lease or permit immediately following our approval under this subpart. The business lease or permit may also be recorded in the local county recorder's office.

(b) Business leases of tribal land that do not require our approval under § 162.102 of this part must be recorded by the tribe in the Land Titles and Records Office with jurisdiction over the land.

## Lease Requirements

**§ 162.413 Is there a standard business lease form?**

No, based on the need for flexibility in negotiating and drafting of appropriate lease terms and conditions, there is no standard business lease form that must be used. We will assist the Indian landowners in drafting lease provisions that conform to the requirements of this part.

**§ 162.414 Are there any provisions that must be included in a business lease?**

In addition to the other requirements of this part, all business leases must provide that:

(a) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(b) Nothing contained in this lease must operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination must not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties must be notified of any such change in the status of the land;

(c) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises; and

(d) The lessee must comply with all applicable Federal, tribal, state and local laws, ordinances, rules, regulations, and other legal requirements.

**§ 162.415 Are there any formal requirements that must be satisfied in the execution of a business lease?**

(a) A business lease must identify the Indian landowners and their respective interests in the leased premises. The requisite percentage of landowners must consent in writing to the lease. One who executes a lease in a representative capacity under § 162.405 must identify the owner being represented and the authority under which such action is being taken.

(b) The lessee must provide evidence of appropriate authority to execute a business lease.

(c) A business lease must include a citation of the provisions in this subpart that authorize our approval, along with a citation of the formal documents by which such authority has been delegated to the official taking such action.

(d) All signatures of the landowner(s) and lessee(s) may be required to be either witnessed by two individuals or be notarized.

**§ 162.416 How should the land be described in a business lease?**

A business lease must describe the leased premises by reference to a public survey. Where there are undivided interests owned in fee status, the aggregate portion of trust or restricted interests should be identified in the description of the leased premises.

**§ 162.417 How much rent must be paid under a business lease?**

(a) The lease must require the initial payment of fair market rental, based on a fixed amount, a percentage of the projected income, or a combination of both unless paragraphs (c), (d) and (f) of this section permit a lesser amount.

(b) Unless the lessee is paying nominal rental as described in paragraphs (c), (d) and (f) of this section, or unless the rental amount is based primarily on a percentage of income, the lease may be reviewed annually in accordance with § 162.418, but must provide for a review and possible adjustment of the rental, at a minimum, every fifth year.

(c) We will approve a negotiated lease of tribal land, or of any undivided tribal interest in a fractionated allotment, which provides for the payment of nominal rent, or less than a fair market rental, if the tribe provides a resolution containing an explanation why approval will serve the tribe's best interest over the entire period in which the reduced rent will be paid. Unless otherwise specified, the reduced rent must be applied for the entire lease term.

(d) We may approve a lease of individually-owned Indian land which provides for the payment of nominal rent, or less than a fair market rental, if:

(1) The lease is for religious, educational, recreational, cultural, or other public purposes;

(2) The lessee is a member of the individual Indian landowner's immediate family or a co-owner; or

(3) The lessee is a joint venture or other legal entity in which the Indian owners directly participate in the revenues or profits generated by the lease, and the distribution of profits or revenues to the owners is projected to exceed the rent that would otherwise be paid over the entire lease term.

(e) We may grant on behalf of non-consenting minority undivided interest owners only if the lease provides for payment of fair market value for their interest(s).

(f) If new construction is required, the lease may provide for the payment of less than a fair annual rental during the

pre-development and construction periods specified in the lease.

**§ 162.418 Must the rent be adjusted under a business lease?**

If rental adjustments are required by us, the lease must specify:

(a) When adjustments are made.

(b) Who makes the adjustments.

(c) What the adjustments are based on.

(d) How disputes arising from the adjustments are resolved.

**§ 162.419 When are rental payments due under a business lease?**

A business lease must specify the dates on which all rental payments are due. Unless otherwise provided in the lease, rental payments may not be made or accepted more than one year in advance of the due date. Rental payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

**§ 162.420 Will untimely rental payments made under a business lease be subject to interest charges or late payment penalties?**

A business lease must specify the rate at which interest will accrue on any rental payment not made by the due date or any other date specified in the lease. A lease may also identify additional late payment penalties that will apply if a rental payment is not made by a specified date. Unless otherwise provided in the lease, such interest charges and late payment penalties will apply in the absence of any specific notice to the lessee from us or the Indian landowners, and the failure to pay such amounts will be treated as a lease violation under § 162.450.

