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4–19–05 Tuesday
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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.

2. The relationship between the Federal Register and Code of Federal Regulations.

3. The important elements of typical Federal Register documents.

4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, April 19, 2005
9:00 a.m.–Noon—(SESSION FULL)

Tuesday, May 17, 2005
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741-6008

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

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 04–130–2]

Asian Longhorned Beetle; Addition to Quarantined Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the Asian longhorned beetle regulations by adding portions of Middlesex and Union Counties, NJ, to the list of quarantined areas and restricting the interstate movement of regulated articles from those areas. That action was necessary to prevent the artificial spread of the Asian longhorned beetle into noninfested areas of the United States.

DATES: The interim rule became effective on January 24, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Michael B. Stefan, Director of Emergency Programs, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–7338.

SUPPLEMENTARY INFORMATION:

Background

The Asian longhorned beetle (ALB) is an insect native to China, Japan, Korea, and the Isle of Hainan. It is a destructive pest of hardwood trees. In addition, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of half an inch or more in diameter are also subject to infestation. The ALB regulations (7 CFR 301.51–1 through 301.51–9) restrict the interstate movement of regulated articles from quarantined areas to prevent the artificial spread of ALB to noninfested areas of the United States.

The regulations in § 301.51–3(a) provide that the Administrator of the Animal and Plant Health Inspection Service (APHIS) will list as a quarantined area each State, or each portion of a State, in which ALB has been found by an inspector, in which there is reason to believe ALB is present, or because of the area's inseparability for quarantine enforcement purposes from localities where ALB has been found.

In an interim rule effective January 24, 2005, and published in the **Federal Register** on January 28, 2005 (70 FR 4003–4005, Docket No. 04–130–1), we amended the ALB regulations by adding portions of Middlesex and Union Counties, NJ, to the list of quarantined areas in § 301.51–3(c). That action was necessary on an emergency basis to help prevent the artificial spread of ALB to noninfested areas of the United States.

Comments on the interim rule were required to be received on or before March 29, 2005. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

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

PART 301—DOMESTIC QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 70 FR 4003–4005 on January 28, 2005.

Done in Washington, DC, this 13th day of April 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–7766 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19616; Directorate Identifier 2004–CE–38–AD; Amendment 39–14058; AD 2005–08–06]

RIN 2120–AA64

Airworthiness Directives; CENTRAIR 101 Series Gliders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for all CENTRAIR 101 series gliders with other than elevator or aileron part number (P/N) SY991A hinge pins installed. This AD requires you to replace any installed elevator or aileron hinge pins that are not P/N SY991A hinge pins with P/N SY991A pins. This AD results from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. We are issuing this AD to replace incorrectly heat-treated elevator or aileron hinge pins, which could result in failure of the elevator or ailerons. Such failure during takeoff, landing, or flight operations could lead to loss of glider control.

DATES: This AD becomes effective on June 2, 2005.

As of June 2, 2005, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: To get the service information identified in this AD, contact CENTRAIR, Aerodome B.P.N. 44, 36300 Le Blanc, France; telephone: 02.54.37.07.96; facsimile: 02.54.37.48.64.

To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–

001 or on the Internet at *http://dms.dot.gov*. The docket number is FAA–2004–19616.

FOR FURTHER INFORMATION CONTACT: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this proposed AD? The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified FAA that an unsafe condition may exist on all CENTRAIR 101 series gliders. The DGAC reports occurrences of improperly heat-treated aileron and elevator hinge pins installed on the CENTRAIR 101 series gliders. Incorrectly heat-treated elevator or aileron hinge pins could result in longitudinal cracks that cause failure of the elevator or ailerons. CENTRAIR has made available new hinge pins (part number (P/N) SY991A) to replace any incorrectly heat-treated elevator or aileron hinge pins or hinge pins with longitudinal cracks.

What is the potential impact if FAA took no action? Failure of the elevator or ailerons during takeoff, landing, or flight operations could lead to loss of glider control.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all CENTRAIR 101 series gliders with other than elevator or aileron part number (P/N) SY991A hinge pins installed. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on December 13, 2004 (69 FR 72136). The NPRM proposed to require you to replace any installed elevator or aileron hinge pins that are not P/N SY991A hinge pins with P/N SY991A pins.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Changes to 14 CFR Part 39—Effect on the AD

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

Costs of Compliance

How many gliders does this AD impact? We estimate that this AD affects 57 gliders in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected gliders? We estimate the following costs to do the elevator and aileron hinge pin replacement. We have no way of determining the number of gliders that may need this hinge pin replacement. However, we have presented the costs to reflect all 57 gliders needing the mandatory replacement:

Labor cost	Parts cost	Total cost per glider	Total cost on U.S. operators
4 workhours × $65 per hour = $260	$1	$261	$261 × 57 = $14,877

Authority for This Rulemaking

What authority does FAA have for issuing this rulemaking action? Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this AD.

Regulatory Findings

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

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

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

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

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

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "Docket No. FAA–2004–19616; Directorate Identifier 2004–CE–38–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends 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. FAA amends § 39.13 by adding a new AD to read as follows:

2005–08–06 Centrair: Amendment 39–14058; Docket No. FAA–2004–19616; Directorate Identifier 2004–CE–38–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on June 2, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Gliders Are Affected by This AD?

(c) This AD affects Models 101, 101A, 101AP, and 101P gliders, all serial numbers, without elevator and aileron part number SY991A hinge pins installed, certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. The actions specified in this AD are intended to replace incorrectly heat-treated elevator or aileron hinge pins, which could result in failure of the elevator or ailerons. Such failure during takeoff, landing, or flight operations could lead to loss of glider control.

(e) To address this problem, you must do the following:

Actions	Compliance	Procedures
(1) Replace any installed elevator and aileron hinge pins that are not part number (P/N) SY991A hinge pins with P/N SY991A hinge pins.	Within the next 25 hours time-in-service (TIS) after June 2, 2005 (the effective date of this AD), unless already done.	Follow Société Nouvelle Centrair Service Bulletin No. 101–22, dated March 13, 2001.
(2) Do not install any elevator and aileron hinge pins that are not P/N SY991A hinge pins as specified in paragraph (e)(1) of this AD.	As of June 2, 2005 (the effective date of this AD).	Not Applicable.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Greg Davison, Aerospace Engineer, FAA, Small Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

Is There Other Information That Relates to This Subject?

(g) French AD Number 2001–247(A), dated June 27, 2001, also addresses the subject of this AD.

Does This AD Incorporate Any Material by Reference?

(h) You must do the actions required by this AD following the instructions in Société Nouvelle Centrair Service Bulletin No. 101–22, dated March 13, 2001. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get a copy of this service information, contact CENTRAIR, Aerodome B.P.N. 44, 36300 Le Blanc, France; telephone: 02.54.37.07.96; facsimile: 02.54.37.48.64. To review copies of this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov*. The docket number is FAA–2004–19616.

Issued in Kansas City, Missouri, on April 11, 2005.

Nancy C. Lane,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7564 Filed 4–18–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20136; Directorate Identifier 2004–NM–185–AD; Amendment 39–14061; AD 2005–08–09]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–200B, –200C, –200F, and –400F Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 747 series airplanes. This AD requires repetitive detailed inspections for cracks in the crease beam and adjacent structure of the fuselage, and related investigative and corrective actions if necessary. This AD is prompted by fatigue cracks found in the crease beam during a follow-on inspection of a previously installed modification. We are issuing this AD to find and fix fatigue cracking of the fuselage frame, which could result in reduced structural integrity of the frame and consequent rapid decompression of the airplane.

DATES: This AD becomes effective May 24, 2005.

The incorporation by reference of a certain publication listed in the AD is approved by the Director of the Federal Register as of May 24, 2005.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Docket: The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Washington, DC. This docket number is FAA–2005–20136; the directorate identifier for this docket is 2005–NM–185–AD.

FOR FURTHER INFORMATION CONTACT: Nick Kusz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6432; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with an AD for certain Boeing Model 747 series airplanes. That action, published in the **Federal Register** on January 28,

2005 (70 FR 4048), proposed to require repetitive detailed inspections for cracks in the crease beam and adjacent structure of the fuselage, and related investigative and corrective actions if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the single comment that has been submitted on the proposed AD. The commenter supports the proposed AD.

Conclusion

We have carefully reviewed the available data, including the comment that has been submitted, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 163 airplanes of the affected design in the worldwide fleet. This AD will affect about 30 airplanes of U.S. registry. The inspection will take about 8 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the inspection for U.S. operators is $15,600, or $520 per airplane, per inspection cycle.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–08–09 Boeing: Amendment 39–14061. Docket No. FAA–2005–20136; Directorate Identifier 2004–NM–185–AD.

Effective Date

(a) This AD becomes effective May 24, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 747–200B, –200C, –200F, and –400F series airplanes, line numbers 604 and subsequent, certificated in any category; as listed in Boeing Alert Service Bulletin 747–53A2504, dated August 19, 2004.

Unsafe Condition

(d) This AD was prompted by fatigue cracks found in the crease beam during a follow-on inspection of a previously installed modification. We are issuing this AD to find and fix fatigue cracking of the fuselage frame, which could result in reduced structural integrity of the frame and consequent rapid decompression of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Repetitive Inspections

(f) Accomplish a detailed inspection for cracks in the crease beam and adjacent structure of the fuselage by doing all the applicable actions in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2504, dated August 19, 2004; at the applicable time specified in paragraph (f)(1) or (f)(2) of this AD. Repeat the inspection thereafter at intervals not to exceed 6,000 flight cycles.

(1) For Groups 1 and 2 airplanes as identified in the service bulletin: Before the accumulation of 10,000 total flight cycles, or within 1,500 flight cycles after the effective date of this AD, whichever is later.

(2) For Groups 3 and 4 airplanes as identified in the service bulletin: Before the accumulation of 14,000 total flight cycles, or within 1,500 flight cycles after the effective date of this AD, whichever is later.

Related Investigative and Corrective Actions

(g) If any crack is found during any inspection required by paragraph (f) of this AD: Before further flight, repair the cracking in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2504, dated August 19, 2004. If cracking of the crease beam or outer tee chord attachment is found: Before further flight, do a high frequency eddy current inspection for additional cracking, and repair any cracking found, in accordance with the service bulletin. Where the service bulletin specifies contacting the manufacturer for disposition of certain repair conditions, repair before further flight in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or by an Authorized Representative for the Boeing Delegation Option Authorization (DOA) Organization, who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

No Reporting Required

(h) For certain airplanes, the service bulletin referenced in this AD recommends reporting any discrepancies to the manufacturer, but this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) An AMOC that provides an acceptable level of safety may be used for a repair required by this AD, if it is approved by an Authorized Representative for the Boeing DOA Organization who has been authorized by the Manager, Seattle ACO, to make such findings.

Material Incorporated by Reference

(j) You must use Boeing Alert Service Bulletin 747–53A2504, dated August 19, 2004, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get copies of the service information, go to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. To view the AD docket, go to the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC. To review copies of the service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on April 11, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7683 Filed 4–18–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19810; Directorate Identifier 2004–NM–119–AD; Amendment 39–14062; AD 2005–08–10]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, and –800 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 737–600, –700, and –800 series airplanes. This AD requires doing a general visual inspection for sealant at the interface of the upper spar fittings, strut side skins, and the fittings of the thrust reverser strut fairing on the engine struts; and applying an injection seal or silicone sponge rubber with fillet seal if necessary. This AD is prompted by a report that an injection seal in the engine strut area may not have been properly completed or installed during production. We are issuing this AD to prevent flammable fluid (such as fuel or hydraulic fluid) from leaking onto a hot engine exhaust nozzle or into the engine core fire zone, and consequently causing an uncontrolled fire or explosion.

DATES: This AD becomes effective May 24, 2005.

The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of May 24, 2005.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Docket: The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Washington, DC. This docket number is FAA–2004–19810; the directorate identifier for this docket is 2004–NM–119–AD.

FOR FURTHER INFORMATION CONTACT: Doug Pegors, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6504; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with an AD for certain Boeing Model 737–600, –700, and –800 series airplanes. That action, published in the **Federal Register** on December 14, 2004 (69 FR 74465), proposed to require doing a general visual inspection for sealant at the interface of the upper spar fittings, strut side skins, and the fittings of the thrust reverser strut fairing on the engine struts; and applying an injection seal or silicone sponge rubber with fillet seal if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been submitted on the proposed AD. Three commenters support the proposed AD.

Request for Shortening the Compliance Time

A commenter supports the proposed AD, but requests that the compliance time of 18 months or 3,500 flight cycles be shortened. The commenter suggests that, due to the low cost of modifying an airplane, short repair time, and the potential severity of a failure, the compliance time is too long.

We do not agree with the commenter's suggestion. In developing an appropriate compliance time, we considered the safety implications and normal maintenance schedules for timely accomplishment of the required inspection and repair. Further, we arrived at the compliance time with operator and manufacturer concurrence. In consideration of all of these factors, we determined that the compliance time, represents an appropriate interval in which the engine nacelle struts can be inspected, and repaired if required, in a timely manner within the fleet, while still maintaining an adequate level of safety. Operators are always permitted to accomplish the requirements of an AD at a time earlier than the specified compliance time. If additional data are presented that would justify a shorter compliance time, we may consider further rulemaking on this issue.

Conclusion

We have carefully reviewed the available data, including the comments that have been submitted, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 257 airplanes worldwide of the affected design. This AD will affect about 99 airplanes of U.S. registry. The inspection will take about 2 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the AD for U.S. operators is $12,870, or $130 per airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on

products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–08–10 Boeing: Amendment 39–14062. Docket No. FAA–2004–19810; Directorate Identifier 2004–NM–119–AD.

Effective Date

(a) This AD becomes effective May 24, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 737–600, –700, and –800 series airplanes, as identified in Boeing Special Attention Service Bulletin 737–54–1040, Revision 1, dated August 14, 2003; certificated in any category.

Unsafe Condition

(d) This AD was prompted by a report that an injection seal in the engine strut area may not have been properly completed or installed during production. We are issuing this AD to prevent flammable fluid (such as fuel or hydraulic fluid) from leaking onto a hot engine exhaust nozzle or into the engine core fire zone, and consequently causing an uncontrolled fire or explosion.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection and Corrective Action

(f) Within 18 months or 3,500 flight cycles after the effective date of this AD, whichever occurs first: Do a general visual inspection for sealant at the interface of the upper spar fittings, strut side skins, and the fittings of the thrust reverser strut fairing on the engine struts, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–54–1040, dated November 14, 2002; or Revision 1, dated August 14, 2003.

(1) If the injection seal is found to properly seal the entire gap, no further action is required by this AD.

(2) If the injection seal is not found to properly seal the entire gap or if the injection seal is found to be missing, before further flight, apply an injection seal or silicone sponge rubber with fillet seal in accordance with the Accomplishment Instructions of the service bulletin.

Alternative Methods of Compliance (AMOCs)

(g) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Material Incorporated by Reference

(h) You must use Boeing Special Attention Service Bulletin 737–54–1040, dated November 14, 2002; or Boeing Special Attention Service Bulletin 737–54–1040, Revision 1, dated August 14, 2003; to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get copies of the service information, go to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. To view the AD docket, go to the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC. To review copies of the service information, go to the National Archives and Records Administration. For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on April 11, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7685 Filed 4–18–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–278–AD; Amendment 39–14063; AD 2005–08–11]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB SF340A and SAAB 340B Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB SF340A and SAAB 340B series airplanes, that requires replacement of certain hydraulic hoses with new hydraulic hoses. This action is necessary to prevent cracking and/or rupture and subsequent failure of hydraulic hoses. Such failure could result in loss of hydraulic pressure and fluid quantity, and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective May 24, 2005.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 24, 2005.

ADDRESSES: The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. 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 National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601

Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: 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 Saab Model SAAB SF340A and SAAB 340B series airplanes was published in the **Federal Register** on March 5, 2004 (69 FR 10387). That action proposed to require replacement of certain hydraulic hoses with new hydraulic hoses.

Comments

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

Request To Withdraw Proposed Rule

One commenter, an operator, notes that since the publication of the proposed AD, the manufacturer has revised Section F of the Airworthiness Limitations Section of the SAAB 340 maintenance review board (MRB) document to Revision 3. The commenter states that the revised Airworthiness Limitations Section includes the replacement of the hydraulic hoses at the life-limits specified in SAAB Service Bulletin 340–29–022, Revision 01, dated February 20, 2003. The commenter states that, since the replacement of the hydraulic hoses is now in the Airworthiness Limitations Section, the proposed AD is not needed.

The FAA partially agrees. Revision 03 of the SAAB 340 MRB document was issued in October 2004. However, we are currently reviewing Revision 04 of the document, which, among other changes, addresses the replacement times for the hydraulic hoses.

The fact that the proposed revision to the Airworthiness Limitations Section now includes the replacement of the hydraulic hoses at the life-limits specified in the proposed AD does not mean that AD action is not necessary. Revisions to the Airworthiness Limitations Section that occur after a type certificate has been issued are not mandatory. An AD is the appropriate vehicle for mandating the changes to the Airworthiness Limitations Section. Also, the Airworthiness Limitations Section does not address what actions should be taken for hydraulic hoses that have already exceeded the 12,000 flight cycle limit. This AD mandates the replacement of hydraulic hoses that have already exceeded the 12,000 flight cycle limit. Once we have approved Revision 04 of the Airworthiness Limitations Section, we may consider additional rulemaking action to mandate repetitive replacement of the hydraulic hoses. No change has been made to this final rule in this regard.

Request To Include a Deferral From Compliance With the Airworthiness Limitations

One commenter, the manufacturer, notes that the parallel Swedish airworthiness directive, SAD–170, became effective on December 17, 2001, and had a compliance time of two years. The commenter notes that, since the expiration of the compliance time for that airworthiness directive, a revision of Section F, Airworthiness Limitations Section, of the MRB document was planned to include the hydraulic hoses and life-limits specified in SAAB Service Bulletin 340–29–022, Revision 01. The commenter notes that (at the time of comment submittal) the proposed release date of Revision 03 of the MRB document is May 2004.

The commenter states that, due to the absence of an FAA AD, U.S. operators may not have performed the actions in the service bulletin and must apply for a deferral from the requirements of the MRB report so that airplanes are not grounded until the hydraulic hoses have been replaced. The commenter also states that there is a compliance time conflict between the FAA AD and the proposed revision to the Airworthiness Limitations Section. The commenter suggests that it is necessary to include a statement in the FAA AD to give operators a deferral from the MRB report requirements until the compliance time in the FAA AD has expired.

We do not agree with the commenter's request to include a deferral from the requirements of the MRB report in this final rule. The MRB report is not mandatory for operators to follow unless the MRB requirements are required by an AD. Therefore, a deferral from the requirements of the MRB is not necessary. As stated previously, the latest revision (Revision 04) of Section F, Airworthiness Limitations Section, of the MRB document has not yet been FAA-approved. Once we have approved the document, we may consider additional rulemaking to require those actions specified in the document that relate to this AD. Therefore, at this time, no compliance time conflict exists between our AD and the Airworthiness Limitations Section, and no deferral is necessary. No change has been made to this final rule in this regard.

Request for Credit for Accomplishment of Original Issue of Service Bulletin

One commenter requests that, if an AD is issued, the original issue of SAAB Service Bulletin 340–29–022, dated December 14, 2001, be considered as an additional acceptable source of service information. The commenter states that considering the original issue of the service bulletin as an additional acceptable source of service information would save both operators and the FAA time and effort in requesting and addressing AMOCs. The commenter states that its fleet of SAAB 340B airplanes was modified per the original issue of the service bulletin. The commenter also states that it did not use the procedures for identification of the replacement hydraulic hoses that are included in the original issue and Revision 1 of the service bulletin. Instead, the commenter used the procedures mandated in section 45.14 of the Federal Aviation Regulations (14 CFR 45.14), "Identification of critical components." The commenter notes that it did not replace flap actuator hoses because those hoses had never failed. The commenter states that it used airplane cycles at the time of replacement of each hydraulic hose to start tracking the 12,000-flight-cycle life-limit for each hose.

We agree with the commenter's request. A new paragraph (b) has been included in this final rule and the subsequent paragraphs reidentified accordingly. The new paragraph (b) states that accomplishment of the original issue of SAAB Service Bulletin 340–29–022, dated December 14, 2001, is an additional appropriate source of service information. The paragraph also states that identifying newly installed hydraulic hoses by using the procedures mandated in section 45.14 of the Federal Aviation Regulations (14 CFR 45.14), "Identification of critical components," is acceptable for compliance with the requirements of the AD.

Request To Change References to Service Information

One commenter, the manufacturer, requests that the "Explanation of Relevant Service Information" paragraph in the proposed AD be changed to include the statement "Saab has issued Service Bulletin 340–29–022, Revision 01, dated February 20, 2003, and will soon issue revision 2." The commenter also requests that paragraph (a) of the proposed AD be changed to "* * *Accomplishment Instructions of Saab Service Bulletin 340–29–022, Revision 01, dated February 20, 2003, or later revision." The commenter states that Revision 02 of SAAB Service Bulletin 340–29–022 will be released soon, but the exact release date has not been decided. Revision 02 will include

two new hydraulic hose part numbers that can be ordered and used as replacement parts. (Revision 01 of the service bulletin is referenced in the proposed AD for accomplishment of the actions.)

Since the issuance of the proposed AD Saab has issued Service Bulletin 340–29–022, Revision 02, dated May 5, 2004. We agree with the intent of the commenter's requests to reference Revision 02 of the service bulletin in this AD. We have revised paragraph (a) of this AD to include Revision 02 of the service bulletin as an additional appropriate source of service information. The "Explanation of Relevant Service Information" paragraph is not restated in this AD, so no change to that paragraph is possible in this AD.

We cannot use the phrase, "or later revision," in an AD when referring to the service document because doing so violates Office of the Federal Register (OFR) regulations for approval of materials "incorporated by reference" in rules. In general terms, we are required by these OFR regulations to either publish the service document contents as part of the actual AD language; or submit the service document to the OFR for approval as "referenced" material, in which case we may only refer to such material in the text of an AD. The AD may refer to the service document only if the OFR approved it for "incorporation by reference." To allow operators to use later revisions of the referenced document (issued after publication of the AD), either we must revise the AD to reference specific later revisions, or operators must request approval to use later revisions as an AMOC with this AD under the provisions of paragraph (c) of this AD.

Conclusion

After careful review of the available data, including the comments noted above, we have determined that air safety and the public interest require the adoption of the rule with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

We estimate that 308 airplanes of U.S. registry will be affected by this AD, that it will take approximately 5 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Required parts will cost approximately $1,600 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $592,900, or $1,925 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

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:

2005–08–11 Saab Aircraft AB: Amendment 39–14063. Docket 2003–NM–278–AD.

Applicability: Model SAAB SF340A series airplanes having serial numbers 004 through 159 inclusive, and SAAB 340B series airplanes having serial numbers 160 through 459 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent cracking and/or rupture and subsequent failure of hydraulic hoses, which could result in loss of hydraulic pressure and fluid quantity, and consequent reduced controllability of the airplane, accomplish the following:

Replacement of Hydraulic Hoses

(a) Replace the hydraulic hoses leading to the actuators of the flaps, main landing gear, nose landing gear (NLG), NLG downlock, and NLG wheel well, with new hydraulic hoses by doing all of the actions per the Accomplishment Instructions of Saab Service Bulletin 340–29–022, Revision 01, dated February 20, 2003; or Saab Service Bulletin 340–29–022, Revision 02, dated May 5, 2004. Do the replacement at the times specified in paragraphs (a)(1) and (a)(2) of this AD, as applicable.

(1) For airplanes on which affected hydraulic hoses have accumulated 12,000 or more total flight cycles since new: Within the next 5,000 flight cycles or 24 months after the effective date of this AD, whichever is first.

(2) For airplanes on which affected hydraulic hoses have accumulated less than 12,000 total flight cycles since new: Before the accumulation of 12,000 total flight cycles or within 24 months after the effective date of this AD, whichever is later.

Actions Accomplished Previously

(b) Accomplishment of the specified replacement before the effective date of this AD per Saab Service Bulletin 340–29–022, dated December 14, 2001; or identification of newly installed hoses using the procedures in section 45.14 of the Federal Aviation Regulations (14 CFR 45.14), "Identification of critical components"; are considered acceptable for compliance with the applicable requirements of this AD.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(d) Unless otherwise specified in this AD, the actions shall be done in accordance with Saab Service Bulletin 340–29–022, Revision 01, dated February 20, 2003; or Saab Service Bulletin 340–29–022, Revision 02, dated May 5, 2004. 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 Saab Aircraft AB, SAAB Aircraft

Product Support, S–581.88, Linköping, Sweden. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 1: The subject of this AD is addressed in Swedish airworthiness directive 1–170, dated December 17, 2001.

Effective Date

(e) This amendment becomes effective on May 24, 2005.

Issued in Renton, Washington, on April 11, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7686 Filed 4–18–05; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9198]

RIN 1545–AY42

Guidance Under Section 355(e); Recognition of Gain on Certain Distributions of Stock or Securities in Connection With an Acquisition

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations under section 355(e) of the Internal Revenue Code relating to the recognition of gain on certain distributions of stock or securities of a controlled corporation in connection with an acquisition. Changes to the applicable law were made by the Taxpayer Relief Act of 1997. These regulations affect corporations and are necessary to provide them with guidance needed to comply with those changes.

DATES: *Effective Date:* These regulations are effective April 19, 2005.

Applicability Date: For dates of applicability, *see* § 1.355–7(k).

FOR FURTHER INFORMATION CONTACT: Amber R. Cook, (202) 622–7530 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains amendments to 26 CFR part 1 under section 355(e) of the Internal Revenue Code (Code). Section 355(e) provides that the stock of a controlled corporation will not be qualified property under section 355(c)(2) or 361(c)(2) if the stock is distributed as "part of a plan (or series of related transactions) pursuant to which 1 or more persons acquire directly or indirectly stock representing a 50-percent or greater interest in the distributing corporation or any controlled corporation."

On April 26, 2002, temporary regulations (TD 8988) (the 2002 temporary regulations) were published in the **Federal Register** (67 FR 20632). The 2002 temporary regulations provide guidance concerning the interpretation of the phrase "plan (or series of related transactions)." A notice of proposed rulemaking (REG–163892–01) (the 2002 proposed regulations) cross-referencing the 2002 temporary regulations was published in the **Federal Register** for the same day (67 FR 20711).

The 2002 temporary regulations provide that whether a distribution and an acquisition are part of a plan is determined based on all the facts and circumstances and set forth a nonexclusive list of factors that are relevant in making that determination. The 2002 temporary regulations also provide that a distribution and a post-distribution acquisition not involving a public offering can be part of a plan only if there was an agreement, understanding, arrangement, or substantial negotiations regarding the acquisition or a similar acquisition at some time during the two-year period preceding the distribution (the post-distribution acquisition rule). Finally, the 2002 temporary regulations set forth seven safe harbors. The satisfaction of any one of these safe harbors confirms that a distribution and an acquisition are not part of a plan.

No public hearing was requested or held for the 2002 proposed regulations. Written and electronic comments responding to the notice of proposed rulemaking were received. After consideration of the comments, the 2002 proposed regulations are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed. The more significant comments and revisions are discussed below.

A. Pre-Distribution Acquisitions Not Involving a Public Offering

The 2002 temporary regulations include a safe harbor, Safe Harbor IV, that may be available for a pre-distribution acquisition. That safe harbor provides that an acquisition and a distribution that occurs more than two years after the acquisition are not part of a plan if there was no agreement, understanding, arrangement, or substantial negotiations concerning the distribution at the time of the acquisition or within six months thereafter. In addition to Safe Harbor IV, the 2002 temporary regulations identify a number of factors that are relevant in determining whether a distribution and a pre-distribution acquisition not involving a public offering are part of a plan. Among the factors tending to show that a distribution and a pre-distribution acquisition not involving a public offering are not part of a plan is the absence of discussions by the distributing corporation (Distributing) or the controlled corporation (Controlled) with the acquirer regarding a distribution during the two-year period before the acquisition (the no-discussions factor). The absence of such discussions, however, will not tend to show that a distribution and an acquisition are not part of a plan if the acquisition occurs after the date of the public announcement of the planned distribution (the public announcement restriction).

Commentators have suggested that, under the 2002 temporary regulations, it is more difficult to establish that a distribution and a pre-distribution acquisition not involving a public offering are not part of a plan than it is to establish that a distribution and a post-distribution acquisition are not part of a plan. This suggestion is based in part on the fact that the 2002 temporary regulations include the post-distribution acquisition rule for post-distribution acquisitions but no analogous rule for pre-distribution acquisitions.

Commentators have proposed extending the availability of Safe Harbor IV by reducing the period between the acquisition and the distribution from two years to one year. They have also suggested adopting a new safe harbor that would be available for acquisitions of Distributing that occur before a pro rata distribution. Finally, commentators have suggested that the public announcement restriction on the no-discussions factor be eliminated because a public announcement, as a practical matter, commits Distributing to attempt the distribution and, thus, is strong evidence that the distribution would

have occurred regardless of the acquisition.

The IRS and Treasury Department believe that it is desirable to provide for additional bright-line rules for determining whether a distribution and a pre-distribution acquisition not involving a public offering are part of a plan. Accordingly, these final regulations amend Safe Harbor IV, add a new safe harbor for acquisitions of Distributing prior to a pro rata distribution, and amend the no-discussions factor.

1. Revisions to Safe Harbor IV of the 2002 Temporary Regulations

The IRS and Treasury Department generally believe that if an acquirer had no knowledge of Distributing's intention to effect a distribution and had no intention or ability to cause a distribution, a pre-distribution acquisition and a distribution should not be considered part of a plan, regardless of whether the distribution occurs more than two years after the acquisition. The IRS and Treasury Department, however, are concerned that conditioning the availability of a safe harbor on an absence of knowledge may be inadministrable and lead to uncertainty. Accordingly, these final regulations amend Safe Harbor IV of the 2002 temporary regulations to provide that a distribution and a pre-distribution acquisition not involving a public offering will not be considered part of a plan if the acquisition occurs before the first disclosure event regarding the distribution. The final regulations define a disclosure event as any communication by an officer, director, controlling shareholder, or employee of Distributing, Controlled, or a corporation related to Distributing or Controlled, or an outside advisor of any of those persons (where such advisor makes the communication on behalf of such person), regarding the distribution, or the possibility thereof, to the acquirer or any other person (other than an officer, director, controlling shareholder, or employee of Distributing, Controlled, or a corporation related to Distributing or Controlled, or an outside advisor of any of those persons).

To ensure that Safe Harbor IV of the 2002 temporary regulations is not available for acquisitions by persons who could participate in the decision to effect a distribution, these final regulations provide that Safe Harbor IV is not available for acquisitions by a person that was a controlling shareholder or a ten-percent shareholder of the acquired corporation at any time during the period beginning immediately after the acquisition and ending on the date of the distribution. The safe harbor is also unavailable if the acquisition occurs in connection with a transaction in which the aggregate acquisitions represent 20 percent or more of the stock of the acquired corporation by vote or value.

2. New Safe Harbor for Acquisitions Before a Pro Rata Distribution

The IRS and Treasury Department believe that acquisitions of Distributing not involving a public offering that occur before a pro rata distribution are not likely to be part of a plan including the distribution where there has been a public announcement of the distribution prior to the acquisition, there were no discussions regarding the acquisition prior to the public announcement, and the acquirer did not have the ability to participate in or influence the distribution decision. The facts that the distribution was publicly announced prior to discussions regarding the acquisition and that the acquisition was small in size suggest that the distribution would have occurred regardless of the acquisition. Moreover, the fact that a pre-distribution shareholder of Distributing has the same interest in both Distributing and Controlled, directly or indirectly, both immediately before and immediately after a pro rata distribution reduces the likelihood that the acquisition and the distribution were part of a plan. Accordingly, these final regulations include a new safe harbor, Safe Harbor V, that applies to acquisitions of Distributing not involving a public offering that occur prior to a pro rata distribution. That safe harbor provides that a distribution that is pro rata among the Distributing shareholders and a pre-distribution acquisition of Distributing not involving a public offering will not be considered part of a plan if the acquisition occurs after the date of a public announcement regarding the distribution and there were no discussions by Distributing or Controlled with the acquirer regarding a distribution on or before the date of the first public announcement regarding the distribution. A public announcement regarding the distribution is any communication by Distributing or Controlled regarding Distributing's intention to effect the distribution where the communication is generally available to the public. A public announcement includes, for example, a press release issued by Distributing announcing the distribution. It also includes a conversation between an officer of Distributing and stock analysts in which the officer communicates Distributing's intention to effect a distribution. New Safe Harbor V is intended to apply only to acquisitions by persons that do not have the ability to effect the distribution. Therefore, new Safe Harbor V is unavailable for acquisitions by persons that were controlling shareholders or ten-percent shareholders of Distributing at any time during the period beginning immediately after the acquisition and ending on the date of the distribution. In addition, new Safe Harbor V is unavailable if the acquisition occurs in connection with a transaction in which the aggregate acquisitions represent 20 percent or more of the stock of Distributing by vote or value.

3. No-Discussions Factor

As discussed above, the IRS and Treasury Department believe that the occurrence of a public announcement of a distribution before the discussion of an acquisition not involving a public offering suggests that the distribution would have occurred regardless of the acquisition. Therefore, these final regulations amend the no-discussions factor to remove the public announcement restriction.

B. Public Offerings

The 2002 temporary regulations distinguish between acquisitions not involving a public offering and acquisitions involving a public offering. A number of commentators have suggested that it is difficult to apply the 2002 temporary regulations to acquisitions involving public offerings and have requested (1) clarification of the definition of public offering, (2) additional safe harbors for acquisitions involving public offerings, and (3) guidance regarding when an acquisition is similar to a potential acquisition involving a public offering. These final regulations address these requests.

1. Definition of Public Offering

Questions have arisen regarding whether a public offering includes stock issuances that are not for cash, including stock issuances for assets or stock in tax-free reorganizations. These final regulations define an acquisition involving a public offering as a stock acquisition for cash where the terms of the acquisition are established by the acquired corporation (Distributing or Controlled) or the seller with the involvement of one or more investment bankers, and the potential acquirers have no opportunity to negotiate the terms of the acquisition. Under this definition, while an initial public offering and a secondary offering will be treated as public offerings, a private

placement involving bilateral discussions and a stock issuance for assets or stock in a tax-free reorganization will not be treated as public offerings.

2. New Safe Harbor for Public Offerings

These final regulations add new Safe Harbor VI. Under new Safe Harbor VI, a distribution and an acquisition involving a public offering occurring before the distribution will not be considered part of a plan if the acquisition occurs before the first disclosure event regarding the distribution in the case of an acquisition of stock that is not listed on an established market, or before the date of the first public announcement regarding the distribution in the case of an acquisition of stock that is listed on an established market. The new safe harbor is based on the view of the IRS and Treasury Department that a public offering and a distribution are not likely to be part of a plan if the acquirers in the offering are unaware that a distribution will occur.

3. Similar Acquisitions Involving Public Offerings

In the plan and non-plan factors and a number of safe harbors, the 2002 temporary regulations refer to acquisitions that are similar to the actual acquisition. The 2002 temporary regulations provide that an acquisition involving a public offering may be similar to another acquisition involving a public offering even though there are changes in the terms of the stock, the class of stock being offered, the size of the offering, the timing of the offering, the price of the stock, or the participants in the offering. This provision is intended to ensure that certain changes in the terms of the offering that is intended at the time of the distribution do not prevent the distribution and the offering that actually occurs from being considered part of a plan.

Commentators have requested further guidance regarding when an acquisition will be treated as similar to another acquisition involving a public offering. The IRS and Treasury Department believe, and these final regulations provide, that more than one actual acquisition may be similar to a potential acquisition involving a public offering. However, the IRS and Treasury Department also believe, and these final regulations provide that, if there is an actual acquisition involving a public offering (the first public offering) that is the same as, or similar to, a potential acquisition involving a public offering, then another actual acquisition involving a public offering (the second public offering) cannot be similar to the potential acquisition unless the purpose of the second public offering is similar to that of the potential acquisition and occurs close in time to the first public offering. The final regulations include three new examples that illustrate the application of this rule.

C. Acquisitions Pursuant to Publicly Offered Options

The IRS and Treasury Department believe that, in certain cases, whether an acquisition that is pursuant to an option and a distribution are part of a plan should be determined pursuant to the rules related to acquisitions involving a public offering. In particular, suppose that, after consulting with its investment banker, Distributing issues options to acquire its stock. The options are marketed and sold through a distribution process that is similar to that utilized in a public offering. In these cases, the acquirer may never discuss the acquisition with Distributing. The investment banker, however, will discuss the acquisition with Distributing. Therefore, it seems more appropriate to analyze whether a distribution and an acquisition of stock pursuant to such an option are part of a plan under the rules that apply to acquisitions involving a public offering, rather than the rules that apply to acquisitions not involving a public offering. Accordingly, these final regulations provide that, if an option is issued for cash, the terms of the acquisition of the option and the terms of the option are established by the corporation the stock of which is subject to the option (Distributing or Controlled) or the writer with the involvement of one or more investment bankers, and the potential acquirers of the option have no opportunity to negotiate the terms of the acquisition of the option or the terms of the option, then an acquisition pursuant to that option will be treated as an acquisition involving a public offering occurring after a distribution if the option is exercised after the distribution or an acquisition involving a public offering occurring before the distribution if the option is exercised before the distribution. Otherwise, an acquisition pursuant to an option will be treated as an acquisition not involving a public offering.

D. Agreement, Understanding, or Arrangement

Throughout the 2002 temporary regulations reference is made to the phrase "agreement, understanding, or arrangement." The 2002 temporary regulations provide that whether an agreement, understanding, or arrangement exists depends on the facts and circumstances. One commentator questioned whether an agreement by a person who does not actively participate in the management of the acquired corporation should be treated as an agreement, understanding, or arrangement. The IRS and Treasury Department believe that the activities of those who have the authority to act on behalf of Distributing or Controlled as well as the activities of the controlling shareholders of Distributing and Controlled are relevant to the determination of whether a distribution and an acquisition are part of a plan. Therefore, these final regulations provide that an agreement, understanding, or arrangement generally requires either (1) an agreement, understanding, or arrangement by one or more officers or directors acting on behalf of Distributing or Controlled, by a controlling shareholder of Distributing or Controlled, or by another person with the implicit or explicit permission of one or more of such persons, with the acquirer or with a person or persons with the implicit or explicit permission of the acquirer; or (2) an agreement, understanding, or arrangement by an acquirer that is a controlling shareholder of Distributing or Controlled immediately after the acquisition that is the subject of the agreement, understanding, or arrangement, or by a person or persons with the implicit or explicit permission of such acquirer, with the transferor or with a person or persons with the implicit or explicit permission of the transferor. These final regulations also make conforming changes to the rules related to when an option will be treated as an agreement, understanding, or arrangement to acquire stock, and the definition of substantial negotiations.

E. Substantial Negotiations and Discussions

Under the 2002 temporary regulations, the presence or absence of "substantial negotiations" or "discussions" regarding an acquisition or a distribution is relevant to the determination of whether a distribution and an acquisition are part of a plan. The 2002 temporary regulations provide that, in the case of an acquisition other than a public offering, substantial negotiations generally require discussions of significant economic terms by one or more officers, directors, or controlling shareholders of Distributing or Controlled, or another person or persons with the implicit or explicit permission of one or more officers, directors, or controlling

shareholders of Distributing or Controlled, with the acquirer or a person or persons with the implicit or explicit permission of the acquirer. In addition, the 2002 temporary regulations provide that (i) discussions by Distributing or Controlled generally require discussions by one or more officers, directors, or controlling shareholders of Distributing or Controlled, or another person or persons with the implicit or explicit permission of one or more officers, directors, or controlling shareholders of Distributing or Controlled; and (ii) discussions with the acquirer generally require discussions with the acquirer or a person or persons with the implicit or explicit permission of the acquirer.

Commentators have requested that final regulations clarify that, where the acquirer is a corporation, substantial negotiations and discussions must involve one or more officers, directors, or controlling shareholders of the acquirer, or another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders. These final regulations reflect those clarifications.

F. Safe Harbor VI of the 2002 Temporary Regulations

1. Asset Reorganizations Involving Distributing or Controlled

Safe Harbor VI of the 2002 temporary regulations generally provides that if stock of Distributing or Controlled is acquired by a person in connection with such person's performance of services as an employee, director, or independent contractor for Distributing, Controlled, or a related person in a transaction to which section 83 or section 421(a) applies, the acquisition and the distribution will not be considered part of a plan. Questions have arisen regarding whether this safe harbor is available for an acquisition of Distributing or Controlled stock to which section 83 or section 421(a) applies when the acquirer performed services for a corporation other than Distributing, Controlled, or a person related to Distributing or Controlled. For example, assume that X, a corporation unrelated to Distributing and Controlled, grants A, an employee, an incentive stock option in connection with A's performance of services as an employee of X. Before A exercises the option, Distributing acquires the assets of X in a reorganization under section 368(a)(1)(A) and A's incentive stock option to acquire stock of X is substituted within the meaning of § 1.424–1(a) with an incentive stock option to acquire stock of Distributing. Commentators have asked whether Safe Harbor VI of the 2002 temporary regulations applies to A's exercise of the option to acquire stock of Distributing, even though A performed services for X rather than Distributing. These final regulations modify this safe harbor (Safe Harbor VIII of these final regulations) to ensure its availability in this and similar situations.

2. Disqualifying Dispositions

As described above, Safe Harbor VI of the 2002 temporary regulations may be available for acquisitions of stock in a transaction to which section 421(a) applies. In order to qualify as a transaction to which section 421(a) applies, the acquirer must satisfy the requirements of section 422(a) or section 423(a), including the holding period requirements of section 422(a)(1) or section 423(a)(1). In particular, the acquirer must not dispose of the acquired stock within two years from the date of the granting of the option or within one year after the transfer of such stock to the acquirer. The IRS and Treasury Department do not believe that a disposition of stock acquired pursuant to an option that otherwise satisfies the requirements of section 422 or section 423 prior to the period prescribed in section 422(a)(1) or 423(a)(1) evidences that the acquisition of stock pursuant to the option and the distribution are part of a plan. Therefore, these final regulations extend the application of Safe Harbor VI of the 2002 temporary regulations to not only transactions to which section 421(a) applies, but also transactions to which section 421(b) applies.

G. Safe Harbor VII of the 2002 Temporary Regulations

Safe Harbor VII of the 2002 temporary regulations generally provides that if stock of Distributing or Controlled is acquired by an employer's retirement plan that qualifies under section 401(a) or 403(a), the acquisition and the distribution will not be considered part of a plan. That safe harbor, however, does not apply to the extent that the stock acquired by all of the employer's qualified plans during the four-year period beginning two years before the distribution, in the aggregate, represents ten percent or more of the total combined voting power of all classes of stock entitled to vote, or ten percent or more of the total value of shares of all classes of stock, of the acquired corporation. Questions have arisen regarding whether this safe harbor is available at all if the acquisitions by the employer's retirement plans exceed ten percent of the acquired corporation's stock during the prescribed period.

These final regulations revise Safe Harbor VII of the 2002 temporary regulations (Safe Harbor IX of these final regulations) to clarify that, if the acquisitions by an employer's retirement plan total in excess of ten percent, the safe harbor is available for the first ten percent acquired during the prescribed period. These final regulations also revise this safe harbor to reflect that it is only available for acquisitions by a retirement plan of Distributing, Controlled, or any person that is treated as the same employer as Distributing or Controlled under section 414(b), (c), (m), or (o).

H. Compensatory Options

The 2002 temporary regulations include special rules that treat an option as an agreement, understanding, or arrangement to acquire the stock subject to the option on the earliest of the date the option was written, transferred, or modified, if on that date the option was more likely than not to be exercised. The 2002 temporary regulations except compensatory options from these rules. For this purpose, a compensatory option is an option to acquire stock in Distributing or Controlled with customary terms and conditions provided to a person in connection with such person's performance of services as an employee, director, or independent contractor for the corporation or a related person (and that is not excessive by reference to the services performed), provided that the transfer of stock pursuant to such option is described in section 421(a) or the option is nontransferable within the meaning of § 1.83–3(d) and does not have a readily ascertainable fair market value as defined in § 1.83–7(b).

The IRS and Treasury Department have become aware that arrangements using compensatory options have been structured to prevent an acquisition of stock from being treated as part of a plan that includes a distribution in avoidance of section 355(e). Accordingly, these final regulations revise the 2002 temporary regulations to treat compensatory options as options.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection

of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Amber R. Cook of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to Regulations

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

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entry for § 1.355–7T and adding the following entry to read, in part, as follows:

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

Section 1.355–7 also issued under 26 U.S.C. 355(e)(5). * * *

■ **Par. 2.** Section 1.355–0 is amended as follows:

■ 1. Revise the introductory text.

■ 2. Remove the entries for § 1.355–7T and add the entries for § 1.355–7.