**§ 162.421 To whom can rental payments be made under a business lease?**

(a) A business lease must specify whether rental payments will be made directly to the Indian landowners or to us on behalf of the Indian landowners. Any changes to the direct pay provision of the lease must be made by amendment to the lease, but such amendment will only require the consent of the individual requesting direct pay and the lessee, and approval of the Secretary. If the lease provides for payment to be made directly to the Indian landowners, the lease must also require that the lessee either provide immediate proof of payment to us or retain specific documentation evidencing proof of payment, such as canceled checks, cash receipt vouchers, or copies of money orders or cashier's checks, for the duration of the lease plus 6 years and 90 days.

(b) Rental payments made directly to the Indian landowners must be made to the parties specified in the lease, unless the lessee receives notice of a change of ownership. Unless otherwise provided in the lease, rental payments may not be made payable directly to anyone other than the Indian landowners.

(c) A lease that provides for rental payments to be made directly to the Indian landowners must also provide for such payments to be suspended and the rent thereafter paid to us, rather than directly to the Indian landowners, if:

(1) An Indian landowner dies;

(2) An Indian landowner requests that payment be made to us;

(3) An Indian landowner is found by us to be in need of assistance in managing his/her financial affairs; or

(4) We determine after consultation with the Indian landowner(s), that direct payment should be discontinued.

**§ 162.422 What form of rental payment can be accepted under a business lease?**

(a) When rental payments are made directly to the Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) Payments made to us may be delivered in person or by mail. We will not accept cash, foreign currency, or third-party checks. We will accept:

(1) Personal or business checks drawn on the account of the lessee;

(2) Money orders;

(3) Cashier's checks;

(4) Certified checks; or

(5) Electronic funds transfer payments.

**§ 162.423 What other types of payments are required under a business lease?**

(a) The lessee may be required to pay additional fees, taxes, and/or assessments associated with the use of the land, as determined by entities having jurisdiction over the land. The lessee must pay these amounts to the appropriate office.

(b) Except as otherwise provided in part 171 of this chapter, if the leased premises are within an Indian irrigation project or drainage district, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. Failure to make such payments will constitute a violation of the lease.

**§ 162.424 How long can the term of a business lease run?**

(a) A lease will specify the term of the lease, as well as any option to renew, extend, or terminate.

(b) The lease term, including any renewal period, must be reasonable, given the purpose of the lease and the type of financing and level of investment required.

(c) Unless otherwise authorized by Federal statute, leases for business purposes will have a maximum primary term that does not exceed 25 years. An extension for one additional term not to exceed 25 years may be included. Leases of land on the following reservations may be made for terms of not to exceed 99 years, including any option to renew: the Gila River Reservation, AZ; the Hualapai Reservation, AZ; the San Carlos Apache Reservation, AZ; Yavapai-Prescott Community Reservation, land on the Colorado River Reservation, AZ and CA., the Navajo Reservation, AZ, NM, and UT; the Palm Springs Reservation, CA; the Soboba Indian Reservation, CA; the Viejas Indian Reservation, CA; the Cabazon Indian Reservation, CA; the Fort Mohave Reservation, CA, AZ, and NV; the Southern Ute Reservation, CO; Hollywood (formerly Dania) Reservation, FL; the Coeur d'Alene Indian Reservation, ID; The Mille Lacs Indian Reservation with respect to a lease between an entity established by the Mille Lacs Band of Chippewa Indians and the Minnesota Historical Society, MN; the Pueblos of Cochiti, Pojoaque, Tesuque, Santa Ana (with the exception of the lands known as the "Santa Ana Pueblo Spanish Grant,"), and Zuni, NM; The Pyramid Lake Reservation, NV; the Burns Paiute Reservation, OR; the Spokane Reservation, WA; the Kalispel Indian Reservation, WA; the Swinomish Reservation, WA; the Tulalip Reservation, WA; leases of the lands comprising the Moses Allotment Number 10, Chelan County, WA; and lands held in trust for: the Twenty-nine Palms Band of Luiseno Mission Indians, CA; the Torres Martinez Desert Cahuilla Indians, CA; the Guidiville Band of Pomo Indians of the Guidiville Indian Rancheria, CA; the Cahuilla Band of Indians of California, CA; the Confederated Salish and Kootenai Tribes of the Flathead Reservation, MT; leases to the Devils Lake Sioux Tribe, or any organization of such tribe, of land on the Devils Lake Sioux Reservation, ND; the Pueblo of Santa Clara, NM; the Las Vegas Paiute Tribe of Indians, NV; the Reno Sparks Indian Colony, NV; the Cherokee Nation of Oklahoma, OK; the Confederated Tribes of the Umatilla Indian Reservation, OR; the Confederated Tribes of the Grand Ronde Community of Oregon, OR; the Confederated Tribes of the Colville

Reservation, WA; and any other reservations as authorized by Congress.

(d) Where the Secretary grants a lease under § 162.404(c)(1) on behalf of undetermined heirs or devisees of an individual Indian decedent owning 100 percent interest in the land, the maximum term of that lease may not exceed 2 years.

(e) A lease can be extended only by one renewal or extension, not to exceed 25 years. The exercise of the option must be in writing and the lease must specify:

(1) The time and manner in which the option must be exercised; and

(2) Any additional consideration, if any, which will be due upon the exercise of the option or the commencement of the renewal period.

(f) The lease may not:

(1) Be renewed or extended by holdover; or

(2) Provide a right of first refusal or any other type of preference with respect to a new lease.

(g) The Secretary must record in the Land Titles and Records Office the official notice to the lessee of the grant of extension or termination.

**§ 162.425 Can a business lease be amended, assigned, sublet, or mortgaged?**

Yes, a business lease can be amended, assigned, sublet, or mortgaged in accordance with §§ 162.426 to 162.431.

**§ 162.426 How and when can a business lease be amended?**

(a) A lease may authorize one or more of the Indian landowners, or a designated representative of the Indian landowners, to consent to an amendment on the landowners' behalf, subject to our approval. The lease may also designate us as the landowners' representative. A designated landowner or representative may not negotiate or consent to an amendment that would:

(1) Reduce the payment obligations or terms to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or modify the term of the lease.

(b) Where the Indian landowners have not designated a representative for the purpose of consenting to an amendment, such consent may be granted by or on behalf of the landowners in the same manner as a new lease.

**§ 162.427 May a lease be assigned without the consent of the Indian landowners?**

(a) The lease may be assigned without the consent of the Indian landowners if:

(1) The lease provides for assignments without further consent of the landowners; or

(2) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance; and the assignee agrees in writing to assume all of the lessee's obligations under the lease, including bonding requirements.

(b) If the Indian landowners' consent is required, it must be obtained in the same manner as a new lease, unless the lease authorizes one or more of the Indian landowners to consent on behalf of all such owners.

(c) If the lease provides, consent must be obtained from any sureties or guarantors.

(d) The assignment of a lease must be approved by the Secretary. Such approval will not be withheld providing that our approval will protect the best interests of the Indian landowners. To make that determination we will consider whether:

(1) The proposed use by the assignee will require an amendment of the lease,

(2) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(3) The assignee has provided supporting documents which demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease.

(e) The lease may provide that assignments may be made without the consent of the landowners, but the assignments must be approved by the Secretary.

**§ 162.428 May a lease be subleased without the consent of the Indian landowners and the approval of the Secretary?**

(a) The lease may provide for subleasing without the consent of the Indian landowners when the sublease is part of a commercial development or residential development for which a general plan has been submitted and approved and we have approved a sublease form for use in the project. The lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval of the Secretary. A copy of the executed sublease must be provided to us.

(b) If the owners' consent is required, it must be obtained in the same manner as a new lease, unless the lease authorizes one or more of the Indian landowners to consent on behalf of all such owners.

(c) Consent must be obtained from any sureties or guarantors.

(d) The sublessee must agree to be subordinated to the terms of the lease.