The revision and addition read as follows:

§ 1.355–0. Outline of sections.

In order to facilitate the use of §§ 1.355–1 through 1.355–7, this section lists the major paragraphs in those sections as follows:

* * * * *

§ 1.355–7 Recognition of gain on certain distributions of stock or securities in connection with an acquisition.

(a) In general.
(b) Plan.
(1) In general.
(2) Certain post-distribution acquisitions.
(3) Plan factors.
(4) Non-plan factors.
(c) Operating rules.
(1) Internal discussions and discussions with outside advisors evidence of business purpose.
(2) Takeover defense.
(3) Effect of distribution on trading in stock.
(4) Consequences of section 355(e) disregarded for certain purposes.
(5) Multiple acquisitions.
(d) Safe harbors.
(1) Safe Harbor I.
(2) Safe Harbor II.
(i) In general.
(ii) Special rule.
(3) Safe Harbor III.
(4) Safe Harbor IV.
(i) In general.
(ii) Special rules.
(5) Safe Harbor V.
(i) In general.
(ii) Special rules.
(6) Safe Harbor VI.
(7) Safe Harbor VII.
(i) In general.
(ii) Special rules.
(8) Safe Harbor VIII.
(i) In general.
(ii) Special rule.
(9) Safe Harbor IX.
(i) In general.
(ii) Special rule.
(e) Options, warrants, convertible obligations, and other similar interests.
(1) Treatment of options.
(i) General rule.
(ii) Agreement, understanding, or arrangement to write, transfer, or modify an option.
(iii) Substantial negotiations related to options.
(2) Stock acquired pursuant to options.
(3) Instruments treated as options.
(4) Instruments generally not treated as options.
(i) Escrow, pledge, or other security agreements.
(ii) Options exercisable only upon death, disability, mental incompetency, or separation from service.
(iii) Rights of first refusal.
(iv) Other enumerated instruments.
(f) Multiple controlled corporations.
(g) Valuation.
(h) Definitions.
(1) Agreement, understanding, arrangement, or substantial negotiations.
(2) Controlled corporation.
(3) Controlling shareholder.
(4) Coordinating group.
(5) Disclosure event.
(6) Discussions.
(7) Established market.
(8) Five-percent shareholder.
(9) Implicit permission.
(10) Public announcement.
(11) Public offering.
(12) Similar acquisition (not involving a public offering).
(13) Similar acquisition involving a public offering.
(i) One public offering.
(ii) More than one public offering.
(iii) Potential acquisition involving a public offering.
(14) Ten-percent shareholder.
(i) [Reserved].
(j) Examples.
(k) Effective dates.

■ **Par. 3.** Section 1.355–7 is added to read as follows:

§ 1.355–7 Recognition of gain on certain distributions of stock or securities in connection with an acquisition.

(a) *In general.* Except as provided in section 355(e) and in this section, section 355(e) applies to any distribution—

(1) To which section 355 (or so much of section 356 as relates to section 355) applies; and

(2) That is part of a plan (or series of related transactions) (hereinafter, plan) pursuant to which 1 or more persons acquire directly or indirectly stock representing a 50-percent or greater interest in the distributing corporation (Distributing) or any controlled corporation (Controlled).

(b) *Plan*—(1) *In general.* Whether a distribution and an acquisition are part of a plan is determined based on all the facts and circumstances. The facts and circumstances to be considered in demonstrating whether a distribution and an acquisition are part of a plan include, but are not limited to, the facts and circumstances set forth in paragraphs (b)(3) and (4) of this section. In general, the weight to be given each of the facts and circumstances depends on the particular case. Whether a distribution and an acquisition are part of a plan does not depend on the relative number of facts and circumstances set forth in paragraph (b)(3) that evidence that a distribution and an acquisition are part of a plan as compared to the relative number of facts and circumstances set forth in paragraph (b)(4) that evidence that a distribution and an acquisition are not part of a plan.

(2) *Certain post-distribution acquisitions.* In the case of an acquisition (other than involving a public offering) after a distribution, the distribution and the acquisition can be part of a plan only if there was an agreement, understanding, arrangement, or substantial negotiations regarding the acquisition or a similar acquisition at some time during the two-year period ending on the date of the distribution. In the case of an acquisition (other than involving a public offering) after a distribution, the existence of an agreement, understanding, arrangement, or substantial negotiations regarding the acquisition or a similar acquisition at some time during the two-year period ending on the date of the distribution tends to show that the distribution and the acquisition are part of a plan. See paragraph (b)(3)(i) of this section. However, all facts and circumstances must be considered to determine whether the distribution and the acquisition are part of a plan. For example, in the case of an acquisition

(other than involving a public offering) after a distribution, if the distribution was motivated in whole or substantial part by a corporate business purpose (within the meaning of § 1.355–2(b)) other than a business purpose to facilitate the acquisition or a similar acquisition of Distributing or Controlled (see paragraph (b)(4)(v) of this section) and would have occurred at approximately the same time and in similar form regardless of whether the acquisition or a similar acquisition was effected (see paragraph (b)(4)(vi) of this section), the taxpayer may be able to establish that the distribution and the acquisition are not part of a plan.

(3) *Plan factors.* Among the facts and circumstances tending to show that a distribution and an acquisition are part of a plan are the following:

(i) In the case of an acquisition (other than involving a public offering) after a distribution, at some time during the two-year period ending on the date of the distribution, there was an agreement, understanding, arrangement, or substantial negotiations regarding the acquisition or a similar acquisition. The weight to be accorded this fact depends on the nature, extent, and timing of the agreement, understanding, arrangement, or substantial negotiations. The existence of an agreement, understanding, or arrangement at the time of the distribution is given substantial weight.

(ii) In the case of an acquisition involving a public offering after a distribution, at some time during the two-year period ending on the date of the distribution, there were discussions by Distributing or Controlled with an investment banker regarding the acquisition or a similar acquisition. The weight to be accorded this fact depends on the nature, extent, and timing of the discussions.

(iii) In the case of an acquisition (other than involving a public offering) before a distribution, at some time during the two-year period ending on the date of the acquisition, there were discussions by Distributing or Controlled with the acquirer regarding a distribution. The weight to be accorded this fact depends on the nature, extent, and timing of the discussions. In addition, in the case of an acquisition (other than involving a public offering) before a distribution, the acquirer intends to cause a distribution and, immediately after the acquisition, can meaningfully participate in the decision regarding whether to make a distribution.

(iv) In the case of an acquisition involving a public offering before a distribution, at some time during the two-year period ending on the date of the acquisition, there were discussions by Distributing or Controlled with an investment banker regarding a distribution. The weight to be accorded this fact depends on the nature, extent, and timing of the discussions.

(v) In the case of an acquisition either before or after a distribution, the distribution was motivated by a business purpose to facilitate the acquisition or a similar acquisition.

(4) *Non-plan factors.* Among the facts and circumstances tending to show that a distribution and an acquisition are not part of a plan are the following:

(i) In the case of an acquisition involving a public offering after a distribution, during the two-year period ending on the date of the distribution, there were no discussions by Distributing or Controlled with an investment banker regarding the acquisition or a similar acquisition.

(ii) In the case of an acquisition after a distribution, there was an identifiable, unexpected change in market or business conditions occurring after the distribution that resulted in the acquisition that was otherwise unexpected at the time of the distribution.

(iii) In the case of an acquisition (other than involving a public offering) before a distribution, during the two-year period ending on the date of the earlier to occur of the acquisition or the first public announcement regarding the distribution, there were no discussions by Distributing or Controlled with the acquirer regarding a distribution. Paragraph (b)(4)(iii) of this section does not apply to an acquisition where the acquirer intends to cause a distribution and, immediately after the acquisition, can meaningfully participate in the decision regarding whether to make a distribution.

(iv) In the case of an acquisition before a distribution, there was an identifiable, unexpected change in market or business conditions occurring after the acquisition that resulted in a distribution that was otherwise unexpected.

(v) In the case of an acquisition either before or after a distribution, the distribution was motivated in whole or substantial part by a corporate business purpose (within the meaning of § 1.355–2(b)) other than a business purpose to facilitate the acquisition or a similar acquisition.

(vi) In the case of an acquisition either before or after a distribution, the distribution would have occurred at approximately the same time and in similar form regardless of the acquisition or a similar acquisition.

(c) *Operating rules.* The operating rules contained in this paragraph (c) apply for all purposes of this section.

(1) *Internal discussions and discussions with outside advisors evidence of business purpose.* Discussions by Distributing or Controlled with outside advisors and internal discussions may be indicative of one or more business purposes for the distribution and the relative importance of such purposes.

(2) *Takeover defense.* If Distributing engages in discussions with a potential acquirer regarding an acquisition of Distributing or Controlled and distributes Controlled stock intending, in whole or substantial part, to decrease the likelihood of the acquisition of Distributing or Controlled by separating it from another corporation that is likely to be acquired, Distributing will be treated as having a business purpose to facilitate the acquisition of the corporation that was likely to be acquired.

(3) *Effect of distribution on trading in stock.* The fact that the distribution made all or a part of the stock of Controlled available for trading or made Distributing's or Controlled's stock trade more actively is not taken into account in determining whether the distribution and an acquisition of Distributing or Controlled stock were part of a plan.

(4) *Consequences of section 355(e) disregarded for certain purposes.* For purposes of determining the intentions of the relevant parties under this section, the consequences of the application of section 355(e), and the existence of any contractual indemnity by Controlled for tax resulting from the application of section 355(e) caused by an acquisition of Controlled, are disregarded.

(5) *Multiple acquisitions.* All acquisitions of stock of Distributing or Controlled that are considered to be part of a plan with a distribution pursuant to paragraph (b) of this section will be aggregated for purposes of the 50-percent test of paragraph (a)(2) of this section.

(d) *Safe harbors*—(1) *Safe Harbor I.* A distribution and an acquisition occurring after the distribution will not be considered part of a plan if—

(i) The distribution was motivated in whole or substantial part by a corporate business purpose (within the meaning of § 1.355–2(b)), other than a business purpose to facilitate an acquisition of the acquired corporation (Distributing or Controlled); and

(ii) The acquisition occurred more than six months after the distribution and there was no agreement, understanding, arrangement, or

substantial negotiations concerning the acquisition or a similar acquisition during the period that begins one year before the distribution and ends six months thereafter.

(2) *Safe Harbor II*—(i) *In general.* A distribution and an acquisition occurring after the distribution will not be considered part of a plan if—

(A) The distribution was not motivated by a business purpose to facilitate the acquisition or a similar acquisition;

(B) The acquisition occurred more than six months after the distribution and there was no agreement, understanding, arrangement, or substantial negotiations concerning the acquisition or a similar acquisition during the period that begins one year before the distribution and ends six months thereafter; and

(C) No more than 25 percent of the stock of the acquired corporation (Distributing or Controlled) was either acquired or the subject of an agreement, understanding, arrangement, or substantial negotiations during the period that begins one year before the distribution and ends six months thereafter.

(ii) *Special rule.* For purposes of paragraph (d)(2)(i)(C) of this section, acquisitions of stock that are treated as not part of a plan pursuant to Safe Harbor VII, Safe Harbor VIII, or Safe Harbor IX are disregarded.

(3) *Safe Harbor III.* If an acquisition occurs after a distribution, there was no agreement, understanding, or arrangement concerning the acquisition or a similar acquisition at the time of the distribution, and there was no agreement, understanding, arrangement, or substantial negotiations concerning the acquisition or a similar acquisition within one year after the distribution, the acquisition and the distribution will not be considered part of a plan.

(4) *Safe Harbor IV*—(i) *In general.* A distribution and an acquisition (other than involving a public offering) occurring before the distribution will not be considered part of a plan if the acquisition occurs before the date of the first disclosure event regarding the distribution.

(ii) *Special rules.* (A) Paragraph (d)(4)(i) of this section does not apply to a stock acquisition if the acquirer or a coordinating group of which the acquirer is a member is a controlling shareholder or a ten-percent shareholder of the acquired corporation (Distributing or Controlled) at any time during the period beginning immediately after the acquisition and ending on the date of the distribution.

(B) Paragraph (d)(4)(i) of this section does not apply to an acquisition that occurs in connection with a transaction in which the aggregate acquisitions are of stock possessing 20 percent or more of the total voting power of the stock of the acquired corporation (Distributing or Controlled) or stock having a value of 20 percent or more of the total value of the stock of the acquired corporation (Distributing or Controlled).

(5) *Safe Harbor V*—(i) *In general.* A distribution that is pro rata among the Distributing shareholders and an acquisition (other than involving a public offering) of Distributing stock occurring before the distribution will not be considered part of a plan if—

(A) The acquisition occurs after the date of a public announcement regarding the distribution; and

(B) There were no discussions by Distributing or Controlled with the acquirer regarding a distribution on or before the date of the first public announcement regarding the distribution.

(ii) *Special rules.* (A) Paragraph (d)(5)(i) of this section does not apply to a stock acquisition if the acquirer or a coordinating group of which the acquirer is a member is a controlling shareholder or a ten-percent shareholder of Distributing at any time during the period beginning immediately after the acquisition and ending on the date of the distribution.

(B) Paragraph (d)(5)(i) of this section does not apply to an acquisition that occurs in connection with a transaction in which the aggregate acquisitions are of stock possessing 20 percent or more of the total voting power of the stock of Distributing or stock having a value of 20 percent or more of the total value of the stock of Distributing.

(6) *Safe Harbor VI.* A distribution and an acquisition involving a public offering occurring before the distribution will not be considered part of a plan if the acquisition occurs before the date of the first disclosure event regarding the distribution in the case of an acquisition of stock that is not listed on an established market immediately after the acquisition, or before the date of the first public announcement regarding the distribution in the case of an acquisition of stock that is listed on an established market immediately after the acquisition.

(7) *Safe Harbor VII*—(i) *In general.* An acquisition (other than involving a public offering) of Distributing or Controlled stock that is listed on an established market is not part of a plan if, immediately before or immediately after the transfer, none of the transferor, the transferee, and any coordinating group of which either the transferor or the transferee is a member is—

(A) The acquired corporation (Distributing or Controlled);

(B) A corporation that the acquired corporation (Distributing or Controlled) controls within the meaning of section 368(c);

(C) A member of a controlled group of corporations within the meaning of section 1563 of which the acquired corporation (Distributing or Controlled) is a member;

(D) A controlling shareholder of the acquired corporation (Distributing or Controlled); or

(E) A ten-percent shareholder of the acquired corporation (Distributing or Controlled).

(ii) *Special rules.* (A) Paragraph (d)(7)(i) of this section does not apply to a transfer of stock by or to a person if the corporation the stock of which is being transferred knows, or has reason to know, that the person or a coordinating group of which such person is a member intends to become a controlling shareholder or a ten-percent shareholder of the acquired corporation (Distributing or Controlled) at any time after the acquisition and before the date that is two years after the distribution.

(B) If a transfer of stock to which paragraph (d)(7)(i) of this section applies results immediately, or upon a subsequent event or the passage of time, in an indirect acquisition of voting power by a person other than the transferee, paragraph (d)(7)(i) of this section does not prevent an acquisition of stock (with the voting power such stock represents after the transfer to which paragraph (d)(7)(i) of this section applies) by such other person from being treated as part of a plan.

(8) *Safe Harbor VIII*—(i) *In general.* If, in a transaction to which section 83 or section 421(a) or (b) applies, stock of Distributing or Controlled is acquired by a person in connection with such person's performance of services as an employee, director, or independent contractor for Distributing, Controlled, a related person, a corporation the assets of which Distributing, Controlled, or a related person acquires in a reorganization under section 368(a), or a corporation that acquires the assets of Distributing or Controlled in such a reorganization (and the stock acquired is not excessive by reference to the services performed), the acquisition and the distribution will not be considered part of a plan. For purposes of this paragraph (d)(8)(i), a related person is a person related to Distributing or Controlled under section 355(d)(7)(A).

(ii) *Special rule.* Paragraph (d)(8)(i) of this section does not apply to a stock acquisition if the acquirer or a coordinating group of which the acquirer is a member is a controlling shareholder or a ten-percent shareholder of the acquired corporation (Distributing or Controlled) immediately after the acquisition.

(9) *Safe Harbor IX*—(i) *In general.* If stock of Distributing or Controlled is acquired by a retirement plan of Distributing or Controlled (or a retirement plan of any other person that is treated as the same employer as Distributing or Controlled under section 414(b), (c), (m), or (o)) that qualifies under section 401(a) or 403(a), the acquisition and the distribution will not be considered part of a plan.

(ii) *Special rule.* Paragraph (d)(9)(i) of this section does not apply to the extent that the stock acquired pursuant to acquisitions by all of the qualified plans of the persons described in paragraph (d)(9)(i) of this section during the four-year period beginning two years before the distribution, in the aggregate, represents more than ten percent of the total combined voting power of all classes of stock entitled to vote, or more than ten percent of the total value of shares of all classes of stock, of the acquired corporation (Distributing or Controlled).

(e) *Options, warrants, convertible obligations, and other similar interests*—(1) *Treatment of options*—(i) *General rule.* For purposes of this section, if stock of Distributing or Controlled is acquired pursuant to an option that is written by Distributing, Controlled, or a person that is a controlling shareholder of Distributing or Controlled at the time the option is written, or that is acquired by a person that is a controlling shareholder of Distributing or Controlled immediately after the option is written, the option will be treated as an agreement, understanding, or arrangement to acquire the stock on the earliest of the following dates: the date that the option is written, if the option was more likely than not to be exercised as of such date; the date that the option is transferred if, immediately before or immediately after the transfer, the transferor or transferee was Distributing, Controlled, a corporation that Distributing or Controlled controls within the meaning of section 368(c), a member of a controlled group of corporations within the meaning of section 1563 of which Distributing or Controlled is a member, or a controlling shareholder or a ten-percent shareholder of Distributing or Controlled and the option was more likely than not to be exercised as of such date; and the date that the option is modified in a manner that materially increases the likelihood of exercise, if the option was more likely than not to be exercised as of such date; provided, however, if the writing, transfer, or modification had a principal purpose of avoiding section 355(e), the option will be treated as an agreement, understanding, arrangement, or substantial negotiations to acquire the stock on the date of the distribution. The determination of whether an option was more likely than not to be exercised is based on all the facts and circumstances, taking control premiums and minority and blockage discounts into account in determining the fair market value of stock underlying an option.

(ii) *Agreement, understanding, or arrangement to write, transfer, or modify an option.* If there is an agreement, understanding, or arrangement to write an option, the option will be treated as written on the date of the agreement, understanding, or arrangement. If there is an agreement, understanding, or arrangement to transfer an option, the option will be treated as transferred on the date of the agreement, understanding, or arrangement. If there is an agreement, understanding, or arrangement to modify an option in a manner that materially increases the likelihood of exercise, the option will be treated as so modified on the date of the agreement, understanding, or arrangement.

(iii) *Substantial negotiations related to options.* If an option is treated as an agreement, understanding, or arrangement to acquire the stock on the date that the option is written, substantial negotiations to acquire the option will be treated as substantial negotiations to acquire the stock subject to such option. If an option is treated as an agreement, understanding, or arrangement to acquire the stock on the date that the option is transferred, substantial negotiations regarding the transfer of the option will be treated as substantial negotiations to acquire the stock subject to such option. If an option is treated as an agreement, understanding, or arrangement to acquire the stock on the date that the option is modified in a manner that materially increases the likelihood of exercise, substantial negotiations regarding such modifications to the option will be treated as substantial negotiations to acquire the stock subject to such option.

(2) *Stock acquired pursuant to options.* For purposes of this section, if an option is issued for cash, the terms of the acquisition of the option and the terms of the option are established by the corporation the stock of which is subject to the option (Distributing or Controlled) or the writer with the involvement of one or more investment bankers, and the potential acquirers of the option have no opportunity to negotiate the terms of the acquisition of the option or the terms of the option, then an acquisition pursuant to such option shall be treated as an acquisition involving a public offering occurring after the distribution if the option is exercised after the distribution or an acquisition involving a public offering before a distribution if the option is exercised before the distribution. Otherwise, an acquisition pursuant to an option shall be treated as an acquisition not involving a public offering.

(3) *Instruments treated as options.* For purposes of this section, except to the extent provided in paragraph (e)(4) of this section, call options, warrants, convertible obligations, the conversion feature of convertible stock, put options, redemption agreements (including rights to cause the redemption of stock), any other instruments that provide for the right or possibility to issue, redeem, or transfer stock (including an option on an option), or any other similar interests are treated as options.

(4) *Instruments generally not treated as options.* For purposes of this section, the following are not treated as options unless (in the case of paragraphs (e)(4)(i), (ii), and (iii) of this section) written, transferred (directly or indirectly), modified, or listed with a principal purpose of avoiding the application of section 355(e) or this section.

(i) *Escrow, pledge, or other security agreements.* An option that is part of a security arrangement in a typical lending transaction (including a purchase money loan), if the arrangement is subject to customary commercial conditions. For this purpose, a security arrangement includes, for example, an agreement for holding stock in escrow or under a pledge or other security agreement, or an option to acquire stock contingent upon a default under a loan.

(ii) *Options exercisable only upon death, disability, mental incompetency, or separation from service.* Any option entered into between shareholders of a corporation (or a shareholder and the corporation) that is exercisable only upon the death, disability, or mental incompetency of the shareholder, or, in the case of stock acquired in connection with the performance of services for the corporation or a person related to it under section 355(d)(7)(A) (and that is

not excessive by reference to the services performed), the shareholder's separation from service.

(iii) *Rights of first refusal.* A bona fide right of first refusal regarding the corporation's stock with customary terms, entered into between shareholders of a corporation (or between the corporation and a shareholder).

(iv) *Other enumerated instruments.* Any other instrument the Commissioner may designate in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(f) *Multiple controlled corporations.* Only the stock or securities of a controlled corporation in which one or more persons acquire directly or indirectly stock representing a 50-percent or greater interest as part of a plan involving the distribution of that corporation will be treated as not qualified property under section 355(e)(1) if—

(1) The stock or securities of more than one controlled corporation are distributed in distributions to which section 355 (or so much of section 356 as relates to section 355) applies; and

(2) One or more persons do not acquire, directly or indirectly, stock representing a 50-percent or greater interest in Distributing pursuant to a plan involving any of those distributions.

(g) *Valuation.* Except as provided in paragraph (e)(1)(i) of this section, for purposes of section 355(e) and this section, all shares of stock within a single class are considered to have the same value. Thus, control premiums and minority and blockage discounts within a single class are not taken into account.

(h) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Agreement, understanding, arrangement, or substantial negotiations.* (i) An agreement, understanding, or arrangement generally requires either—

(A) An agreement, understanding, or arrangement by one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders, with the acquirer or with a person or persons with the implicit or explicit permission of the acquirer; or

(B) An agreement, understanding, or arrangement by an acquirer that is a controlling shareholder of Distributing or Controlled immediately after the acquisition that is the subject of the agreement, understanding, or arrangement, or by a person or persons with the implicit or explicit permission of such acquirer, with the transferor or with a person or persons with the implicit or explicit permission of the transferor.

(ii) In the case of an acquisition by a corporation, an agreement, understanding, or arrangement with the acquiring corporation generally requires an agreement, understanding, or arrangement with one or more officers or directors acting on behalf of the acquiring corporation, with controlling shareholders of the acquiring corporation, or with another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders.

(iii) Whether an agreement, understanding, or arrangement exists depends on the facts and circumstances. The parties do not necessarily have to have entered into a binding contract or have reached agreement on all significant economic terms to have an agreement, understanding, or arrangement. However, an agreement, understanding, or arrangement clearly exists if a binding contract to acquire stock exists.

(iv) Substantial negotiations in the case of an acquisition (other than involving a public offering) generally require discussions of significant economic terms, *e.g.*, the exchange ratio in a reorganization, either—

(A) By one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders, with the acquirer or with a person or persons with the implicit or explicit permission of the acquirer; or

(B) If the acquirer is a controlling shareholder of Distributing or Controlled immediately after the acquisition that is the subject of substantial negotiations, by the acquirer or by a person or persons with the implicit or explicit permission of the acquirer, with the transferor or with a person or persons with the implicit or explicit permission of the transferor.

(v) In the case of an acquisition (other than involving a public offering) by a corporation, substantial negotiations generally require discussions of significant economic terms with one or more officers or directors acting on behalf of the acquiring corporation, with controlling shareholders of the acquiring corporation, or with another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders.

(vi) In the case of an acquisition involving a public offering, the existence of an agreement, understanding, arrangement, or substantial negotiations will be based on discussions by one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders, with an investment banker.

(2) *Controlled corporation.* A controlled corporation is a corporation the stock of which is distributed in a distribution to which section 355 (or so much of section 356 as relates to section 355) applies.

(3) *Controlling shareholder.* (i) A controlling shareholder of a corporation the stock of which is listed on an established market is a five-percent shareholder who actively participates in the management or operation of the corporation. For purposes of this paragraph (h)(3)(i), a corporate director will be treated as actively participating in the management of the corporation.

(ii) A controlling shareholder of a corporation the stock of which is not listed on an established market is any person that owns stock possessing voting power representing a meaningful voice in the governance of the corporation. For purposes of determining whether a person owns stock possessing voting power representing a meaningful voice in the governance of the corporation, the person shall be treated as owning the stock that such person owns actually and constructively under the rules of section 318 (without regard to section 318(a)(4)). In addition, if the exercise of an option (whether by itself or in conjunction with the deemed exercise of one or more other options) would cause the holder to own stock possessing voting power representing a meaningful voice in the governance of the corporation, then the option will be treated as exercised.

(iii) If a distribution precedes an acquisition, Controlled's controlling shareholders immediately after the distribution and Distributing are included among Controlled's controlling shareholders at the time of the distribution.

(4) *Coordinating group.* A coordinating group includes two or more persons that, pursuant to a formal or informal understanding, join in one or more coordinated acquisitions or dispositions of stock of Distributing or Controlled. A principal element in determining if such an understanding exists is whether the investment decision of each person is based on the investment decision of one or more other existing or prospective shareholders. A coordinating group is treated as a single shareholder for purposes of determining whether the coordinating group is treated as a controlling shareholder, a five-percent shareholder, or a ten-percent shareholder.

(5) *Disclosure event.* A disclosure event regarding the distribution means any communication by an officer, director, controlling shareholder, or employee of Distributing, Controlled, or a corporation related to Distributing or Controlled, or an outside advisor of any of those persons (where such advisor makes the communication on behalf of such person), regarding the distribution, or the possibility thereof, to the acquirer or any other person (other than an officer, director, controlling shareholder, or employee of Distributing, Controlled, or a corporation related to Distributing or Controlled, or an outside advisor of any of those persons). For purposes of this paragraph (h)(5), a corporation is related to Distributing or Controlled if it is a member of an affiliated group (as defined in section 1504(a) without regard to section 1504(b)) that includes either Distributing or Controlled or it is a member of a qualified group (as defined in § 1.368–1(d)(4)(ii)) that includes either Distributing or Controlled.

(6) *Discussions.* Discussions by Distributing or Controlled generally require discussions by one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders. Discussions with the acquirer generally require discussions with the acquirer or with a person or persons with the implicit or explicit permission of the acquirer. In the case of an acquisition by a corporation, discussions with the acquiring corporation generally require discussions with one or more officers or directors acting on behalf of the acquiring corporation, with controlling shareholders of the acquiring corporation, or with another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders.

(7) *Established market.* An established market is—

(i) A national securities exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f);

(ii) An interdealer quotation system sponsored by a national securities association registered under section 15A of the Securities Act of 1934 (15 U.S.C. 78o–3); or

(iii) Any additional market that the Commissioner may designate in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(8) *Five-percent shareholder.* A person will be considered a five-percent shareholder of a corporation the stock of which is listed on an established market if the person owns five percent or more of any class of stock of the corporation whose stock is transferred. For purposes of determining whether a person owns five percent or more of any class of stock of the corporation whose stock is transferred, the person shall be treated as owning the stock that such person owns actually and constructively under the rules of section 318 (without regard to section 318(a)(4)). In addition, if the exercise of an option (whether by itself or in conjunction with the deemed exercise of one or more other options) would cause the holder to become a five-percent shareholder, then the option will be treated as exercised. Absent actual knowledge that a person is a five-percent shareholder, a corporation can rely on Schedules 13D and 13G (or any similar schedules) filed with the Securities and Exchange Commission to identify its five-percent shareholders.

(9) *Implicit permission.* A corporation is treated as having the implicit permission of its shareholders when it engages in discussions or negotiations, or enters into an agreement, understanding, or arrangement.

(10) *Public announcement.* A public announcement regarding the distribution means any communication by Distributing or Controlled regarding Distributing's intention to effect the distribution where the communication is generally available to the public.

(11) *Public offering.* An acquisition involving a public offering means an acquisition of stock for cash where the terms of the acquisition are established by the acquired corporation (Distributing or Controlled) or the seller with the involvement of one or more investment bankers and the potential acquirers have no opportunity to negotiate the terms of the acquisition. For example, a public offering includes an underwritten offering of registered stock for cash.

(12) *Similar acquisition (not involving a public offering).* In general, an actual acquisition (other than involving a public offering) is similar to another potential acquisition if the actual acquisition effects a direct or indirect combination of all or a significant portion of the same business operations as the combination that would have been effected by such other potential acquisition. Thus, an actual acquisition may be similar to another acquisition even if the timing or terms of the actual acquisition are different from the timing or terms of the other acquisition. For example, an actual acquisition of Distributing by shareholders of another corporation in connection with a merger of such other corporation with and into Distributing is similar to another acquisition of Distributing by merger into such other corporation or into a subsidiary of such other corporation. However, in general, an actual acquisition (other than involving a public offering) is not similar to another acquisition if the ultimate owners of the business operations with which Distributing or Controlled is combined in the actual acquisition are substantially different from the ultimate owners of the business operations with which Distributing or Controlled was to be combined in such other acquisition.

(13) *Similar acquisition involving a public offering*—(i) *One public offering.* In general, an actual acquisition involving a public offering may be similar to a potential acquisition involving a public offering, even though there are changes in the terms of the stock, the class of stock being offered, the size of the offering, the timing of the offering, the price of the stock, or the participants in the offering.

(ii) *More than one public offering.* More than one actual acquisition involving a public offering may be similar to a potential acquisition involving a public offering. If there is an actual acquisition involving a public offering (the first public offering) that is the same as, or similar to, a potential acquisition involving a public offering, then another actual acquisition involving a public offering (the second public offering) cannot be similar to the potential acquisition unless the purpose of the second public offering is similar to that of the potential acquisition and occurs close in time to the first public offering.

(iii) *Potential acquisition involving a public offering.* For purposes of paragraph (h)(13)(i) and (ii) of this section, as the context may require, a potential acquisition involving a public offering means a potential acquisition involving a public offering that was discussed by Distributing or Controlled with an investment banker, that motivated the distribution, or that was the subject of an agreement, understanding, arrangement, or substantial negotiations.

(14) *Ten-percent shareholder.* A person will be considered a ten-percent shareholder of a corporation the stock of which is listed on an established market if the person owns, actually or constructively under the rules of section 318 (without regard to section 318(a)(4)), ten percent or more of any class of stock of the corporation whose stock is transferred. A person will be considered a ten-percent shareholder of a corporation the stock of which is not listed on an established market if the person owns stock possessing ten percent or more of the total voting power of the stock of the corporation whose stock is transferred or stock having a value equal to ten percent or more of the total value of the stock of the corporation whose stock is transferred. For purposes of determining whether a person owns ten percent or more of the total voting power or value of the stock of the corporation whose stock is transferred, the person shall be treated as owning the stock that such person owns actually and constructively under the rules of section 318 (without regard to section 318(a)(4)). In addition, if the exercise of an option (whether by itself or in conjunction with the deemed exercise of one or more other options) would cause the holder to become a ten-percent shareholder, then the option will be treated as exercised. Absent actual knowledge that a person is a ten-percent shareholder, a corporation the stock of which is listed on an established market can rely on Schedules 13D and 13G (or any similar schedules) filed with the Securities and Exchange Commission to identify its ten-percent shareholders.

(i) [Reserved]

(j) *Examples.* The following examples illustrate paragraphs (a) through (h) of this section. Throughout these examples, assume that Distributing (D) owns all of the stock of Controlled (C). Assume further that D distributes the stock of C in a distribution to which section 355 applies and to which section 355(d) does not apply. Unless otherwise stated, assume the corporations do not have controlling shareholders. No inference should be drawn from any example concerning whether any requirements of section 355 other than those of section 355(e) are satisfied. The examples are as follows:

Example 1. Unwanted assets. (i) D is in business 1. C is in business 2. D is relatively small in its industry. D wants to combine with X, a larger corporation also engaged in business 1. X and D begin negotiating for X to acquire D, but X does not want to acquire C. To facilitate the acquisition of D by X, D agrees to distribute all the stock of C pro rata before the acquisition. Prior to the distribution, D and X enter into a contract for D to merge into X subject to several conditions. One month after D and X enter into the contract, D distributes C and, on the day after the distribution, D merges into X. As a result of the merger, D's former shareholders own less than 50 percent of the stock of X.

(ii) The issue is whether the distribution of C and the merger of D into X are part of a plan. No Safe Harbor applies to this acquisition. To determine whether the distribution of C and the merger of D into X are part of a plan, D must consider all the facts and circumstances, including those described in paragraph (b) of this section.

(iii) The following tends to show that the distribution of C and the merger of D into X are part of a plan: X and D had an agreement regarding the acquisition during the two-year period ending on the date of the distribution (paragraph (b)(3)(i) of this section), and the distribution was motivated by a business purpose to facilitate the merger (paragraph (b)(3)(v) of this section). Because the merger was agreed to at the time of the distribution, the fact described in paragraph (b)(3)(i) of this section is given substantial weight.

(iv) None of the facts and circumstances listed in paragraph (b)(4) of this section, tending to show that a distribution and an acquisition are not part of a plan, exist in this case.

(v) The distribution of C and the merger of D into X are part of a plan under paragraph (b) of this section.

Example 2. Public offering. (i) D's managers, directors, and investment banker discuss the possibility of offering D stock to the public. They decide a public offering of 20 percent of D's stock with D as a stand-alone corporation would be in D's best interest. One month later, to facilitate a stock offering by D of 20 percent of its stock, D distributes all the stock of C pro rata to D's shareholders. D issues new shares amounting to 20 percent of its stock to the public in a public offering seven months after the distribution.

(ii) The issue is whether the distribution of C and the public offering by D are part of a plan. No Safe Harbor applies to this acquisition. Safe Harbor VII, relating to public trading, does not apply to public offerings (see paragraph (d)(7)(i) of this section). To determine whether the distribution of C and the public offering by D are part of a plan, D must consider all the facts and circumstances, including those described in paragraph (b) of this section.

(iii) The following tends to show that the distribution of C and the public offering by D are part of a plan: D discussed the public offering with its investment banker during the two-year period ending on the date of the distribution (paragraph (b)(3)(ii) of this section), and the distribution was motivated by a business purpose to facilitate the public offering (paragraph (b)(3)(v) of this section).

(iv) None of the facts and circumstances listed in paragraph (b)(4) of this section, tending to show that a distribution and an acquisition are not part of a plan, exist in this case.

(v) The distribution of C and the public offering by D are part of a plan under paragraph (b) of this section.

Example 3. Hot market. (i) D is a widely-held corporation the stock of which is listed on an established market. D announces a distribution of C and distributes C pro rata to D's shareholders. By contract, C agrees to indemnify D for any imposition of tax under section 355(e) caused by the acts of C. The distribution is motivated by a desire to improve D's access to financing at preferred customer interest rates, which will be more readily available if D separates from C. At the time of the distribution, although neither D nor C has been approached by any potential acquirer of C, it is reasonably certain that soon after the distribution either an acquisition of C will occur or there will be an agreement, understanding, arrangement, or substantial negotiations regarding an acquisition of C. Corporation Y acquires C in a merger described in section 368(a)(1)(A) by reason of section 368(a)(2)(E) within six months after the distribution. The C shareholders receive less than 50 percent of the stock of Y in the exchange.

(ii) The issue is whether the distribution of C and the acquisition of C by Y are part of a plan. No Safe Harbor applies to this acquisition. Under paragraph (b)(2) of this section, because prior to the distribution neither D nor C and Y had an agreement, understanding, arrangement, or substantial negotiations regarding the acquisition or a similar acquisition, the distribution of C by D and the acquisition of C by Y are not part of a plan under paragraph (b) of this section.

Example 4. Unexpected opportunity. (i) D, the stock of which is listed on an established market, makes a public announcement that it will distribute all the stock of C pro rata to D's shareholders. After the public announcement but before the distribution, widely-held X becomes available as an acquisition target. There were no discussions by D or C with X before the date of the public announcement. D negotiates with X and X merges into D before the distribution. In the merger, X's shareholders receive ten percent of D's stock. D distributes the stock of C pro rata within six months after the acquisition of X. No shareholder of X was a controlling shareholder or a ten-percent shareholder of D at any time during the period beginning immediately after the merger and ending on the date of the distribution

(ii) The issue is whether the acquisition of X by D and the distribution of C are part of a plan. Safe Harbor V applies to this acquisition because the distribution is pro rata among D's shareholders, the acquisition occurs after the date of a public announcement regarding the distribution,

there were no discussions by D or C with X on or before the date of the public announcement, no acquirer was a controlling shareholder or a ten-percent shareholder of D during the period beginning immediately after the merger and ending on the date of the distribution, and not more than 20 percent of D's stock was acquired by the X shareholders in the merger.

Example 5. Vote shifting transaction. (i) D is in business 1. C is in business 2. D wants to combine with X, which is also engaged in business 1. The stock of X is closely held. X and D begin negotiating for D to acquire X, but the X shareholders do not want to acquire an indirect interest in C. To facilitate the acquisition of X by D, D agrees to distribute all the stock of C pro rata before the acquisition of X. D and X enter into a contract for X to merge into D subject to several conditions. Among those conditions is that D will amend its corporate charter to provide for two classes of stock: Class A and Class B. Under all circumstances, each share of Class A stock will be entitled to ten votes in the election of each director on D's board of directors. Upon issuance, each share of Class B stock will be entitled to ten votes in the election of each director on D's board of directors; however, a disposition of such share by its original holder will result in such share being entitled to only one vote, rather than ten votes, in the election of each director. Immediately after the merger, the Class B shares will be listed on an established market. One month after D and X enter into the contract, D distributes C. Immediately after the distribution, the shareholders of D exchange their D stock for the new Class B shares. On the day after the distribution, X merges into D. In the merger, the former shareholders of X exchange their X stock for Class A shares of D. Immediately after the merger, D's historic shareholders own stock of D representing 51 percent of the total combined voting power of all classes of stock of D entitled to vote and more than 50 percent of the total value of all classes of stock of D. During the 30-day period following the merger, none of the Class A shares are transferred, but a number of D's historic shareholders sell their Class B stock of D in public trading with the result that, at the end of that 30-day period, the Class A shares owned by the former X shareholders represent 52 percent of the total combined voting power of all classes of stock of D entitled to vote.

(ii) *X acquisition.* (A) The issue is whether the distribution of C and the merger of X into D are part of a plan. No Safe Harbor applies to this acquisition. To determine whether the distribution of C and the merger of X into D are part of a plan, D must consider all the facts and circumstances, including those described in paragraph (b) of this section.

(B) The following tends to show that the distribution of C and the merger of X into D are part of a plan: X and D had an agreement regarding the acquisition during the two-year period ending on the date of the distribution (paragraph (b)(3)(i) of this section), and the distribution was motivated by a business purpose to facilitate the merger (paragraph (b)(3)(v) of this section). Because the merger was agreed to at the time of the distribution, the fact described in paragraph (b)(3)(i) of this section is given substantial weight.

(C) None of the facts and circumstances listed in paragraph (b)(4) of this section, tending to show that a distribution and an acquisition are not part of a plan, exist in this case.

(D) The distribution of C and the merger of X into D are part of a plan under paragraph (b) of this section.

(iii) *Public trading of Class B shares.* (A) Assuming that each of the transferors and the transferees of the Class B stock of D in public trading is not one of the prohibited transferors or transferees listed in paragraph (d)(7)(i), Safe Harbor VII will apply to the acquisitions of the Class B stock during the 30-day period following the merger such that the distribution and those acquisitions will not be treated as part of a plan. However, to the extent that those acquisitions result in an indirect acquisition of voting power by a person other than the acquirer of the transferred stock, Safe Harbor VII does not prevent the acquisition of the D stock (with the voting power such stock represents after those acquisitions) by the former X shareholders from being treated as part of a plan.

(B) To the extent that the transfer of the Class B shares causes the voting power of D to shift to the Class A stock acquired by the former X shareholders, such shifted voting power will be treated as attributable to the stock acquired by the former X shareholders as part of a plan that includes the distribution and the X acquisition.

Example 6. Acquisition not involving a public offering that is not similar. (i) D, X, and Y are each corporations the stock of which is publicly traded and widely held. Each of D, X, and Y is engaged in the manufacture and sale of trucks. C is engaged in the manufacture and sale of buses. D and X engage in substantial negotiations concerning X's acquisition of the stock of D from the D shareholders in exchange for stock of X. D and X do not reach an agreement regarding that acquisition. Three months after D and X first began negotiations regarding that acquisition, D distributes the stock of C pro rata to its shareholders. Three months after the distribution, Y acquires the stock of D from the D shareholders in exchange for stock of Y. The ultimate owners of Y are substantially different from the ultimate owners of X.

(ii) Although both X and Y engage in the manufacture and sale of trucks, X's truck business and Y's truck business are not the same business operations. Therefore, because Y's acquisition of D does not effect a combination of the same business operations as X's acquisition of D would have effected, and because the ultimate owners of Y are substantially different from the ultimate owners of X, Y's acquisition of D is not similar to X's potential acquisition of D that was the subject of earlier negotiations.

Example 7. Acquisition not involving a public offering that is similar. (i) D is engaged in the business of writing custom software for several industries (industries 1 through 6). The software business of D related to industries 4, 5, and 6 is significant relative to the software business of D related to industries 3, 4, 5, and 6. X, an unrelated corporation, is engaged in the business of writing software and the business of manufacturing and selling hardware devices. X's business of writing software is significant relative to its total businesses. X and D engage in substantial negotiations regarding X's acquisition of D stock from the D shareholders in exchange for stock of X. Because X does not want to acquire the software businesses related to industries 1 and 2, these negotiations relate to an acquisition of D stock where D owns the software businesses related only to industries 3, 4, 5, and 6. Thereafter, D concludes that the intellectual property licenses central to the software business related to industries 1 and 2 are not transferable and that a separation of the software business related to industry 3 from the software business related to industry 2 is not desirable. One month after D begins negotiating with X, D contributes the software businesses related to industries 4, 5, and 6 to C, and distributes the stock of C pro rata to its shareholders. In addition, X sells its hardware businesses for cash. After the distribution, C and X negotiate for X's acquisition of the C stock from the C shareholders in exchange for X stock, and X acquires the stock of C.

(ii) Although D and C are different corporations, C does not own the custom software business related to industry 3, and X sold its hardware business prior to the acquisition of C, because X's acquisition of C involves a combination of a significant portion of the same business operations as the combination that would have been effected by the acquisition of D that was the subject of negotiations between D and X, X's acquisition of C is the same as, or similar to, X's potential acquisition of D that was the subject of earlier negotiations.

Example 8. Acquisitions involving public offerings with different purposes. (i) D's managers, directors, and investment banker discuss the possibility of offering D stock to the public for the purpose of funding the acquisition of the assets of X. They decide a public offering of 20 percent of D's stock with D as a stand-alone corporation would allow D to raise the capital needed to effect the acquisition of X's assets. One month later, to facilitate a stock offering by D of 20 percent of its stock, D distributes all the stock of C pro rata to D's shareholders. Two months after the distribution, D issues new shares amounting to 20 percent of its stock to the public in a public offering (the first public offering). Four months after the distribution, D acquires the assets of X. Seven months after the distribution, D's managers, directors, and investment banker discuss the possibility of offering D stock to the public solely for the purpose of funding the acquisition of the assets of Y, a corporation unrelated to X. One year after the distribution, D issues new shares amounting to 40 percent of its stock to the public in a public offering (the second public offering). One month after the second public offering, D acquires the assets of Y.

(ii) The first public offering is the same as the potential acquisition that D's managers, directors, and investment banker discussed prior to the distribution. The purpose of the second public offering (funding the

acquisition of the assets of Y) is not similar to that of the potential acquisition (funding the acquisition of the assets of X). Therefore, the second public offering is not similar to the potential acquisition.

Example 9. Acquisitions involving public offerings that are close in time. (i) D's managers, directors, and investment banker discuss the possibility of offering D stock to the public for the purpose of raising funds for general corporate purposes. They decide a public offering of 20 percent of D's stock with D as a stand-alone corporation would allow D to raise such funds. One month later, to facilitate a stock offering by D of 20 percent of its stock, D distributes all the stock of C pro rata to D's shareholders. Two months after the distribution, D issues new shares amounting to 20 percent of its stock to the public in a public offering (the first public offering). After the first public offering, D's managers, directors, and investment banker discuss the possibility of another offering of D stock to the public for the purpose of raising additional funds for general corporate purposes. Eight months after the distribution, D issues new shares amounting to ten percent of its stock to the public in a public offering (the second public offering).