(e) If the lease requires that the sublease be approved by the Secretary, such approval will not be withheld providing that our approval will protect the best interests of the Indian landowners. To make that determination we will consider whether:

(1) The proposed use by the sublessee will require an amendment of the lease;

(2) The value of any part of the leased premises not covered by the sublease would be adversely affected; and

(3) The sublessee has bonded its performance and provided supporting documents which demonstrate that the sublease will be enforceable against the sublessee, and that the sublessee will be able to perform its obligations under the sublease.

**§ 162.429 How will BIA decide whether to approve an assignment or sublease under a business lease?**

(a) We will approve an assignment or sublease under a business lease if:

(1) The required consents have been obtained from the parties to the lease under § 162.404 and the tenant's sureties and encumbrancers;

(2) The tenant is not in violation of the lease;

(3) The assignee agrees to be bound by, or the subtenant agrees to be subordinated to, the terms of the lease; and

(4) We find no compelling reason to withhold our approval in order to protect the best interests of the Indian owners.

(b) In making the finding required by paragraph (a)(4) of this section, we will consider whether:

(1) The Indian landowners should receive any income derived by the tenant from the assignment or sublease, under the terms of the lease;

(2) The proposed use by the assignee or subtenant will require an amendment of the lease;

(3) The value of any part of the leased premises not covered by the assignment or sublease would be adversely affected; and

(4) The assignee or subtenant has bonded its performance and provided supporting documents that demonstrate that the lease or sublease will be enforceable against the assignee or subtenant, and that the assignee or subtenant will be able to perform its obligations under the lease or sublease.

**§ 162.430 May a lease be mortgaged without the consent of the Indian landowners?**

(a) The lease may be mortgaged without further consent of the Indian landowners for the purpose of borrowing capital for commercially reasonable purposes defined in the lease

if the lease contains a general authorization for such a mortgage.

(b) The mortgage cannot secure any unrelated debts owed by the lessee to the mortgagee.

(c) The mortgage may be refinanced.

(d) The encumbrance instrument must be approved by us.

**§ 162.431 How will BIA decide whether to approve a leasehold mortgage under a business lease?**

(a) We will approve a leasehold mortgage under a business lease if:

(1) The required consents have been obtained from the parties to the lease under § 162.404 and the tenant's sureties;

(2) The mortgage covers only the tenant's interest in the leased premises, and no unrelated collateral; and

(3) We find no compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we will consider whether:

(1) The tenant's ability to comply with the lease would be adversely affected by any new loan obligations;

(2) Any lease provisions would be modified by the mortgage;

(3) The remedies available to us or to the Indian landowners would be limited (beyond any additional notice and cure rights to be afforded to the mortgagee), in the event of a lease violation; and

(4) Any rights of the Indian landowners would be subordinated or adversely affected in the event of a loan default by the tenant.

**§ 162.432 When will a BIA decision to approve an amendment, assignment, sublease, or mortgage under a business lease be effective?**

Our decision to approve an amendment, assignment, sublease, or mortgage under a business lease will be effective immediately, even though an appeal has been filed under part 2 of this chapter. Copies of approved documents will be provided to the party requesting approval, and made available to the Indian landowners upon request.

**§ 162.433 Must an amendment, assignment, sublease, or mortgage approved under a business lease be recorded?**

An amendment, assignment, sublease, or mortgage approved under a business lease must be recorded in our Land Titles and Records Office that has jurisdiction over the leased premises. We will record the document immediately following our approval under this subpart.

**§ 162.434 When will BIA take action on an amendment, assignment, sublease, or mortgage under a business lease?**

(a) We will take action on a business lease amendment, assignment, sublease, or mortgage within 60 days of the date of our receipt of the complete assignment and all supporting documents. If we do not act within 60 days, any interested party may take appropriate action under part 2 of this chapter. If we approve or disapprove an amendment, assignment, sublease, or mortgage, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter. Copies of business lease amendments, assignments, subleases or mortgages that have been granted or approved will be provided to the tenant, and made available to the Indian landowners upon request.

(b) Copies of approved documents will be provided to the party requesting approval, and made available to the Indian landowners upon request.

**§ 162.435 How can the leased premises be used under a business lease?**

A business lease must describe the authorized uses of the leased premises. Any use of the leased premises for an unauthorized purpose, or a failure by the lessee to maintain continuous operations throughout the lease term unless so provided in the lease, will be treated as a lease violation.

**§ 162.436 Can improvements be made under a business lease?**

Yes, improvements can be made under a business lease. A business lease must:

(a) Describe, or provide for development of, a plan that describes the type and location of any improvements to be constructed by the lessee. Development plans for the construction of those improvements will require the review and approval by tribal officials, if applicable, and must be filed with us before the commencement of construction, unless specifically exempted in the lease.

(b) Provide a construction schedule.

**§ 162.437 Who will own the improvements made under a business lease?**

(a) A business lease must specify who will own any improvements constructed by the lessee during the lease term. The lease must indicate whether any improvements constructed by the lessee will remain on the leased premises upon the expiration or termination of the lease, providing for the improvements to either:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and us; or

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before construction of such improvements.

(b) If the lease allows the lessee to remove the improvements, it must also provide the Indian landowners with an option to waive the removal requirement and take possession of the improvements if they are not removed within the specified time period. If the Indian landowners choose not to exercise this option, we will take appropriate enforcement action to ensure removal and restoration of the premises at the lessee's expense. This obligation survives the termination or expiration of the lease.

(c) A business lease may also contain alternative provisions for disposal of the leasehold improvements, including provision for reimbursement of the residual value of the improvements at the termination of the lease.

**§ 162.438 What indemnities are required under a business lease?**

(a) A business lease must require that the lessee indemnify and hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises, unless the lessee would be prohibited by law from making such an agreement.

(b) Unless the lessee would be prohibited by law from making such an agreement, a business lease must specifically require that the lessee indemnify the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous materials from the leased premises that occurs during the lease term, regardless of fault, unless the liability or cost arises from the gross negligence or wilful misconduct of the Indian landowner.

**§ 162.439 How will payment rights and obligations relating to business leases be allocated between the Indian landowners and the lessee?**

The lease must specify the distribution of any settlement funds or other payments arising from certain actions that diminish the value of the land or the improvements thereon. Such payments may include, but are not limited to:

(a) Insurance proceeds;

(b) Trespass damages; and

(c) Condemnation awards.

**§ 162.440 Can a business lease provide for negotiated remedies in the event of a violation?**

(a) A business lease of tribal land may provide the tribe with certain negotiated remedies in the event of a lease violation, including the power to terminate the lease. A business lease of individually-owned land may provide the individual Indian landowners with similar remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the landowners.

(b) The negotiated remedies described in paragraph (a) of this section will apply in addition to the cancellation remedy available to us under § 162.452. If the lease specifically authorizes us to exercise any negotiated remedies on behalf of the Indian landowners, the exercise of such remedies may substitute for cancellation.

(c) A business lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, for example, if they conflict or diminish our trust responsibility to the Indian landowners or are contrary to Federal law, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us under § 162.452.

**§ 162.441 Must a lessee or assignee provide a bond for a lease?**

(a) Except as provided in paragraph (c) of this section, the lessee or assignee will be required to provide a bond to secure:

(1) The payment of one year's rental;

(2) The construction of any required improvements;

(3) The performance of any additional lease obligations, including the payment of operation and maintenance charges under § 162.424;

(4) The restoration and reclamation of the leased premises, to their condition at the commencement of the lease term or some other specified condition; and

(5) Applicable tribal laws and policies.

(b) The lease may provide that we may adjust security or bond requirements at any time to reflect changing conditions.

(c) The lease may provide that a bond is not required, however we must determine that this is in the best interest of the landowners.

**§ 162.442 What forms of bond can be accepted under a business lease?**

We will only accept bonds in the following forms:

(a) Negotiable Treasury securities that:

(1) Have a market value at least equal to the bond amount; and

(2) Are accompanied by a statement granting full authority to us to sell such securities in case of a violation of the terms of the lease.

(b) Certificates of deposit that indicate on their face that our approval is required before redemption by any party; and

(1) Have a face value at least equal to the bond amount, plus any penalties for early redemption; and

(2) Are accompanied by a statement granting full authority to us to sell such securities in case of a violation of the terms of the lease.