(ii) The first public offering is the same as the potential acquisition that D's managers, directors, and investment banker discussed prior to the distribution. The purpose of the second public offering (raising funds for general corporate purposes) is the same as that of the potential acquisition. In addition, the second public offering is close in time to the first public offering. Therefore, the second public offering is similar to the potential acquisition.

Example 10. Acquisitions involving public offerings that are not close in time. The facts are the same as those in *Example 9.* except that the second public offering occurs fourteen months after the distribution. Although the purpose of the second public offering is the same as that of the potential acquisition, the second public offering is not close in time to the first public offering. Therefore, the second public offering is not similar to the potential acquisition.

(k) *Effective dates.* This section applies to distributions occurring after April 19, 2005. For distributions occurring on or before April 19, 2005, and after April 26, 2002, see § 1.355–7T as contained in 26 CFR part 1 revised as of April 1, 2003; however, taxpayers may apply these regulations, in whole, but not in part, to such distributions. For distributions occurring on or before April 26, 2002, and after August 3, 2001, see § 1.355–7T as contained in 26 CFR part 1 revised as of April 1, 2002; however, taxpayers may apply, in whole, but not in part, either these regulations or § 1.355–7T as contained in 26 CFR part 1 revised as of April 1, 2003, to such distributions. For distributions occurring on or before August 3, 2001, and after April 16, 1997, taxpayers may apply, in whole, but not in part, either these regulations or § 1.355–7T as contained in 26 CFR part 1 revised as of April 1, 2003, to such distributions.

§ 1.355–7T [Removed]

■ **Par. 4.** Section 1.355–7T is removed.

Cono R. Namorato,

Acting Deputy Commissioner for Services and Enforcement.

Approved: April 13, 2005.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 05–7811 Filed 4–18–05; 8:45 am]

BILLING CODE 4830–01–P

POSTAL SERVICE

39 CFR Parts 211 and 601

Purchasing of Property and Services

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service™ is amending its regulations in order to implement the acquisition portions of its *Transformation Plan* (April 2002) and the similar recommendations of the President's Commission on the United States Postal Service (July 2003) as they relate to the acquisition of property, goods and services in accordance with 39 U.S.C. §§ 101, 401, 403, 404, and 410.

DATES: *Effective Date:* May 19, 2005.

FOR FURTHER INFORMATION, CONTACT: Michael J. Harris, (202) 268–5653.

SUPPLEMENTARY INFORMATION:

Background

The Board of Governors of the Postal Service has determined in the *Transformation Plan* that challenging times require the Postal Service to continually improve its business practices to meet the challenge of the future in order to fulfill its charter to serve the American public. As part of that challenge, the Postal Service determined to "revise purchasing regulations [where possible] to allow for the acquisition of goods and services in a manner similar to that followed by businesses." *Transformation Plan* (April 2002), p. v.

The President's Commission on the Postal Service also has recommended that the Postal Service exercise the "latitude to conduct its procurement with fewer substanti[ve] regulations" pursuant to authority granted by Congress in the Postal Reorganization Act Report (July 2003), p. 94. The Commission expressed its view that "it is inappropriate to apply regulations * * * aimed at traditional agencies to a Federal entity required to finance its own multi-billion dollar operations." Rather, the public will benefit greatly if the Postal Service applies purchasing practices used by leading corporate enterprises. In accordance with the *Transformation Plan* and the Commission's recommendations, the Postal Service is replacing all of its current purchasing regulations with those discussed here.

The Postal Service published in the **Federal Register** on March 24, 2004 [Vol. 69, No. 57, pages 13786–13793], proposed rules, invited comments by members of the public on or before April 23, 2004, and received 20 responses and comments, some of which were by membership associations or organizations.

Discussion of Comments

Given that the Postal Service does business with approximately 25,000 suppliers per annum, very few commented on the proposed regulations. We view that as an indication that the supplier community is satisfied with the proposed regulations and did not have serious reservations about the proposed regulations. Some responders expressed positive views of the proposed regulations. The critical comments may generally be placed in three categories, as follows:

1. Revocation of previous purchasing regulations. Several responders expressed a view that revocation of the previous regulations would lead to a lack of transparency and also expressed a view that the Postal Service's non-binding guidelines should be made available to the public, so the public will know more about the Postal Service's acquisition policies and practices.

When Congress passed the Postal Reorganization Act it exempted the Postal Service from most governmental purchasing regulations in order to give it the flexibility to operate in a manner akin to those in the private sector. The Postal Service, in its transformed purchasing regulations, seeks to fulfill that Congressional policy by adopting regulations which will allow it to obtain the best products or services to meet its needs at fair and reasonable prices. In other words, the Postal Service seeks to focus upon and to obtain the best value in its acquisitions. The new regulations, as well as Supplying Principles and Practices now under development, are designed to permit flexibility to the Postal Service so it may respond to market conditions in acquiring the best property, goods and services it believes meet its needs at a fair and reasonable

price. Best value and supply-chain management will be most conducive to the mission of the Postal Service and will allow it to continue to serve its customers, the supplier community, and the general public well. These regulations have the force and effect of law. The Supplying Principles and Practices, currently being drafted, will provide flexible, modern supply-chain management throughout the Postal Service. These Principles and Practices will not have the force or effect of law. During the time period between these regulations becoming effective and the completion of the new Supplying Principles and Practices, a set of Interim Internal Purchasing Guidelines will provide guidance to Postal Service contracting officers. The Guidelines will not have the force and effect of law.

Public oversight of the Postal Service will not be diminished, as those charged now with such functions will continue to do so. In addition, the Postal Service has added an ombudsman (discussed further below) to assist it in obtaining the best goods and services to meet its needs at the best prices. Review by the ombudsman will be available to members of the supplier community to resolve any disagreements they are unable to resolve with contracting officers or management.

Some responders asked that internal Postal Service guidelines be made available to the public. Given that much information about the Postal Service is available to the public through the Freedom of Information Act and other means, the Postal Service will place many of its internal processes, including its Supplying Principles and Practices, on its web page. Those materials will not be postal regulations and will not have the force or effect of law, as they are designed to permit flexibility to address changing market conditions. The Supplying Principles and Practices will not be binding regulations of the Postal Service. The public should be guided by and may rely upon the regulations contained herein, 39 CFR Part 601, rather than the Supplying Principles and Practices, which are intended for internal use only to assist the Postal Service in obtaining best value and efficiently conducting its supply chain functions. The Supplying Principles and Practices will be advisory and illustrative of approaches that may generally be used by Postal Service employees, but will be intended to provide for flexibility and discretion in their application to specific business situations. The Supplying Principles and Practices, therefore, will create no rights, substantive or procedural, enforceable against the Postal Service. Those materials may be altered or superseded at any time without notice.

The supplier community will continue to be notified in individual solicitations as to how proposals generally will be evaluated and how the Postal Service will determine best value. Debriefings will continue to be available upon request.

2. Declining to accept or consider proposals. Several responders expressed the view that those parts of the new regulations dealing with cancellation of business relationships should not be adopted, as existing contracts could be terminated and because Postal Service contracting officers will act arbitrarily to cease doing business with suppliers. We do not believe those concerns are realistic. We are re-naming this section of the regulations to more precisely state that the Postal Service will not accept or consider proposals from persons or organizations that do not meet reasonable business expectations. Declining to accept or consider a proposal should not be confused with cancellation of an existing contract. The Postal Service may continue to terminate a contract for its convenience or for default, as it has done in the past.

Only the vice president of Supply Management (not contracting officers) is authorized to decide that the Postal Service will decline to accept or consider proposals from any prospective supplier, and that is expected to be a rare occurrence that would be made only after careful analysis of the basis of the action.

The purpose of this part of the regulation is to provide the Postal Service with the ability, in a forthright manner, to decline to do business with a company or organization that has demonstrated a record of poor performance. It is not in the best interest of Postal Service customers, the supplier community, or the general public for the Postal Service to acquire property, goods, or services from companies that do not perform adequately.

As a safeguard, any company or organization from which the Postal Service decides not to accept or consider its proposals will receive written notice of the reason(s) why and an opportunity to provide countervailing evidence, justification, or other reasons, e.g., that the problem has been corrected.

3. Ombudsman. Most comments favored adoption of this dispute-resolution mechanism. There was some concern that the ombudsman could not consider the Interim Internal Purchasing Guidelines or the Supplying Principles and Practices, whichever is in effect. Either set of guidelines, however, will address the process by which the Postal Service seeks suppliers while the ombudsman will focus on the best value considerations and business decisions made by the contracting officer to determine which supplier should be awarded a contract. That is, the organization that offers the best products or services to meet the Postal Service's needs at a fair and reasonable cost will be awarded a contract. Those are best-value considerations that the ombudsman will focus upon in resolving disputes.

Section-by-Section Analysis

Section 211.2(a)(2)

This section describes the regulations of the Postal Service. It is changed to reflect that the Postal Service Purchasing Manual and all other Postal Service purchasing regulations are revoked and replaced by those in Part 601.

Section 601.100 Purchasing Policy

This section describes the policy of the Postal Service to acquire property and services in accordance with all applicable laws enacted by Congress. It is intended that the Postal Service will exercise the full powers granted by Congress to it with respect to the acquisition of property and services and will acquire goods and services in a manner akin to the best commercial practices in the private sector in order to serve the American public.

Section 601.101 Effective Date

So that prospective suppliers and members of the public have sufficient time to become acquainted with the new regulations, the new regulations will become effective thirty days after publication in the **Federal Register**.

Section 601.102 Revocation of Prior Purchasing Regulations

This section specifies that all other regulations dealing with any or all aspects of purchasing are revoked and will be of no further force or effect, excepting only as applied to solicitations issued and contracts signed prior to the effective date of these regulations. Examples of the revoked regulations are given.

Section 601.103 Applicability and Coverage

This section makes it clear that the regulations apply to all acquisitions of property (except real property) and services.

Section 601.104 Postal Purchasing Authority

This section discusses who is authorized to bind the Postal Service with respect to contracts involving the acquisition of property and services. Only certain people legally may bind the Postal Service. Those persons are identified by title or position in the regulations. The regulations also provide that other persons may be given authority by appropriate written delegation to enter into contracts to bind the Postal Service with respect to any and all purchasing matters. Absent specific authority, however, a person may not enter into a contract or commitment on behalf of the Postal Service or otherwise bind the Postal Service.

Section 601.105 Business Relationships

This section states the Postal Service's expectation that it will be treated by each of its suppliers and prospective suppliers as a valued customer. This section also informs the supplier community that the Postal Service may cease accepting or considering proposals from any person or organization that fails to meet the Postal Service's expectations of high quality, prompt service, and overall professionalism.

Section 601.106 Declining To Accept or Consider Proposals

This section states the Postal Service's policy that it may elect not to accept or consider proposals from persons or organizations that do not meet reasonable business expectations or provide a high level of confidence about current and/or future business relationships. Examples of the kind of behavior that may lead the Postal Service to cease considering or accepting proposals from a person or organization are given. The reasons that may cause the Postal Service to cease accepting or considering proposals under § 601.106 with a potential supplier differ from the reasons that may cause the Postal Service to debar a supplier under § 601.113. A decision not to accept or consider proposals may be informed by a supplier's unreasonable or unsatisfactory business practices while debarment is reserved for more egregious forms of supplier misconduct.

This section also provides that when the Postal Service elects to exercise its right to cease accepting or considering proposals from any person or organization, the Postal Service will notify that person or organization, state the reason(s) it has taken that action, and give the person or organization an opportunity to question the Postal Service's actions. Dispute-resolution procedures have been created in the regulations to resolve disagreements over such decisions as well as some other matters.

Section 601.107 Initial Disagreement Resolution

This section states the Postal Service's policy to initially attempt to address and resolve all business disagreements that arise between suppliers or potential suppliers and the Postal Service regarding all aspects of solicitations, awards of contracts, and related matters quickly and inexpensively, at the contracting officer or management level. Time lines have been established concerning the lodging of disagreements and their resolution.

The Postal Service contracting officer must consider alternative dispute resolution procedures as a means of resolving such disagreements, which may be used if agreed to by both parties. Illustrations of various types of dispute resolution procedures are listed. No supplier, however, will be required to use such alternate dispute procedures if the supplier chooses not to do so.

This section also provides that it does not apply to disputes arising under the Contract Disputes Act or with respect to disputes about debarment, suspension, and ineligibility from government contracting under § 601.113.

Section 601.108 Ombudsman Disagreement Resolution

This section states that if resolution of disagreements between a person or organization and the contracting officer or appropriate management level does not occur within ten calendar days, the disagreement may then be presented, addressed and resolved by an ombudsman appointed by the Postal Service. An expedited procedure is provided to resolve any such disagreements quickly and with finality. The ombudsman is expected to give a written decision within 30 days after receiving notice of a disagreement from a supplier or prospective supplier. Decisions of the ombudsman will be final and binding, with limited exceptions specified in this section of the regulations.

This section also provides that it does not apply to disputes arising under the Contract Disputes Act or with respect to disputes about debarment, suspension, and ineligibility from government contracting under § 601.113.

Section 601.109 Contract Claims and Procedures

This section implements the Contract Disputes Act. The section is very similar to the current regulations regarding contract disputes and it does not reflect substantive changes.

Section 601.113 Debarment, Suspension, and Ineligibility

This section sets forth the Postal Service's policies and practices regarding debarment, suspension, and ineligibility from contracting with the Postal Service. Debarment generally is considered for very serious offenses. Examples of such offenses are given in this section. Procedures to be followed by the Postal Service regarding debarment, suspension, and ineligibility are given in this section.

Debarment is applicable to more serious instances of supplier misconduct as compared to a cessation of business relationships under § 601.106, which is akin to decisions by private organizations to choose not to do business with other private organizations for legitimate business reasons.

List of Subjects in 39 CFR Parts 211 and 601

Postal Service.

■ Therefore, for the reasons set forth in the preamble, the Postal Service is amending part 211 and revising 601 as follows:

PART 211—APPLICATION OF REGULATIONS

■ 1. The authority citation for part 211 continues to read as follows:

Authority: 39 U.S.C. 201, 202, 401(2), 402, 403, 404, 410, 1001, 1005, 1209.

■ 2. Revise § 211.2(a)(2) to read as follows:

§ 211.2 Regulations of the Postal Service.

(a) * * *

(2) The *Mailing Standards of the United States Postal Service, Domestic Mail Manual*; the *Postal Operations Manual*; the *Administrative Support Manual*; the *Employee and Labor Relations Manual*; the *Financial Management Manual*; the *International Mail Manual*; and those portions of Chapter 2 of the former *Postal Service Manual* and chapter 7 of the former *Postal Manual* retained in force.

* * * * *

PART 601—PURCHASING OF PROPERTY AND SERVICES

■ 3. Revise 601 to read as follows:

PART 601—PURCHASING OF PROPERTY AND SERVICES

Sec.

Authority: 39 U.S.C. 401, 404, 410, 411, 2008, 5001–5605.

§ 601.100 Purchasing policy.

It is the policy of the Postal Service to acquire property and services in accordance with 39 U.S.C. 410 and all other applicable public laws enacted by Congress.

§ 601.101 Effective date.

These regulations are effective May 19, 2005.

§ 601.102 Revocation of prior purchasing regulations.

All previous Postal Service purchasing regulations, including the *Postal Contracting Manual*, *Procurement Manual*, the *Purchasing Manual* (Issues 1, 2 and 3), and procurement handbooks, circulars, and instructions, are revoked and are superseded by the regulations contained in this part, except as provided in § 601.103.

§ 601.103 Applicability and coverage.

The regulations contained in this part apply to all Postal Service acquisition of property (except real property) and services. Solicitations issued and contracts entered into prior to the effective date of the regulations in this part will be governed by the regulations in effect at the time the contract was signed.

§ 601.104 Postal purchasing authority.

Only the Postmaster General/CEO; the Postal Service's vice president of Supply Management; contracting officers with written statements of specific authority; and others designated in writing or listed in this part have the authority to bind the Postal Service with respect to entering into, modifying, or terminating any contract regarding the acquisition of property, services, and related purchasing matters. The Postal Service's vice president of Supply Management, or his or her designee, may also delegate in writing local buying authority throughout the Postal Service.

§ 601.105 Business relationships.

A person or organization wishing to enjoy a continuing business relationship with the Postal Service in purchasing matters is expected to treat the Postal Service in the same manner as it would other valued customers of similar size and importance. The Postal Service reserves the right to cease accepting or considering proposals from a person or organization when that person or organization fails to meet reasonable business expectations of high quality, prompt service, and overall professionalism.

§ 601.106 Declining to accept or consider proposals.

(a) *General.* The Postal Service may decline to accept or consider proposals from a person or organization that does not meet reasonable business expectations or does not provide a high level of confidence about current or future business relations. Typically, these sorts of unacceptable conduct and business practices will not rise to the level of unethical or criminal activities that could lead to the debarment, suspension, or ineligibility of a supplier. Unacceptable conduct or business practices include, but are not limited to:

(1) Marginal or dilatory contract performance;

(2) Failure to deliver on promises made in the course of dealings with the Postal Service;

(3) Providing false or misleading information as to financial condition, ability to perform, or other material matters, including any aspect of performance on a contract; and

(4) Engaging in other questionable or unprofessional conduct or business practices.

(b) *Notice.* If the Postal Service elects to decline to accept or consider proposals from a person or organization, the vice president of Supply Management, or his or her designee, will provide a written notice to the person or organization explaining:

(1) The reasons for the decision;

(2) The effective date of the decision;

(3) The scope of the decision;

(4) The duration of the decision (this may be limited to a specified length of time or may extend indefinitely); and

(5) The supplier's right to contest the decision.

(c) *Contesting Decisions.* If a person or organization believes the decision not to accept or consider proposals is not merited, it may contest the matter in accordance with the ombudsman and disagreement-resolution procedures contained in this part, seek to resolve the matter by agreement through alternative dispute resolution, or both. The Postal Service may reconsider the matter and, if warranted, rescind or modify the decision to decline to accept or consider proposals.

§ 601.107 Initial disagreement resolution.

It is the policy of the Postal Service and in the interest of suppliers to resolve potential disagreements by mutual agreement at the contracting officer or appropriate management level. Therefore, all disputes, protests, claims, disagreements, or demands of whatsoever nature (hereinafter "disagreements") against the Postal Service arising in connection with the purchasing process, except claims that arise pursuant to a contract under the Contract Disputes Act or claims concerning debarment, suspension, or ineligibility under § 601.113, must be lodged with the responsible contracting officer for resolution within 10 days of the date the disagreement arose. If the matter is not resolved within 10 days following the lodging of the dispute, the disagreement may be lodged with the Ombudsman as described in § 601.108. Alternative dispute resolution (ADR) procedures may be used, if agreed to by both parties. The Postal Service supports and encourages the use of ADR as an effective way to understand, address, and resolve disagreements and conflicts. A person or organization disagreeing with a Postal Service decision and the Postal Service contracting officer must consider the use of ADR to resolve a particular purchasing disagreement, regardless of the nature of the disagreement or when it occurs during the purchasing process. ADR methods include informal negotiation, mediation by a neutral third party, and any other agreed-upon method.

§ 601.108 Ombudsman disagreement resolution.

(a) *Policy.* From time to time, disagreements may arise between suppliers, potential suppliers, and the Postal Service regarding awards of contracts and related matters that are not resolved as set forth in § 601.107. When a disagreement under § 601.107 is not resolved within ten calendar days of when it was lodged with the contracting officer, then the disagreement may be lodged with the ombudsman established in this part for final resolution. The Postal Service desires to resolve all such disagreements quickly and

inexpensively in keeping with the regulations in this part, 39 U.S.C. 410, and all other applicable public laws enacted by Congress. In resolving disagreements, non-Postal Service procurement rules or regulations will not govern.

(b) *Scope and Applicability.* In order to expeditiously resolve disagreements that are not resolved at the contracting officer or appropriate management level, to reduce litigation expenses, inconvenience, and other costs for all parties, and to facilitate successful business relationships with Postal Service suppliers, the supplier community, and other persons, the following procedure is established as the sole and exclusive means to resolve disagreements arising in connection with awards of contracts for the purchase of property (excluding real property) or services and all related matters. All disputes, protests, claims, disagreements, or demands of whatsoever nature (hereinafter "disagreements") against the Postal Service arising in connection with the purchasing process, except claims that arise pursuant to a contract under the Contract Disputes Act or claims concerning debarment, suspension, or ineligibility under § 601.113, will be lodged with and resolved, with finality, by the ombudsman under and in accordance with the sole and exclusive procedure established in this section.

(c) A disagreement may be lodged with the ombudsman by an organization or a person with respect to the Postal Service's decision not to accept or consider business proposals or the award of a contract.

(d) The disagreement must be lodged in writing and must state the factual circumstances relating to it, the remedy sought, and the rationale for the disagreement. Counsel is not required, but may be retained to assist in the disagreement process. The person or organization lodging the disagreement must indicate in the disagreement whether it is willing to attempt to resolve the matter through informal discussions, mediation, or another means of ADR.

(e) A disagreement must be lodged with the ombudsman within twenty calendar days after the time it was presented in § 601.107. The ombudsman may grant an extension of time to lodge a disagreement or to provide supporting information when warranted. Any request for an extension must set forth the reasons for the request, be made in writing, and be delivered to the ombudsman on or before the time to lodge a disagreement lapses. The address of the ombudsman is: Attn: Ombudsman, United States Postal Service Headquarters, 475 L'Enfant Plaza, SW., Room 4110, Washington, DC 20260–6200.

(f) The ombudsman will promptly provide a copy of a disagreement to the contracting officer, who will promptly notify other interested persons (i.e., actual or prospective offerors whose direct economic interests would be affected by the award of, or failure to award, the contract). The ombudsman will consider a disagreement and any response by other interested persons and appropriate Postal Service officials within a time frame established by the ombudsman. The ombudsman may also meet individually or jointly with the person or organization lodging the disagreement, other interested persons, and/or Postal Service officials, and may undertake other activities in order to obtain materials, information, or advice that may help to resolve the disagreement. The person or organization lodging the disagreement, other interested persons, or Postal Service officials must promptly provide all relevant, nonprivileged materials and other information requested by the ombudsman. After obtaining such information, materials, and advice as may be needed, the ombudsman will promptly issue a decision in writing resolving a disagreement and will deliver the decision to the person or organization lodging the disagreement, other interested persons, and appropriate Postal Service officials. If confidential or privileged material is needed in order to reach a decision, the ombudsman will notify the appropriate party to provide such material to the ombudsman only. The confidential material will be held in confidence by the ombudsman and will be returned to the party upon request at the conclusion of the matter.