(c) Irrevocable letters of credit (LOC) issued by Federally-insured financial institutions authorized to do business in the United States. LOC's must:

(1) Contain a clause that grants us authority to demand immediate payment if the lessee defaults or fails to replace the LOC within 30 calendar days before its expiration date;

(2) Be payable to the Department of the Interior, BIA;

(3) Be irrevocable during its term and have an initial expiration date of not less than one year following the date BIA receives it; and

(4) Be automatically renewable for a period of not less than one year, unless the issuing financial institution provides BIA with written notice at least 90 calendar days before the letter of credit's expiration date that it will not be renewed.

(d) Surety bond issued by a company approved by the U.S. Department of the Treasury;

(e) Assignment of savings account; or

(f) Any other form of highly liquid, non-volatile security subsequently approved by us that is easily convertible to cash by us and for which Secretarial approval is required before redemption by any party.

**§ 162.443 How will a bond be administered?**

(a) If a lease requires a bond or guaranty, the bond or guaranty must remain effective throughout the lease term and any renewal period. Alternatively, the lease may provide for the bond or guaranty to be modified or released:

(1) After a specified period of time;

(2) If we determine that the original bond or guaranty is no longer needed to secure the contractual obligations; or

(3) If, for leases on tribal lands, the tribe requests the modification or release of the bond, and we approve the request.

(b) If the lease does not initially require a bond or guaranty, or if it provides for modification or release at some future date, the lease must allow us to establish or reinstate a bond or guaranty requirement at any time we deem it necessary to secure the contractual obligations. A tribe may request that we establish or reinstate a bond or guaranty requirement.

(c) We may require that the surety or guarantor provide any supporting documents needed to show that the bond or guaranty will be enforceable, and that the surety or guarantor will be able to perform the guaranteed obligations. The surety or guarantor must provide notice of cancellation before canceling the bond.

(d) The lease must require that the lessee or assignee obtain the consent of the surety or guarantor, with respect to any amendment, assignment, sublease, or leasehold mortgage that directly impacts or affects the obligations and liabilities of the surety or guarantor. The lease must also provide for the surety or guarantor to receive a copy of any notice of default issued to the lessee by us or by the Indian landowners.

**§ 162.444 Will we require insurance for a business lease?**

We may require any or all of the following types of insurance depending upon the activity conducted under the lease: property, business interruption, liability, and casualty (such as for fire, hazard, or flood). If insurance is required, it must:

(a) Be provided in an amount sufficient to:

(1) Protect any improvements on the leased premises;

(2) Cover losses such as personal injury or death; and

(3) Protect the interest of the Indian landowner.

(b) Identify the Indian landowners and the United States as additional insured parties.

(c) Be provided by a nationally accredited insurance company, with a minimum insurer financial strength rating of "A" or its equivalent, authorized to do business in the state where the land is located.

**Lease Administration**

**§ 162.445 Will administrative fees be charged for actions relating to business leases?**

(a) We will charge an administrative fee each time we approve a business lease, amendment, assignment, sublease, mortgage, or related document. These fees will be paid by the lessee, assignee, or sublessee, to cover our costs in preparing or processing the documents and administering the lease.

(b) We will charge administrative fees based on the rent payable under the lease. The fee will be 3 percent of the annual rent payable, including any percentage-based rent that can be reasonably estimated. The minimum administrative fee is $10.00 and the maximum administrative fee is $500.00, and any administrative fees that have been paid will be non-refundable. However, we may waive all or part of these administrative fees, in our discretion.

(c) If all or part of the expenses of the work are paid from tribal funds, the tribe may establish an additional or alternate schedule of fees.

**§ 162.446 Will we notify a lessee when a rental payment is due under a business lease?**

We may issue bills or invoices to a lessee in advance of the dates on which rental payments are due under a business lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such bills or invoices are not delivered or received.

Lease Enforcement

**§ 162.447 What will we do if rental payments are not made in the time and manner required by a business lease?**

(a) A lessee's failure to pay rent in the time and manner required by a business lease will be a violation of the lease, and a notice of violation will be issued under § 162.450. If the lease requires that rental payments be made to us, we will send the lessee and its sureties a notice of violation within 10 business days after the date the rent was due. If the lease provides for payment directly to the Indian landowners, we will send the lessee and its sureties a notice of violation within 10 business days of the date on which we receive actual notice of non-payment from the landowners.

(b) If a lessee fails to provide adequate proof of payment or cure the violation within the requisite time period described in § 162.450, and the amount due is not in dispute, we may immediately take action to recover the amount of the unpaid rent and any associated interest charges or late payment penalties. We may also cancel the lease under § 162.451, or invoke any other remedies available under the lease or applicable law, including collection on any available bond or referral of the debt to the Department of the Treasury for collection. An action to recover any unpaid amounts will not be conditioned on the prior termination of the lease or any further notice to the lessee, nor will such an action be precluded by a prior termination.

(c) Partial payments may be accepted by the Indian landowners or us, but acceptance will not operate as a waiver with respect to any amounts remaining unpaid or any other existing lease violations. Unless otherwise provided in the lease, overpayments may be credited as an advance against future rental payments, or refunded. Lessee will not be entitled to any interest accrued on advanced payments.

(d) If a personal or business check is dishonored, and a rental payment is therefore not made by the due date, the failure to make the payment in a timely manner will be a violation of the lease and a notice of violation will be issued under § 162.450. Any payment made to cure such a violation, and any future payments by the same lessee, must be made by one of the alternative payment methods listed in § 162.422.

**§ 162.448 Will any special fees be assessed on delinquent rental payments due under a business lease?**

(a) The following special fees will be assessed if rent is not paid in the time and manner required, in addition to any interest or late payment penalties that must be paid to the Indian landowners under a business lease. The following special fees will be assessed to cover administrative costs incurred by us in the collection of the debt:

| The lessee will pay . . . | For . . . |
|---|---|
| (1) $50.00 | Administrative fee for dishonored checks. |
| (2) $25.00 | Administrative fee for our processing of each notice or demand letter. |
| (3) 18 percent of balance due. | Administrative fee charged by Treasury following referral for collection of delinquent debt. |

(b) If all or part of the expenses of the work are paid from tribal funds, the tribe may establish an additional or alternate schedule of fees.

**§ 162.449 How will we determine whether the activities of a lessee under a business lease are in compliance with the terms of the lease?**

(a) Unless a business lease provides otherwise, we may enter the leased premises at any reasonable time, without prior notice, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will initiate an appropriate investigation within 5 business days of that notification. If we find out from another source that a specific lease violation has occurred, we will initiate an appropriate investigation and make a reasonable attempt to notify the Indian landowners.

**§ 162.450 What will we do in the event of a violation under a business lease?**

(a) If we determine that there has been a violation of a business lease we will send the lessee and its sureties a notice of violation within 5 business days of that determination. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within 10 business days of the receipt of a notice of violation, the lessee must:

(1) Cure the violation and notify us in writing that the violation has been cured;

(2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or

(3) Request additional time to cure the violation.

**§ 162.451 What will we do if a violation of a business lease is not cured to our satisfaction within the requisite time period?**

(a) If the lessee does not cure a violation of a business lease within the requisite time period, we will consult with the Indian landowners, as appropriate, and determine whether:

(1) The lease should be canceled by us under paragraph (c) of this section and §§ 162.453 through 162.457;

(2) We should invoke any other remedies available to us under the lease, including collecting on any available bond;

(3) The Indian landowners wish to invoke any remedies available to them under the lease; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) If we decide to grant a lessee additional time in which to cure a violation, the lessee must proceed diligently to complete the necessary corrective actions within a reasonable or specified time period from the date on which the extension is granted.

(c) If we decide to cancel the lease, we will send the lessee, its encumbrancers, and its sureties a cancellation letter within 5 business days of that decision. The cancellation letter must be sent to the lessee by certified mail, return receipt requested. We will also provide actual or constructive notice of a cancellation decision to the Indian landowners. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) Notify the lessee of the amount of any unpaid rent, interest charges, or late payment penalties due under the lease;

(3) Notify the lessee of its right to appeal under part 2 of this chapter, as modified by § 162.452, including the amount of any appeal bond that must be posted with an appeal of the cancellation decision; and

(4) Order the lessee to vacate the property within 30 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time.