(g) In considering and in resolving a disagreement, the ombudsman will be guided by the regulations contained in this part and all applicable public laws enacted by Congress. Non-Postal Service procurement rules or regulations and revoked Postal Service regulations will not apply or be taken into account in resolving disagreements. Failure of any party to provide promptly requested information may be taken into account by the ombudsman in the decision.

(h) A decision of the ombudsman will be final and binding on the person or organization lodging the disagreement, other interested persons, and the Postal Service. However, the person or organization that lodged the disagreement or another interested person may appeal the decision to a federal court with jurisdiction over such claims, but only on the grounds that the decision:

(1) Was procured by fraud or other criminal misconduct; or

(2) Was obtained in violation of the regulations contained in this part or an applicable public law enacted by Congress.

(i) It is intended that this procedure generally will resolve disagreements within approximately 30 days after the ombudsman receives the disagreement. The time may be shortened or lengthened depending on the complexity of the issues and other relevant considerations.

§ 601.109 Contract claims and disputes.

(a) *General.* This section implements the Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613).

(b) *Policy.* It is Postal Service policy to resolve contractual claims and disputes by mutual agreement at the level of an authorized contracting officer whenever possible. In addition, the Postal Service supports and encourages the use of alternative dispute resolution as an effective way to understand, address, and resolve conflicts with suppliers. Efforts to resolve differences should be made before the issuance of a final decision on a claim, and even when the supplier does not agree to use ADR, the contracting officer should consider holding informal discussions between the parties in order to resolve the conflict before the issuance of a final decision.

(c) *Contractor Claim Initiation.* Supplier claims must be submitted in writing to the contracting officer for final decision. The contracting officer must document the contract file with evidence of the date of receipt of any submission that the contracting officer determines is a claim. Supplier claims must be submitted within 6 years after accrual of a claim unless the parties agreed to a shorter time period. The 6-year time period does not apply to contracts awarded prior to October 1, 1995.

(d) *Postal Service Claim Initiation.* The contracting officer must issue a written decision on any Postal Service claim against a supplier, within 6 years after accrual of a claim, unless the parties agreed in writing to a shorter time period. The 6-year time period does not apply to contracts awarded prior to October 1, 1995, or to a Postal Service claim based on a supplier claim involving fraud.

(e) *Certified Claims.* Each supplier claim exceeding $100,000 must be accompanied by a certification in accordance with the supplier's contract.

(f) When the contracting officer determines that the supplier is unable to support any part of the claim and there is evidence or reason to believe the inability is attributable to either misrepresentation of fact or fraud on the supplier's part, the contracting officer must deny that part of the claim and refer the matter to the Office of Inspector General.

(g) *Decision and Appeal.* (1) *Contracting Officer's Authority.* A contracting officer is authorized to decide or settle all claims arising under or relating to a contract subject to the Contract Disputes Act, except for:

(i) Claims or disputes for penalties or forfeitures prescribed by statutes or regulation that a Federal agency administers; or

(ii) Claims involving fraud.

(2) *Contracting Officer's Decision.* The contracting officer must review the facts pertinent to the claim, obtain assistance from assigned counsel and other advisors, and issue a final decision in writing. The decision must include a description of the claim or dispute with references to the pertinent contract provisions, a statement of the factual areas of agreement and disagreement, and a statement of the contracting officer's decision with supporting rationale.

(3) *Insufficient Information.* When the contracting officer cannot issue a decision because the supplier has not provided sufficient information, the contracting officer must promptly request the required information. Further failure to provide the requested information is an adequate reason to deny the claim.

(4) *Furnishing Decisions.* The contracting officer must furnish a copy of the decision to the supplier by Certified Mail , return receipt requested, or by any other method that provides evidence of receipt.

(5) *Decisions on Claims for $100,000 or Less.* If the supplier has asked for a decision within 60 days, the contracting officer must issue a final decision on a claim of $100,000 or less within 60 calendar days of its receipt. The supplier may consider the contracting officer's failure to issue a decision within the applicable time period as a denial of its claim, and may file a suit or appeal on the claim.

(6) *Decisions on Certified Claims.* For certified claims over $100,000, the contracting officer must either issue a final decision within 60 calendar days of their receipt or notify the supplier within the 60-day period of the time when a decision will be issued. The time period established must be reasonable, taking into account the size and complexity of the claim, the adequacy of the supplier's supporting data, and any other relevant factors.

(7) *Wording of Decisions.* The contracting officer's final decision must contain the following paragraph: "This is the final decision of the contracting officer pursuant to the Contract Disputes Act of 1978 and the clause of your contract entitled Claims and Disputes. You may appeal this decision to the Postal Service Board of Contract Appeals by mailing or otherwise furnishing written notice (preferably in triplicate) to the contracting officer within 90 days from the date you receive this decision. The notice should identify the contract by number, reference this decision, and indicate that an appeal is intended. Alternatively, you may bring an action directly in the United States Court of Federal Claims within 12 months from the date you receive this decision.

(8) *Additional Wording for Decisions of $50,000 or Less.* When the claim or claims denied total $50,000 or less, the contracting officer must add the following to the paragraph: "In taking an appeal to the Board of Contract Appeals, you may include in your notice of appeal an election to proceed under the Board's small claims (expedited) procedure, which provides for a decision within approximately 120 days, or an election to proceed under the Board's accelerated procedure, which provides for a decision within approximately 180 days. If you do not make an election in the notice of appeal, you may do so by written notice anytime thereafter."

(9) *Additional Wording for Decisions Over $50,000 Up to $100,000.* When the claim or claims denied total $100,000 or less, but more than $50,000, the contracting officer must add the following to the paragraph: "In taking an appeal to the Board of Contract Appeals, you may include in your notice of appeal an election to proceed under the Board's accelerated procedure, which provides for a decision within approximately 180 days. If you do not make an election in the notice of appeal, you may do so by written notice anytime thereafter."

(10) Contracting officers must have sufficient information available at the time a final decision is issued on a claim so resolution of an appeal within the period set for an expedited disposition will not be delayed. Once an appeal is docketed, and expedited disposition is elected, contracting officers must devote sufficient resources to the appeal to ensure the schedule for resolution is met. Nothing in this part precludes an effort by the parties to settle a controversy after an appeal has been filed, although such efforts to settle the controversy will not suspend processing the appeal, unless the Board of Contract Appeals so directs.

§ 601.110 Payment of claims.

Any claim amount determined in a final decision to be payable, less any portion previously paid, should be promptly paid to the supplier without prejudice to either party in the event of appeal or action on the claim. In the absence of appeal by the Postal Service, a board or court decision favorable in whole or in part to the supplier must be implemented promptly. In cases when only the question of entitlement has been decided and the matter of amount has been remanded to the parties for negotiation, a final decision of the contracting officer must be issued if agreement is not reached promptly.

§ 601.111 Interest on claim amounts.

Interest on the amount found due on the supplier's claim must be paid from the date the contracting officer received the claim (properly certified, if required) or from the date payment would otherwise be due, if that date is later, until the date of payment. Simple interest will be paid at the rate established by the Secretary of the Treasury for each 6-month period in which the claim is pending. Information on the rate at which interest is payable is announced periodically in the *Postal Bulletin.*

§ 601.112 Review of adverse decisions.

Any party may seek review of an adverse decision of the Board of Contract Appeals in the Court of Appeals for the Federal Circuit or in any other appropriate forum.

§ 601.113 Debarment, suspension, and ineligibility.

(a) *General.* Except as provided otherwise in this part, contracting officers may not solicit proposals from, award contracts to, or consent to subcontracts with debarred, suspended, or ineligible suppliers.

(b) *Definitions.* (1) *Affiliate.* A business, organization, person, or individual connected by the fact that one controls or has the power to control the other or by the fact that a third party controls or has the power to control both. Factors such as common ownership, common management, and contractual relationships may be considered. Franchise agreements are not conclusive evidence of affiliation if the franchisee has a right to profit in proportion to its ownership and bears the risk of loss or failure.

(2) *Debarment.* An exclusion from contracting and subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense, failure, or inadequacy of performance.

(3) *General Counsel.* This includes the General Counsel's authorized representative.

(4) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.

(5) *Ineligible.* An exclusion from contracting and subcontracting by an entity other than the Postal Service under statutes, executive orders, or regulations, such as the Davis Bacon Act, the Service Contract Act, the Equal Employment Opportunity Acts, the Walsh-Healy Public Contracts Act, or the Environmental Protection Acts and related regulations or executive orders, to which the Postal Service is subject or has adopted as a matter of policy.

(6) *Judicial Officer.* This includes the acting Judicial Officer.

(7) *Suspension.* An exclusion from contracting and subcontracting for a reasonable period of time due to specified reasons or the pendency of a debarment proceeding.

(8) *Supplier.* For the purposes of this part, a supplier is any individual, person, or other legal entity that:

(i) Directly or indirectly (*e.g.*, through an affiliate) submits offers for, is awarded, or reasonably may be expected to submit offers for or be awarded, a Postal Service contract, including a contract for carriage under Postal Service or commercial bills of lading, or a subcontract under a Postal Service contract; or

(ii) Conducts business or reasonably may be expected to conduct business with the Postal Service as a subcontractor, an agent, or as a representative of another supplier.

(c) *Establishment and Maintenance of Lists.* (1) The vice president of Supply Management will establish, maintain, and distribute to purchasing offices a list of suppliers debarred or suspended by the Postal Service.

(2) The General Services Administration (GSA) compiles and maintains a consolidated list of all persons and entities debarred, suspended, proposed for debarment, or declared ineligible by Federal agencies or the Government Accountability Office. GSA posts the list on the Internet and publishes a hardcopy of the list.

(3) The vice president of Supply Management will notify the GSA of any Postal Service debarment, suspension, and change in the status of suppliers, including any of their affiliates, on the Postal Service list.

(d) *Treatment of Suppliers on Postal Service or GSA Lists.* (1) Contracting officers will review the Postal Service and GSA lists before making a contract award.

(2) Suppliers on the Postal Service list are excluded from receiving contracts and subcontracts, and contracting officers may not solicit proposals or quotations from, award contracts to, or, when a contract provides for such consent, consent to subcontracts with such suppliers, unless the vice president of Supply Management, or his or her designee, after consultation with the General Counsel, has approved such action. Suppliers on the Postal Service list may not provide goods or services to other persons or entities for resale, in whole or part, to the Postal Service and such other persons or entities are obligated to obtain and review the Postal Service list in order to exclude debarred or suspended suppliers from performing any part of a Postal Service contract.

(3) Suppliers on the GSA list are assigned a code by GSA which is related to the basis of ineligibility. The vice president of Supply Management maintains a table describing the Postal Service treatment assigned to each code. Suppliers on the GSA list who are coded as ineligible are excluded from receiving contracts and subcontracts, and contracting officers may not solicit proposals or quotations from, award contracts to, or, when the contract provides for such consent, consent to subcontracts with such suppliers, unless the vice president of Supply Management, or designee, after consultation with the General Counsel, has approved such action. Suppliers on the GSA list may not provide goods or services to other persons or entities for resale, in whole or part, to the Postal Service and such other persons or entities are obligated to obtain and review the GSA list in order to exclude debarred or suspended suppliers from performing any part of a Postal Service contract.

(4) Suppliers on the GSA list are assigned codes for which the table provides other Postal Service guidance, and are considered according to that guidance. When so indicated on the table, contracting officers must obtain additional information from the entity responsible for establishing the supplier's ineligibility, if such information is available.

(5) The debarment, suspension, or ineligibility of a supplier does not, of itself, affect the rights and obligations of the parties to any valid, pre-existing contract. The Postal Service may terminate for default a contract with a supplier that is debarred, suspended, or determined to be ineligible. Except for service changes under mail transportation contracts, contracting officers may not add new work to the contract by supplemental agreement, by exercise of an option, or otherwise, except with the approval of the vice president of Supply Management or designee.

(e) *Causes for Debarment.* (1) The vice president of Supply Management, with the concurrence of the General Counsel, may debar a supplier, including its affiliates, for cause such as the following:

(i) Conviction of a criminal offense incidental to obtaining or attempting to obtain contracts or subcontracts, or in the performance of a contract or subcontract.

(ii) Conviction under a Federal antitrust statute arising out of the submission of bids or proposals.

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property.

(iv) Violation of a Postal Service contract so serious as to justify debarment, such as willful failure to perform a Postal Service contract in accordance with the specifications or within the time limit(s) provided in the contract; a record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more Postal Service contracts occurring within a reasonable period of time preceding the determination to debar (except that failure to perform or unsatisfactory performance caused by acts beyond the control of the supplier may not be considered a basis for debarment); violation of a contractual provision against contingent fees; or acceptance of a contingent fee paid in violation of a contractual provision against contingent fees.

(v) Any other offense indicating a lack of business integrity or business honesty.

(vi) Any other cause of a serious and compelling nature that debarment is warranted.

(2) The existence of a conviction in paragraph (e)(1)(i) or (ii) of this section can be established by proof of a conviction in a court of competent jurisdiction. If appeal taken from such conviction results in a reversal of the conviction, the debarment may be removed upon the request of the supplier, unless another cause or another basis for debarment exists.

(3) The existence of any of the other causes in paragraphs (e)(1)(iii), (iv), (v), or (vi) of this section can be established by a preponderance of the evidence, either direct or indirect, in the judgment of the debarring official.

(4) The criminal, fraudulent, or improper conduct of an individual may be imputed to the firm with which he or she is or has been connected when an impropriety was committed. Likewise, when a firm is involved in criminal, fraudulent, or other improper conduct, any person who participated in, knew of, or had reason to know of the impropriety may be debarred.

(5) The fraudulent, criminal, or other improper conduct of one supplier participating in a joint venture or similar arrangement may be imputed to other participating suppliers if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of the supplier. Acceptance of the benefits derived from the conduct will be evidence of such knowledge, approval, or acquiescence.

(f) *Mitigating Factors.* (1) The existence of any cause for debarment does not necessarily require that a supplier be debarred. The decision to debar is within the discretion of the vice president of Supply Management, with the concurrence of the General Counsel, and must be made in the best interest of the Postal Service. The following factors may be assessed in determining the seriousness of the offense, failure, or inadequacy of performance, and may be taken into account in deciding whether debarment is warranted:

(i) Whether the supplier had established written standards of conduct and had published internal control systems at the time of the activity that constitutes cause for debarment or had adopted such procedures prior to any Postal Service investigation of the activity cited as a cause for debarment.

(ii) Whether the supplier brought the activity cited as a cause for debarment to the attention of the Postal Service in a prompt, timely manner.

(iii) Whether the supplier promptly and fully investigated the circumstances involving debarment and, if so, made the full results of the investigation available to appropriate officials of the Postal Service.

(iv) Whether the supplier cooperated fully with the Postal Service during its investigation into the matter.

(v) Whether the supplier paid or agreed to pay all criminal, civil, and administrative liability and other costs arising out of the improper activity, including any investigative or administrative costs incurred by the Postal Service, and made or agreed to make full restitution.

(vi) Whether the supplier took appropriate disciplinary action against the individual(s) responsible for the activity that could cause debarment.

(vii) Whether the supplier implemented and/or agreed to implement remedial measures, including those identified by the Postal Service.

(viii) Whether the supplier instituted and/or agreed to institute new and/or revised review and control procedures and ethics programs.

(ix) Whether the supplier had adequate time to eliminate circumstances within the supplier's organization that could lead to debarment.

(x) Whether the supplier's senior officers and mid-level management recognize and understand the seriousness of the misconduct giving rise to debarment.

(2) The existence or nonexistence of mitigating factors or remedial measures such as those above is not determinative whether or not a supplier should be debarred. If a cause for debarment exists, the supplier has the burden of demonstrating, to the satisfaction of the vice president of Supply Management that debarment is not warranted or necessary.

(g) *Period of Debarment.* (1) When an applicable statute, executive order, or controlling regulation of other agencies provides a specific period of debarment, that period applies. In other cases, debarment by the Postal Service should be for a reasonable, definite, stated period of time, commensurate with the seriousness of the offense or the failure or inadequacy of performance. Generally, a period of debarment should not exceed 3 years. When debarment for an additional period is deemed necessary, notice of the proposed additional period of debarment must be furnished to the supplier as in the case of original debarment.

(2) Except as precluded by an applicable statute, executive order, or controlling regulation of another agency, debarment may be removed or the period may be reduced by the vice president of Supply Management when requested by the debarred supplier and when the request is supported by a reasonable justification, such as newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, or the elimination of the causes for which debarment was imposed. The vice president of Supply Management may, at his or her discretion, deny any request or refer it to the Judicial Officer for a hearing and for findings of fact, which the vice president of Supply Management will consider when deciding the matter. When a debarment is removed or the debarment period is reduced, the vice president of Supply Management must state in writing the reason(s) for the removal of the debarment or the reduction of the period of debarment.

(h) *Procedural Requirements for Debarment.* (1) After securing the concurrence of the General Counsel, the vice president of Supply Management will initiate a debarment proceeding by sending the supplier a written notice of proposed debarment. The notice will be served by sending it to the last known address of the supplier by Certified Mail, return receipt requested. A copy of the notice will be furnished to the Office of Inspector General. The notice will state that debarment is being considered; the reason(s) for the proposed debarment; the anticipated period of debarment and the proposed effective date; and, within 30 days of the notice, the supplier may submit, in person or in writing, or through a representative, information and argument in opposition to the proposed debarment. In the event a supplier does not submit information or argument in opposition to the proposed debarment to the vice president of Supply Management within the time allowed, the debarment will become final with no further review or appeal.

(2) If the proposed debarment is based on a conviction or civil judgment, the vice president of Supply Management with the concurrence of the General Counsel, may decide whether debarment is merited based on the conviction or judgment, including any information received from the supplier. If the debarment is based on other circumstances or if there are questions regarding material facts, the vice president of, Supply Management may seek additional information from the supplier and/or other persons, and may request the Judicial Officer to hold a fact-finding hearing on such matters. The hearing will be governed by rules of procedure promulgated by the Judicial Officer. The vice president of Supply Management may reject any findings of fact, in whole or in part, when they are clearly erroneous.

(3) When the vice president of Supply Management proposes to debar a supplier already debarred by another government agency for a period concurrent with such debarment, the debarment proceedings before the Postal Service may be based entirely upon the record of evidence, facts, and proceedings before the other agency,

upon any additional facts the Postal Service deems relevant, or on the decision of another government agency. In such cases, the findings of facts by another government agency may be considered as established, but, within 30 days of the notice of proposed debarment, the supplier may submit, in person or in writing, or through a representative, any additional facts, information, or argument to the vice president of Supply Management, and to explain why debarment by the Postal Service should not be imposed.

(4) Questions of fact to be resolved by a hearing before the Judicial Office will be based on the preponderance of the evidence.

(5) After consideration of the circumstances and any information and argument submitted by the supplier, the vice president of Supply Management, with the concurrence of the General Counsel, will issue a written decision regarding whether the supplier is debarred, and, if so, for the period of debarment. The decision will be mailed to the supplier by Certified Mail, return receipt requested. A copy of the decision will be furnished to the Office of the Inspector General. The decision will be final and binding, unless:

(i) The decision was procured by fraud or other criminal misconduct or

(ii) The decision was obtained in violation of the regulations contained in this part or an applicable public law enacted by Congress.

(i) *Causes for Suspension.* The vice president of Supply Management may suspend any supplier, including any of its affiliates, if:

(1) The supplier commits, is indicted for, or is convicted of fraud or a criminal offense incidental to obtaining, attempting to obtain, or performing a government contract, violates a Federal antitrust statute arising out of the submission of bids and proposals, or commits or engages in embezzlement, theft, forgery, bribery, falsification or destruction of records, receipt of stolen property, or any other offense indicating a lack of business integrity or business honesty; or

(2) If the Postal Service has notified a supplier of its proposed debarment under this Part.

(j) *Period of Suspension.* A suspension will not exceed 1 year in duration, except a suspension may be extended for reasonable periods of time beyond 1 year by the vice president of Supply Management. The termination of a suspension will not prejudice the Postal Service's position in any debarment proceeding. A suspension will be superseded by a decision rendered by the vice president of Supply Management, under paragraph (h)(5) of this section.

(k) *Procedural Requirements for Suspension.* (1) The vice president of Supply Management will notify a supplier of a suspension or an extension of a suspension and the reason(s) for the suspension or extension in writing sent to the supplier by Certified Mail, return receipt requested, within 10 days after the effective date of the suspension or extension. A copy of the notice will be furnished to the Office of the Inspector General.

(2) The notice will state the cause(s) for the suspension or extension.

(3) Within 30 days of notice of suspension or an extension, a supplier may submit to the vice president of Supply Management in writing, any information or reason(s) the supplier believes makes a suspension or an extension inappropriate, and the vice president of Supply Management in consultation with the General Counsel, will consider the supplier's submission, and, in their discretion, may revoke a suspension or an extension of a suspension. If a suspension or extension is revoked, the revocation will be in writing and a copy of the revocation will be sent to the supplier by Certified Mail, return receipt requested. A copy of the revocation will be furnished to the Office of the Inspector General.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 05–7751 Filed 4–18–05; 8:45 am]

BILLING CODE 7710–12–U

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA–7875]

Suspension of Community Eligibility

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

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

ADDRESSES: If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT: Michael M. Grimm, Mitigation Division, 500 C Street, SW.; Room 412, Washington, DC 20472, (202) 646–2878.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial

assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives a 6-month, 90-day, and 30-day notification letter addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications have been made, this final rule may take effect within less than 30 days.

National Environmental Policy Act

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

Regulatory Flexibility Act

The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless they take remedial action.

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.