**§ 162.452 Will BIA's regulations concerning appeal bonds apply to cancellation decisions involving business leases?**

(a) The appeal bond provisions in part 2 of this chapter will not apply to appeals from lease cancellation decisions made under § 162.451. Instead, when we decide to cancel a business lease, we may require that the lessee post an appeal bond with an appeal of the cancellation decision. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) An appeal bond should be set in an amount necessary to protect the Indian landowners against financial losses that will likely result from the delay caused by an appeal. Appeal bond requirements will not be separately appealable, but may be contested during the appeal of the lease cancellation decision.

(c) If the appeal bond is not posted, BIA can dismiss the appeal. That dismissal will be final for the Department of the Interior.

**§ 162.453 When will a cancellation of a business lease be effective?**

A cancellation decision involving a business lease will not be effective until 30 days after either the lessee receives a cancellation letter from us, or ten days from the date the letter is mailed, whichever is earlier. The cancellation decision will be stayed if the lessee files an appeal under §§ 162.451 and 162.452 and part 2 of this chapter unless the decision is made immediately effective under part 2. While a cancellation decision is stayed, the lessee must continue to pay rent and comply with the other terms of the lease. If an appeal is not filed in accordance with § 162.453 and part 2 of this chapter, the cancellation decision will be effective on the 31st day after either the lessee receives a cancellation letter from us, or 10 days from the date the letter is mailed, whichever is earlier.

**§ 162.454 Can we take emergency action if the leased premises are threatened with immediate and significant harm?**

In the event of a natural disaster, or if a lessee or any other party causes or threatens to cause immediate and significant harm to the leased premises during the term of a business lease, we may take appropriate emergency action. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm. Reasonable efforts will be made to notify the Indian landowners, either before or after the emergency action is taken.

**§ 162.455 What will we do if a lessee holds over after the expiration or cancellation of a business lease?**

If a lessee remains in possession after the expiration or cancellation of a business lease, we will treat the unauthorized use as a trespass. Unless we have been advised in writing by the applicable percentage of Indian landowners under § 162.404 that they are engaged in good faith negotiations with the lessee to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action.

**§ 162.456 May a lease be terminated before its expiration date?**

(a) Yes, the lease may provide either party with one or more options to terminate, for any reason. If an option to terminate is provided, the lease must specify the time and manner in which the option must be exercised.

(b) The lease may be mutually terminated by agreement between the lessee and the Indian landowners, subject to our approval and notice to any approved encumbrancer. The percentage of consent by the landowners for termination must be in the same percentages as required to obtain a lease (*see* § 162.404).

**§ 162.457 What happens if the lessee abandons the lease?**

(a) If a lessee abandons the leased premises, the lessee and its sureties will not be relieved of the obligations contained in the lease.

(b) We may cancel the lease, effective immediately, and attempt to find a new lessee for the property.

**Subpart E [Amended]**

9. The title for subpart E is revised to read as follows:

**Subpart E—Special Requirements for Certain Reservations**

**Subpart F [Removed]**

10. Subpart F (§§ 162.600–162.633) is removed in its entirety.

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## LIST OF PUBLIC LAWS

**Note:** A cumulative List of Public Laws for the first session of the 108th Congress appears in Part II of this issue.

**Last List January 29, 2004**

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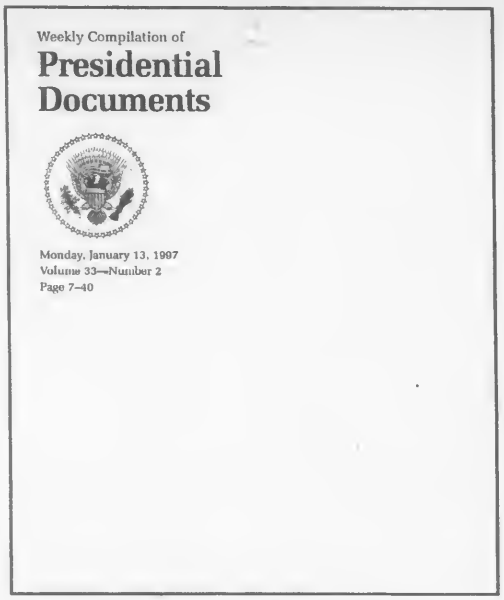


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