Paperwork Reduction Act

This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp.; p. 252.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp.; p. 309.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 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.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region III				
Pennsylvania:				
Adamstown, Borough of, Lancaster County.	420541	December 4, 1973, Emerg; January 16, 1981, Reg; April 19, 2005, Susp.	Apr. 19, 2005 ...	Apr. 19, 2005.
Akron, Borough of, Lancaster County ...	422461	December 31, 1975, Emerg; December 16, 1980, Reg: April 19, 2005, Susp..	.....do	Do.
Bart, Township of, Lancaster County	421761	June 10, 1975, Emerg; January 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Brecknock, Township of, Lancaster County.	421762	July 9, 1975, Emerg; April 1, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Caernarvon, Township of, Lancaster County.	421763	April 29, 1975, Emerg; May 19, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Christiana, Borough of, Lancaster County.	420542	July 30, 1975, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Clay, Township of, Lancaster County ...	421764	April 29, 1975, Emerg; December 16, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Colerain, Township of, Lancaster County.	421765	September 17, 1975, Emerg; January 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Columbia, Borough of, Lancaster County.	420543	March 9, 1973, Emerg; January 6, 1982, Reg; April 19, 2005, Susp.	.....do	Do.
Conestoga, Township of, Lancaster County.	420544	April 24, 1973, Emerg; March 18, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Conoy, Township of, Lancaster County	420545	July 6, 1973, Emerg; June 4, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Denver, Borough of, Lancaster County	420546	August 22, 1973, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Drumore, Township of, Lancaster County.	421766	July 7, 1975, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Earl, Township of, Lancaster County	421767	January 13, 1975, Emerg; December 16, 1980, Reg; April 19, 2005, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
East Cocalico, Township of, Lancaster County.	420547	April 24, 1974, Emerg; March 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
East Donegal, Township of, Lancaster County.	421768	August 30, 1974, Emerg; January 16, 1980, Reg; April, 19, 2005, Susp.	.....do	Do.
East Drumore, Township of, Lancaster County.	421769	August 27, 1975, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
East Earl, Township of, Lancaster County.	421770	October 18, 1974, Emerg; September 4, 1987, Reg; April 19, 2005, Susp.	.....do	Do.
East Hempfield, Township of, Lancaster County.	420548	June 6, 1973, Emerg; September 28, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
East Lampeter, Township of, Lancaster County.	421771	September 6, 1974, Emerg; December 16, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
East Petersburg, Borough of, Lancaster County.	420549	September 27, 1974, Emerg; September 5, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
Eden, Township of, Lancaster County ..	421772	July 7, 1980, Emerg; December 16, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Elizabeth, Township of Lancaster County.	421773	July 31, 1975, Emerg; September 28, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
Elizabethtown, Borough of, Lancaster County.	420550	May 15, 1973, Emerg; April 17, 1978, Reg; April 19, 2005, Susp.	.....do	Do.
Ephrata, Borough of, Lancaster County	420551	April 17, 1973, Emerg; April 1, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Fulton, Township of, Lancaster County	421774	July 11, 1975, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Lancaster, City of, Lancaster County	420552	May 12, 1972, Emerg; September 28, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
Lancaster, Township of, Lancaster County.	420553	March 9, 1973, Emerg; December 18, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
Leacock, Township of, Lancaster County.	420958	December 17, 1973, Emerg; March 1, 1978, Reg; April 19, 2005, Susp.	.....do	Do.
Lititz, Borough of, Lancaster County	420554	October 6, 1972, Emerg; October 15, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Little Britain, Township of, Lancaster County.	421775	June 16, 1975, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Manheim, Borough of, Lancaster County.	420555	April 19, 1973, Emerg; March 2, 1983, Reg; April 19, 2005, Susp.	.....do	Do.
Manheim, Township of, Lancaster County.	420556	July 5, 1973, Emerg; August 15, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
Manor, Township of, Lancaster County	420557	April 19, 1973, Emerg; March 18, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Marietta, Borough of, Lancaster County	420558	July 5, 1973, Emerg; February 1, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Martic, Township of, Lancaster County	421146	April 11, 1974, Emerg; January 16, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Millersville, Borough of, Lancaster County.	420559	November 11, 1974, Emerg; December 15, 1978, Reg; April 19, 2005, Susp.	.....do	Do.
Mount Joy, Borough of, Lancaster County.	420561	May 22, 1974, Emerg; October 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Mount Joy, Township of, Lancaster County.	421776	May 22, 1974, Emerg; October 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Mountville, Borough of, Lancaster County.	420560	August 5, 1975, Emerg; July 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Paradise, Township of, Lancaster County.	421777	January 13, 1975, Emerg; May 19, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Penn, Township of, Lancaster County ..	421778	February 5, 1975, Emerg; September 2, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Pequea, Township of, Lancaster County.	421779	January 24, 1975, Emerg; September 30, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
Providence, Township of, Lancaster County.	421780	December 13, 1974, Emerg; September 30, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Quarryville, Borough of, Lancaster County.	420563	September 25, 1974, Emerg; January 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Rapho, Township of, Lancaster County	421781	June 25, 1975, Emerg; February 16, 1983, Reg; April 19, 2005, Susp.	.....do	Do.
Sadsbury, Township of, Lancaster County.	421782	July 30, 1975, Emerg; January 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Salisbury, Township of, Lancaster County.	421783	May 5, 1975, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Strasburg, Township of, Lancaster County.	421784	May 27, 1975, Emerg; February 4, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Upper Leacock, Township of, Lancaster County.	421785	June 19, 1975, Emerg; November 3, 1978, Reg; April 19, 2005, Susp.	.....do	Do.
Warwick, Township of, Lancaster County.	421786	July 2, 1975, Emerg; November 19, 1980, Reg; April 19, 2005, Susp.	.....do	Do.
West Cocalico, Township of, Lancaster County.	421787	August 5, 1974, Emerg; April 15, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
West Donegal, Township of, Lancaster County.	421788	June 5, 1975, Emerg; July 16, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
West Earl, Township of, Lancaster County.	420959	November 2, 1973, Emerg; May 19, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
West Hempfield, Township of, Lancaster County.	421789	August 30, 1974, Emerg; September 5, 1979, Reg; April 19, 2005, Susp.	.....do	Do.
West Lampeter, Township of, Lancaster County.	420566	July 9, 1973, Emerg; January 2, 1981, Reg; April 19, 2005, Susp.	.....do	Do.
Region V				
Brooklyn Park, City of, Hennepin County.	270152	February 5, 1974, Emerg; May 17, 1982, Reg; September 2, 2004, Susp.	09/02/2004	Do.
Region VI				
Oklahoma: Tuttle, Town of, Grady County ...	400443	February 10, 1987, Emerg, November 1, 1989, Reg; April 19, 2005, Susp.	4/19/2005	Do.
Region X				
Washington: North Bend, City of, King County.	530085	November 6, 1974, Emerg; August 1, 1984, Reg; April 19, 2005, Susp.	.....do	Do.

* -do- =Ditto.
Code for reading third column: Emerg.-Emergency; Reg.-Regular; Susp.-Suspension.

Dated: April 11, 2005.

David I. Maurstad,

Acting Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 05–7754 Filed 4–18–05; 8:45 am]

BILLING CODE 9110–12–U

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 115

Inspection and Certification

CFR Correction

■ In Title 46 of the Code of Federal Regulations, parts 90 to 139, revised as of October 1, 2004, on page 311, the second § 115.620 is removed.

[FR Doc. 05–55504 Filed 4–18–05; 8:45 am]

BILLING CODE 1505–01–D

FEDERAL MARITIME COMMISSION

46 CFR Parts 501 and 535

[Docket No. 03–15]

Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Final rule; Clarifications and corrections.

SUMMARY: This document clarifies and corrects the regulations in sections 535.311 and 535.704 and appendix A of 46 CFR part 535 of the Final Rule published on November 4, 2004. These revisions to the regulations are non-substantive, and no further public comments on the Final Rule are necessary.

DATES: April 19, 2005.

FOR FURTHER INFORMATION CONTACT:
Amy W. Larson, General Counsel, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1018, Washington, DC 20573–0001, (202) 523–5740, E-mail: *GeneralCounsel@fmc.gov.*
Florence A. Carr, Director, Bureau of Trade Analysis, Federal Maritime Commission, 800 North Capitol Street, NW., Room 940, Washington, DC 20573–0001, (202) 523–5796, E-mail: *tradeanalysis@fmc.gov.*

SUPPLEMENTARY INFORMATION: On October 27, 2004, the Federal Maritime Commission ("FMC" or "Commission") adopted a Final Rule to amend its regulations in 46 CFR parts 501 and 535 on the delegation of the Commission's authorities, the filing of ocean common carrier and marine terminal operator agreements, and the reporting requirements for agreements pursuant to the Shipping Act of 1984 46 U.S.C. 1701–1719 ("Shipping Act"). 69 FR 64298, November 4, 2004. This document revises certain sections of the regulation in part 535 of the Final Rule published on November 4, 2004. The revisions clarify the meaning of the regulations and correct certain omissions and errors in the regulations, which were not detected in the course of preparing the Final Rule for publication. The revisions are non-substantive in nature and do not alter the decision adopted by the Commission in this Final Rule. Therefore, no further public comments on the Final Rule are necessary. The following sections in the regulations of part 535 of the Final Rule have been revised.

1. Section 535.311 Low Market Share Agreements—Exemption

As discussed in the supplementary information of the Final Rule, the Commission adopted a new regulation in section 535.311, which provides an exemption from the statutory 45-day waiting period for filed agreements that qualify as "low market share agreements." Id. at 64399–64400. As adopted, section 535.311(a) states that:

> (a) Low market share agreement means any agreement among ocean common carriers which contains none of the authorities listed in 535.502(b) and for which the combined market share of the parties in any of the agreement's sub-trade is either:
>
> (1) Less than 30 percent, if all parties are members of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b); or
>
> (2) Less than 35 percent, if all parties are not members of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b).

Id. at 64420

Section 535.311(a) uses different levels of market share to apply the exemption based on whether the parties to the filed agreement are members of another agreement in the same trade or sub-trade with any authorities listed in section 535.502(b).[1] As stated, the language in section 535.311(a) may reflect some ambiguity in the application of the exemption that was unintended by the Commission. In a literal sense, section 535.311(a) can be read to mean that the application of the exemption only accounts for the two extreme cases where all parties are members of another agreement, or where none of the parties are members of another agreement. The application of the exemption may appear ambiguous in cases where some, but not all, parties are members of another agreement in the same trade or sub-trade with the authorities listed in section 535.502(b).

As adopted, it is the intention of the Commission that the market share level of less than 30 percent only applies in cases where all parties are members of another agreement; otherwise, the market share level of less than 35 percent applies.[2] To clarify the meaning of the exemption, as intended by the Commission, section 535.311(a)(2) has been revised to state that the market share level of less than 35 percent applies if at least one party is not a member of another agreement in the same trade or sub-trade with any of the authorities listed in section 535.502(b).

A number of other minor revisions have also been made to section 535.311. The introductory paragraph in section 535.311(a) has been revised to clarify that the unit of measurement for determining the combined market share of the parties shall be based on the volume of cargo carried by the parties. Cargo volume, whether measured in freight tons, containers, or other such units carried, is the standard unit of measurement used to derive the market share of ocean common carriers throughout the industry and in the FMC's regulations. In addition, the term "sub-trade" in the introductory paragraph of section 535.311(a) has been revised to use the grammatically correct plural form of the term, *i.e.*, "sub-trades." Further, the symbol "§" has been added in the introductory paragraph in section 535.311(a) before the cite for section "535.502(b)."

2. Section 535.704 Filing of Minutes

As discussed in the supplementary information of the Final Rule, the Commission adopted a new regulation in section 535.704(d)(1) that exempts the parties' discussions of certain operational and administrative matters from the minutes requirements for agreements. Id. at 64411–64412. Discussions between parties on matters identified in section 535.408(b)(4)(iv)[3] were included as an exemption. Id. In preparing the Final Rule, this exemption was inadvertently omitted from the regulations. Therefore, section 535.704(d)(1) has been revised to include this exemption. In addition, the singular form of the term "exemption" has been revised to the plural form "exemptions" in the introductory paragraph in section 535.704(d). The plural form conveys the correct use of the term in the context of this section.

3. Appendix A to Part 535—Information Form and Instructions

Minor revisions have also been made in the format of FMC Form–150, INFORMATION FORM FOR AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS, in appendix A to part 535 of the Final Rule. Specifically, part 2(B) of section III in the text of Form–150 has been revised to request that parties provide a narrative statement on significant changes in their vessel calls. This change was adopted by the Commission in response to comments submitted to the Notice of Proposed Rulemaking, and addressed in the supplementary information of the Final Rule. Id. at 64407–64408. The text in Form–150 for this part was not modified due to an oversight. In addition, the term "Part 1" in the heading of part 1 of section V was inadvertently omitted from the text of FMC Form–150 when the Final Rule was prepared. Section V of the text of FMC Form–150 has been revised to correct this oversight.

List of Subjects in 46 CFR Part 535

Freight, Maritime carriers, Reporting and recordkeeping requirements.

■ Therefore, for reasons stated in the preamble, part 535 is amended as follows:

PART 535—OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR AGREEMENTS SUBJECT TO THE SHIPPING ACT OF 1984

■ 1. Amend section 535.311 to revise paragraphs (a) introductory text and (a)(2) to read as follows:

§ 535.311 Low market share agreements—exemption.

(a) Low market share agreement means any agreement among ocean common carriers which contains none of the authorities listed in § 535.502(b) and for which the combined market share, based on cargo volume, of the parties in any of the agreement's sub-trades is either:

(1) * * *

(2) Less than 35 percent, if at least one party is not a member of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b).

* * * * *

■ 2. Amend section 535.704 to revise paragraphs (d) introductory text and (d)(1) to read as follows:

---

[1] Section 535.502(b) of the Final Rule includes any of the following authorities: (1) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (2) the discussion of, or agreement on, capacity rationalization; (3) the establishment of a joint service; (4) the pooling or division of cargo traffic, earnings, or revenues and/or losses; or (5) the discussion of, or agreement on, any service contract matter.

[2] The more stringent market share standard of less than 30 percent applies for the exemption because parties to an agreement with none of the authorities in section 535.502(b) are afforded greater authority to act concertedly when they all participate in another agreement, such as a conference or rate discussion agreement, within the same trade or sub-trade. For such agreements where the market share is 30 percent or above, the full 45-day waiting period, after the agreement is filed, is necessary for the Commission to analyze and assess the potential competitive impact of the agreement in relation to the overall authority of the parties within the relevant trade or sub-trade. This is less of a concern when only some, but not all, parties are members of another agreement, and thus, the more flexible market share standard of less than 35 percent is appropriate for exempting such agreements from the 45-day waiting period.

[3] Section 535.408(b)(4)(iv) of the Final Rule pertains to the express enabling authority of an agreement to establish procedures for anticipating the space requirements of the parties.

§ 535.704 Filing of minutes.

* * * * *

(d) Exemptions. For parties to agreements subject to this section, the following exemptions shall apply:

(1) Minutes of meetings between parties are not required to reflect discussions of matters set forth in § 535.408(b)(2), (b)(3), (b)(4)(iii), (b)(4)(iv), (b)(4)(v), and (b)(4)(vi);

* * * * *

■ 3. In appendix A to part 535, amend FMC Form–150 by revising the paragraph in part 2(B) of section III and the heading of section V to read as follows:

Appendix A to Part 535—Information Form and Instructions Information Form Instructions

* * * * *

FMC Form–150
OMB Control No. 3072–0045

FEDERAL MARITIME COMMISSION

INFORMATION FORM FOR AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS

* * * * *

Section III

* * * * *

Part 2 Vessel Calls

(A) * * *

(B) Narrative statement on significant changes in vessel calls: _____

_____

_____

_____

* * * * *

Section V

Part 1 Contact Persons and Certification

* * * * *

Bryant L. VanBrakle,

Secretary.

[FR Doc. 05–7741 Filed 4–18–05; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 660

[Docket No. 050125016–5097–02; I.D. 011805C]

RIN 0648–AS61

Pacific Halibut Fisheries; Catch Sharing Plan; Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Specifications and Management Measures; Inseason Adjustments

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

ACTION: Final rule.

SUMMARY: The Assistant Administrator for Fisheries, NOAA (AA), on behalf of the International Pacific Halibut Commission (IPHC), publishes annual management measures to govern the Pacific halibut fishery. These measures are promulgated as regulations by the IPHC and accepted by the Secretary of State. The AA announces modifications to the Catch Sharing Plan (Plan) for Area 2A and implementing regulations for 2005, and announces approval of the Area 2A Plan. The AA also announces related changes to management measures in the recreational Pacific Coast groundfish fisheries, which are authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). These actions are intended to enhance the conservation of Pacific halibut and groundfish and further the goals and objectives of the Pacific Fishery Management Council (Pacific Council).

DATES: The amendments to § 660.384 are effective May 1, 2005. The inseason adjustment to the annual management measures for Pacific halibut fisheries are effective from April 14, 2005, until the effective date of the 2006 annual management measures, which will be published in the **Federal Register**.

ADDRESSES: Copies of the Plan, Environmental Assessment (EA)/Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), Final Regulatory Flexibility Analysis (FRFA) and Categorical Exclusion (CE) are available from D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070. Electronic copies of the Plan, including proposed changes for 2005, and of the EA/RIR/IRFA are also available at the NMFS Northwest Region website: *http://www.nwr.noaa.gov*, click on "Pacific Halibut."

FOR FURTHER INFORMATION CONTACT: Jamie Goen or Yvonne deReynier (Northwest Region, NMFS), phone: 206–526–6150, fax: 206–526–6736 or e-mail: *jamie.goen@noaa.gov* or *yvonne.dereynier@noaa.gov*.

SUPPLEMENTARY INFORMATION: The IPHC manages Pacific halibut in waters off Alaska, British Columbia, and the U.S. West Coast. On January 18–21, 2005, the IPHC held its annual meeting in Victoria, B.C., and recommended its bilateral regulations for 2005. The Secretary of State of the United States has accepted the 2005 IPHC regulations under section 4 of the Northern Pacific Halibut Act (Halibut Act, 16 U.S.C. 773–773k). For U.S. waters, NMFS works with the North Pacific and Pacific Fishery Management Councils to set area-specific fishery management measures. IPHC refers to waters off the U.S. West Coast (Washington, Oregon, and California) as "Area 2A." In addition, regulations governing the retention of groundfish in the recreational halibut fishery in Area 2A are included in the Pacific coast groundfish regulations at Title 50 in the Code of Federal Regulations (CFR), part 660, subpart G, which regulates fishing for over 80 species of groundfish off the coasts of Washington, Oregon, and California. Groundfish specifications and management measures are developed by the Pacific Council, and are implemented by NMFS. The Pacific coast groundfish specifications and management measures for 2005–2006 were codified at 50 CFR part 600, subpart G and published in the **Federal Register** as a proposed rule on September 21, 2004 (69 FR 56550), and as a final rule on December 23, 2004 (69 FR 77012), and as subsequently amended through inseason action.

On February 7, 2005, NMFS published a proposed rule to revise the Area 2A Plan for Pacific halibut and to implement the portions of the revised Plan that are not implemented in the IPHC regulations (70 FR 6395). A complete description of the Pacific Council recommended changes to the Plan and management measures were published in the proposed rule for this action. NMFS requested comment on the proposed rule through March 16, 2005. On February 25, 2005, NMFS published a final rule (70 FR 9242) to implement the IPHC's recommendations and to announce fishery regulations for U.S. waters off Alaska and fishery regulations for treaty commercial and ceremonial and subsistence fisheries and some regulations for non-treaty commercial fisheries for U.S. waters off the West Coast. None of the Pacific Council's proposed 2005 revisions to the Plan addressed either the treaty fisheries or the non-treaty commercial fisheries.

As described in the proposed rule, there was confusion over the Pacific Council's recommendation to prohibit the retention of all groundfish, except sablefish when allowed by groundfish regulation, in the Columbia River fishery during all days and in the Central Coast fisheries during "all-depth" days. The confusion was over how it would apply to the Columbia River subarea, which is shared by Washington and Oregon. At their November 1–5, 2004, meeting, the

Pacific Council adopted a recommendation for "Sub-areas south of Leadbetter Point, Washington" that stated "No groundfish retention except sablefish allowed during the all-depth fishery if halibut are on-board the vessel except south of Humbug Mt." After the November meeting it became apparent that various Council participants were confused as to exactly where this prohibition would apply. Because of the introductory description (Sub-areas south of Leadbetter Point, Washington), some thought it applied in the entire Columbia River area and the Oregon Central Coast subarea. However, others thought this measure would only apply off Oregon because it was introduced by Oregon and had not been discussed in Washington State meetings with Washington fishermen, and because one purpose was to allow dockside enforcement during the groundfish closure seaward of 40 fm (73 m), which is only in place off of Oregon. In the proposed rule, NMFS concluded the two possible ways to implement this provision in the Columbia River subarea would be to apply the groundfish retention prohibition to all halibut fishing in the Columbia River subarea or only to vessels that land halibut in Oregon.

Therefore, NMFS requested that the Pacific Council clarify this recommendation at their March 6–11, 2005, meeting in Sacramento, CA. NMFS scheduled the public comment period on the proposed rule to end on March 16, 2005, after the Pacific Council's March meeting. At their March 2005 meeting, the Pacific Council recommended and NMFS is implementing in this final rule for the halibut regulations and in this inseason action for the groundfish regulations (1) a prohibition on the landing of all groundfish, except sablefish when allowed by groundfish regulation, in the Columbia River recreational fishery when halibut are onboard the vessel and (2) a prohibition on the retention of all groundfish, except sablefish when allowed by groundfish regulation, in the Central Coast recreational fisheries during "all depth" days when halibut are onboard the vessel.

This final rule announces approval of revisions to the Area 2A Plan and implements the Area 2A Pacific halibut Plan and management measures for 2005. These halibut management measures are effective until superceded by the 2006 halibut management measures that will be published in the **Federal Register**.

Comments and Responses

During the comment period on the proposed rule for implementing the Area 2A Plan, NMFS received three letters of comment, two of those letters were from the Washington Department of Fish and Wildlife (WDFW) and the Oregon Department of Fish and Wildlife (ODFW). The letters from WDFW and ODFW, commenting on the season dates, are addressed below in the section on the Plan for Area 2A.

Comment 1: The commenter opposed NMFS proposal to remove the minimum length requirement for sport halibut caught south of Leadbetter Point, WA, stating that this requirement is an important conservation measure, balancing the overall ecosystem. The commenter voiced a concern that removing the minimum length requirement would cause a decline in halibut populations.

Response: Sport fishing for halibut off the Oregon coast has been managed with a 32–inch (81–cm) minimum size limit since 1989. In the Columbia River area (shared between Washington and Oregon), the sport fishery for halibut has been managed with a 32 inch (81 cm) size limit since 2002. Off Washington, there has not been a size limit for sport halibut fisheries since at least 1988.

The EA (see **ADDRESSES** for a copy) for this action analyzed the impacts of retaining the current size limit, requiring fishery participants to release any undersized halibut (Alternative 1), versus eliminating the minimum size limit for the sport fisheries south of Leadbetter Point, WA (Alternative 2). Area 2A sport halibut management subareas south of Leadbetter Point, WA include the Columbia River subarea (Leadbetter Point, WA to Cape Falcon, OR), the Central Coast subarea (Cape Falcon, OR to Humbug Mountain, OR), and the southern Oregon/California subarea (south of Humbug Mountain, OR). Based on the analysis in the EA and on a recommendation from the Pacific Council and originally from ODFW, NMFS proposed to eliminate the minimum size limit south of Leadbetter Point, WA, in their proposed rule (70 FR 6395, February 7, 2005). This action is intended to reduce the number of halibut released and time on the water, thus reducing incidental catch of groundfish species without harming the halibut population.

The halibut population in Area 2A is a small portion of the overall halibut stock off northern North America and is thought to migrate down from breeding grounds off Alaska and Canada. Annual halibut harvest amounts are set by the IPHC, which has a long history of conservative halibut management. The IPHC surveys the halibut stock annually to monitor biomass trends and adjusts their total allowable catch to mirror those trends. Neither retaining or eliminating the minimum size limit will have any effect on the amount of halibut taken in Area 2A. Eliminating the minimum size limit, however, could have an effect on the number of halibut taken in the sport fisheries south of Leadbetter Point, WA, and on the sex composition of the local halibut catch. Because eliminating the minimum size limit would allow the retention of smaller-size halibut, a larger number of halibut may be taken in the fishery before the quota is reached than under a larger size limit. Female halibut grow at a faster rate and achieve greater lengths at younger ages than male halibut. Thus, a size-limited fishery may catch a greater proportion of female halibut and/or younger female than male halibut. The Oregon/California sport fishery allocation, however, is 0.36 percent of the overall North American halibut harvest, and variations in the size and sex of fish harvested in this fishery are unlikely to affect the abundance of Pacific halibut.

In addition, the South Washington Coast subarea sport fishery average halibut lengths in each year for 2001, 2002, and 2003 have been 37 in (93 cm), 39 in (98 cm), and 36 in (92 cm), respectively. Average weights for these same years have been 20.26 lb (9.2 kg), 20.62 lb (9.4 kg), and 17.42 lb (7.9 kg), respectively. In the central Oregon subarea sport fishery, average halibut lengths in each year for 2001, 2002, and 2003 have been 41 in (104 cm), 41 in (103 cm), and 40 in (101 cm), respectively. Average weights for these same years have been 23.1 lb (10.5 kg), 22.1 lb (10.0 kg) and 20.6 lb (9.3 kg). Fish taken off southern Washington are slightly smaller than those taken in the size-limited Oregon coast fishery. However, the average sizes for both subareas are well over the 32 in (81 cm) Oregon minimum size limit. Thus, although removing the minimum size limit from the sport fisheries south of Leadbetter Point, WA, may have some effect on the size composition of retained halibut, that effect will likely be minimal.

Catch Sharing Plan for Area 2

The Pacific Council's Area 2A Plan allocates the halibut catch limit for Area 2A among treaty Indian, non-treaty commercial, and non-treaty sport fisheries in and off Washington, Oregon, and California. Those allocations were described in the proposed rule for this action (70 FR 6395, February 7, 2005).

The Plan also includes many other provisions regarding the distribution of harvest in the area. For 2005, the Pacific Council recommended changes to the Plan to modify the Pacific halibut fisheries in Area 2A in 2005 and beyond pursuant to recommendations from WDFW and ODFW. These changes to the Plan will:

Allow remaining quota from Washington's south coast subarea to be used to accommodate incidental catch in the south coast nearshore fishery;

Allow quota projected to be unused to be transferred from Oregon's central coast subarea to another subarea south of Leadbetter Point, WA;

Revise the season structure for Oregon's all-depth spring and summer sport fisheries;

Provide more flexibility for Oregon's inseason sport fishery management (triggers for additional fishery openings and bag limits in the all-depth summer fishery);

Revise the public announcement process for Oregon's all-depth summer sport fishery;

Revise the Columbia River subarea quota contributions from Oregon/California;

Remove the minimum length requirement in all subareas south of Leadbetter Point, WA;

Prohibit landing of groundfish, except sablefish, in the Columbia River subarea when halibut are onboard the vessel and prohibit the retention of groundfish, except sablefish, in Oregon's Central Coast subarea on "all-depth" days when halibut are onboard the vessel;

Implement a closed area off Oregon's coast; and

Revise all coordinates from degrees minutes seconds to degrees decimal minutes.

NMFS has approved the proposed changes to the Plan. Copies of the complete Plan for Area 2A as modified are available from the NMFS Northwest Regional Office (see **ADDRESSES**).

The ODFW held a public workshop (after the IPHC set the Area 2A quota) in Newport, OR, on January 27, 2005, to develop recommendations on the opening dates of Oregon's central coast sport fisheries. WDFW held a public workshop in Olympia, WA on February 4, 2005, to develop recommendations on the opening dates of Washington's Puget Sound subarea sport fisheries; on January 6 in Montesano, WA and February 22 in Olympia, WA to discuss the anticipated short season in Washington's north coast subarea sport fishery; and February 8 in Montesano, WA to discuss groundfish retention in the Columbia River subarea sport halibut fishery. The WDFW and ODFW sent letters to NMFS providing recommendations on the opening dates and season structure for managing the sport fisheries under the 2005 quotas consistent with the Plan.

WDFW recommended an April 14 to June 20 season for eastern Puget Sound and a May 26 to July 31 season for western Puget Sound, 5 days per week (closed Tuesday and Wednesday). The recommended number of fishing days is based on an analysis of past harvest patterns in this fishery and meets the requirements of the Plan for the overall Puget Sound sport fishery subarea. For the Washington North Coast subarea, the Plan allows for a season opening May 10 and continuing until the May sub-quota is taken, 5 days per week (closed Sunday and Monday), and a second season opening June 16 and continuing until the remaining quota is projected to be taken, 5 days per week (closed Sunday and Monday). For the Washington South Coast subarea, the Plan allows for a season opening May 1 and continuing until July 1 or until the quota is taken, whichever is earlier, 5 days per week (closed Friday and Saturday) in the offshore area and 7 days per week in the nearshore area. Beginning July 1, and if quota remains, the south coast subarea will be open 7 days per week in the offshore and nearshore areas continuing until September 30 or until the quota is taken, whichever is earlier.

The Plan allows for a Columbia River subarea season opening on May 1 and continuing 7 days per week until September 30 or until the quota has been reached, whichever is earlier.

The Plan allows for an Oregon Central Coast subarea nearshore fishery (inside of a boundary line approximating the 40–fm (73–m) depth contour) season opening on May 1 and continuing 7 days per week until October 31 or until the sub-quota for that fishery is taken, whichever is earlier. For the all-depth fishery in that subarea, ODFW recommended a 12–day spring season of May 12–14, 19–21, June 2–4 and 9–11, based on an analysis of past harvest rates. If the spring season does not take the entire spring sub-quota for this subarea, ODFW recommended these additional potential opening dates: June 30, July 1–2, 14–16, and 28–30. ODFW further recommended re-opening the all-depth fishery on Friday, August 5 to take the summer sub-quota for this subarea, if sufficient quota remains. This summer fishery would remain open every other Friday through Sunday until the quota is taken, or October 31, whichever is earlier. The Plan also allows for an increase in the open days and bag limits in the summer all-depth season if a certain amount of quota remains after the first and third summer all-depth openers. These recommendations meet the requirements of the Plan for this subarea.

For the southernmost subarea, south of Humbug Mountain, Oregon, the Plan allows for opening this subarea on May 1 and continuing the season until October 31, 7 days per week.

NMFS is implementing sport fishing management measures in Area 2A which are in accordance with the Plan and based on recommendations from the states.

NMFS Actions

■ For the reasons stated herein, NMFS concurs with Pacific Council's recommendations. NMFS hereby announces under authority of 16 U.S.C. 773–773k, the following changes to the 2005 annual halibut management measures at 70 FR 9242 (February 25, 2005) to read as follows:

■ 1. On page 9249, in the **Federal Register** document published on February 25, 2005, in Section 24, "Sport Fishing for Halibut," paragraph (4)(b) is revised to read as follows:

* * * * *

(4)* * *

(b) The sport fishing subareas, subquotas, fishing dates, and daily bag limits are as follows, except as modified under the inseason actions in Section 25. All sport fishing in Area 2A is managed on a "port of landing" basis, whereby any halibut landed into a port counts toward the quota for the area in which that port is located, and the regulations governing the area of landing apply, regardless of the specific area of catch.

(i) In Puget Sound and the U.S. waters in the Strait of Juan de Fuca, east of a line extending from 48°17.30′ N. lat., 124°23.70′ W. long. north to 48°24.10′ N. lat., 124°23.70′ W. long., there is no quota. This area is managed by setting a season that is projected to result in a catch of 64,800 lb (29 mt).

(A) The fishing season in eastern Puget Sound (east of 123°49.50′ W. long., Low Point) is April 14 through June 20 and the fishing season in western Puget Sound (west of 123°49.50′ W. long., Low Point) is May 26 through July 31, 5 days a week (Thursday through Monday).

(B) The daily bag limit is one halibut of any size per day per person.

(ii) The quota for landings into ports in the area off the north Washington coast, west of the line described in paragraph (4)(b)(i) of this section and north of the Queets River (47°31.70′ N. lat.), is 115,437 lb (52.4 mt).

(A) The fishing seasons are:

(*1*) Commencing May 10 and continuing 5 days a week (Tuesday through Saturday) until 83,115 lb (37.7 mt) are estimated to have been taken and the season is closed by the Commission.

(*2*) From June 16, and continuing thereafter for 5 days a week (Tuesday through Saturday) until the overall quota of 115,437 lb (52.4 mt) are estimated to have been taken and the area is closed by the Commission, or until September 30, whichever occurs first.

(B) The daily bag limit is one halibut of any size per day per person.

(C) A "C-shaped" yelloweye rockfish conservation area southwest of Cape Flattery is closed to sport fishing for halibut. This area is defined by the following coordinates in the order listed:

48°18.00′ N. lat.; 125°18.00′ W. long.;
48°18.00′ N. lat.; 124°59.00′ W. long.;
48°11.00′ N. lat.; 124°59.00′ W. long.;
48°11.00′ N. lat.; 125°11.00′ W. long.;
48°04.00′ N. lat.; 125°11.00′ W. long.;
48°04.00′ N. lat.; 124°59.00′ W. long.;
48°00.00′ N. lat.; 124°59.00′ W. long.;
48°00.00′ N. lat.; 125°18.00′ W. long.;
and connecting back to 48°18.00′ N. lat.; 125°18.00′ W. long.

(iii) The quota for landings into ports in the area between the Queets River, WA (47°31.70′ N. lat.) and Leadbetter Point, WA (46°38.17′ N. lat.), is 50,146 lb (22.7 mt).

(A) The fishing season commences on May 1 and continues 5 days a week (Sunday through Thursday) in all waters, except that in the area from Queets River south to 47°00′00″ N. lat. and east of 124°40′00″ W. long, the fishing season commences on May 1 and continues 7 days a week. Beginning July 1, the halibut fishery between Queets River and Leadbetter Point will be open 7 days per week. The fishery will continue from May 1 until 50,146 lb (22.7 mt) are estimated to have been taken and the season is closed by the Commission, or until September 30, whichever occurs first.

(B) The daily bag limit is one halibut of any size per day per person.

(iv) The quota for landings into ports in the area between Leadbetter Point, WA (46°38.17′ N. lat.) and Cape Falcon, OR (45°46.00′ N. lat.), is 13,747 lb (6.2 mt).

(A) The fishing season commences on May 1, and continues every day through September 30, or until 13,747 lb (6.2 mt) are estimated to have been taken and the area is closed by the Commission, whichever occurs first.

(B) The daily bag limit is one halibut of any size per day per person.

(C) Landing Pacific Coast groundfish is prohibited, except sablefish when allowed by Pacific Coast groundfish regulations, if halibut are on board the vessel.

(v) The quota for landings into ports in the area off Oregon between Cape Falcon (45°46.00′ N. lat.) and Humbug Mountain (42°40.50′ N. lat.), is 251,264 lb (114 mt).

(A) The fishing seasons are:

(*1*) The first season commences May 1 and continues every day through October 31, in the area inside of a boundary line approximating the 40–fathom (73–m) depth contour, or until the sub-quota for the central Oregon inside 40–fm fishery (20,101 lb (9.1 mt)) or any inseason revised subquota is estimated to have been taken and the season is closed by the Commission, whichever is earlier. The boundary line approximating the 40–fathom (73–m) depth contour between 45°46.00′ N. lat. and 42°40.50′ N. lat. is defined by straight lines connecting all of the following points in the order stated:

(1) 45°46.00′ N. lat., 124°04.49′ W. long.;
(2) 45°44.34′ N. lat., 124°05.09′ W. long.;
(3) 45°40.64′ N. lat., 124°04.90′ W. long.;
(4) 45°33.00′ N. lat., 124°04.46′ W. long.;
(5) 45°32.27′ N. lat., 124°04.74′ W. long.;
(6) 45°29.26′ N. lat., 124°04.22′ W. long.;
(7) 45°20.25′ N. lat., 124°04.67′ W. long.;
(8) 45°19.99′ N. lat., 124°04.62′ W. long.;
(9) 45°17.50′ N. lat., 124°04.91′ W. long.;
(10) 45°11.29′ N. lat., 124°05.19′ W. long.;
(11) 45°05.79′ N. lat., 124°05.40′ W. long.;
(12) 45°05.07′ N. lat., 124°05.93′ W. long.;
(13) 45°03.83′ N. lat., 124°06.47′ W. long.;
(14) 45°01.70′ N. lat., 124°06.53′ W. long.;
(15) 44°58.75′ N. lat., 124°07.14′ W. long.;
(16) 44°51.28′ N. lat., 124°10.21′ W. long.;
(17) 44°49.49′ N. lat., 124°10.89′ W. long.;
(18) 44°44.96′ N. lat., 124°14.39′ W. long.;
(19) 44°43.44′ N. lat., 124°14.78′ W. long.;
(20) 44°42.27′ N. lat., 124°13.81′ W. long.;
(21) 44°41.68′ N. lat., 124°15.38′ W. long.;
(22) 44°34.87′ N. lat., 124°15.80′ W. long.;
(23) 44°33.74′ N. lat., 124°14.43′ W. long.;
(24) 44°27.66′ N. lat., 124°16.99′ W. long.;
(25) 44°19.13′ N. lat., 124°19.22′ W. long.;
(26) 44°15.35′ N. lat., 124°17.37′ W. long.;
(27) 44°14.38′ N. lat., 124°17.78′ W. long.;
(28) 44°12.80′ N. lat., 124°17.18′ W. long.;
(29) 44°09.23′ N. lat., 124°15.96′ W. long.;
(30) 44°08.38′ N. lat., 124°16.80′ W. long.;
(31) 44°08.30′ N. lat., 124°16.75′ W. long.;
(32) 44°01.18′ N. lat., 124°15.42′ W. long.;
(33) 43°51.60′ N. lat., 124°14.68′ W. long.;
(34) 43°42.66′ N. lat., 124°15.46′ W. long.;
(35) 43°40.49′ N. lat., 124°15.74′ W. long.;
(36) 43°38.77′ N. lat., 124°15.64′ W. long.;
(37) 43°34.52′ N. lat., 124°16.73′ W. long.;
(38) 43°28.82′ N. lat., 124°19.52′ W. long.;
(39) 43°23.91′ N. lat., 124°24.28′ W. long.;
(40) 43°20.83′ N. lat., 124°26.63′ W. long.;
(41) 43°17.96′ N. lat., 124°28.81′ W. long.;
(42) 43°16.75′ N. lat., 124°28.42′ W. long.;
(43) 43°13.98′ N. lat., 124°31.99′ W. long.;
(44) 43°13.71′ N. lat., 124°33.25′ W. long.;
(45) 43°12.26′ N. lat., 124°34.16′ W. long.;
(46) 43°10.96′ N. lat., 124°32.34′ W. long.;
(47) 43°05.65′ N. lat., 124°31.52′ W. long.;
(48) 42°59.66′ N. lat., 124°32.58′ W. long.;
(49) 42°54.97′ N. lat., 124°36.99′ W. long.;
(50) 42°53.81′ N. lat., 124°38.58′ W. long.;
(51) 42°50.00′ N. lat., 124°39.68′ W. long.;
(52) 42°49.14′ N. lat., 124°39.92′ W. long.;
(53) 42°46.47′ N. lat., 124°38.65′ W. long.;
(54) 42°45.60′ N. lat., 124°39.04′ W. long.;
(55) 42°44.79′ N. lat., 124°37.96′ W. long.;
(56) 42°45.00′ N. lat., 124°36.39′ W. long.;

(57) 42°44.14′ N. lat., 124°35.16′ W. long.;
(58) 42°42.15′ N. lat., 124°32.82′ W. long.;
(59) 42°40.50′ N. lat., 124°31.98′ W. long.; and
(60) 42°38.82′ N. lat., 124°31.09′ W. long.

(*2*) The second season (spring season), which is for the "all-depth" fishery, is open on May 12, 13, 14, 19, 20, and 21, and June 2, 3, 4, 9, 10, and 11. The projected catch for this season is 173,372 lb (78.6 mt). If sufficient unharvested catch remains for additional fishing days, the season will re-open. Dependent on the amount of unharvested catch available, the potential season re-opening dates will be: June 30, and July 1, 2, 14, 15, 16, 28, 29, and 30. If NMFS decides inseason to allow fishing on any of these re-opening dates, notice of the re-opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No halibut fishing will be allowed on the re-opening dates unless the date is announced on the NMFS hotline.

(*3*) If sufficient unharvested catch remains, the third season (summer season), which is for the "all-depth" fishery, will be open August 5, 6, 7, 19, 20, and 21, September 2, 3, 4, 16, 17, 18, 30, and October 1, 2, 14, 15, 16, 28, 29, and 30, or until the combined spring season and summer season quotas in the area between Cape Falcon and Humbug Mountain, OR, totaling 231,163 lb (104.9 mt), are estimated to have been taken and the area is closed by the Commission, whichever is earlier. NMFS will announce on the NMFS hotline in July whether the fishery will re-open for the summer season in August. No halibut fishing will be allowed in the summer season fishery unless the dates are announced on the NMFS hotline. Additional fishing days may be opened if a certain amount of quota remains after August 7 and September 4. If after August 7, greater than or equal to 60,000 lbs (27.2 mt) remains in the combined all-depth and inside 40–fm (73–m) quota, the fishery may re-open on August 12, 13, 14, 19, 20, 21, 26, 27, and 28 and September 2, 3, 4, 9, 10, 11, 16, 17, 18, 23, 24, 25, and 30, and October 1, 2, 7, 8, 9, 14, 15, 16, 21, 22, 23, 28, 29, and 30 (every Friday through Sunday versus every other Friday through Sunday). If after September 4, greater than or equal to 30,000 lbs (13.6 mt) remains in the combined all-depth and inside 40–fm (73–m) quota, the fishery may re-open on September 9, 10, 11, 16, 17, 18, 23, 24, 25, and 30, and October 1, 2, 7, 8, 9, 14, 15, 16, 21, 22, 23, 28, 29, and 30 (every Friday through Sunday) with a bag limit of two fish of any size per person, per day. NMFS will announce on the NMFS hotline whether the summer all-depth fishery will be open on such additional fishing days and what days will comprise such opening.

(B) The daily bag limit is one halibut of any size per day per person, unless otherwise specified. NMFS will announce on the NMFS hotline any bag limit changes.

(C) During days open to all-depth halibut fishing, no Pacific Coast groundfish may be retained, except sablefish when allowed by Pacific Coast groundfish regulations, if halibut are on board the vessel.

(D) When the all-depth halibut fishery is closed and halibut fishing is permitted only inshore of a boundary line approximating the 40–fm (73–m) depth contour, halibut possession and retention by vessels operating offshore of 40–fm (73–m) is prohibited.

(E) A yelloweye rockfish conservation area off central Oregon is closed to sport fishing for halibut. This area is defined by the following coordinates in the order listed:

(1) 44°37.46′ N. lat.; 124°24.92′ W. long.;
(2) 44°37.46′ N. lat.; 124°23.63′ W. long.;
(3) 44°28.71′ N. lat.; 124°21.80′ W. long.;
(4) 44°28.71′ N. lat.; 124°24.10′ W. long.;
(5) 44°31.42′ N. lat.; 124°25.47′ W. long.;
(6) and connecting back to 44°37.46′ N. lat.; 124°24.92′ W. long.

(vi) In the area south of Humbug Mountain, Oregon (42°40.50′ N. lat.) and off the California coast, there is no quota. This area is managed on a season that is projected to result in a catch of less than 7,984 lb (3.6 mt).

(A) The fishing season will commence on May 1 and continue every day through October 31.

(B) The daily bag limit is one halibut of any size per day per person.

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■ 2. On page 9250, in the **Federal Register** document published on February 25, 2005, Section 25, "Flexible Inseason Management Provisions in Area 2A" is revised to read as follows:

25. Flexible Inseason Management Provisions in Area 2A

(1) The Regional Administrator, NMFS Northwest Region, after consultation with the Chairman of the Pacific Fishery Management Council, the Commission Executive Director, and the Fisheries Director(s) of the affected state(s), or their designees, is authorized to modify regulations during the season after making the following determinations.

(a) The action is necessary to allow allocation objectives to be met.

(b) The action will not result in exceeding the catch limit for the area.

(c) If any of the sport fishery subareas north of Cape Falcon, OR are not projected to utilize their respective quotas by September 30, NMFS may take inseason action to transfer any projected unused quota to another Washington sport subarea.

(d) If any of the sport fishery subareas south of Leadbetter Point, WA are not projected to utilize their respective quotas by their season ending dates, NMFS may take inseason action to transfer any projected unused quota to another Oregon sport subarea.

(2) Flexible inseason management provisions include, but are not limited to, the following:

(a) Modification of sport fishing periods;

(b) Modification of sport fishing bag limits;

(c) Modification of sport fishing size limits;

(d) Modification of sport fishing days per calendar week; and

(e) Modification of subarea quotas north of Cape Falcon, OR.

(3) Notice procedures.

(a) Actions taken under this section will be published in the **Federal Register.**

(b) Actual notice of inseason management actions will be provided by a telephone hotline administered by the Northwest Region, NMFS, at 206–526–6667 or 800–662–9825 (May through October) and by U.S. Coast Guard broadcasts. These broadcasts are announced on Channel 16 VHF-FM and 2182 kHz at frequent intervals. The announcements designate the channel or frequency over which the notice to mariners will be immediately broadcast. Since provisions of these regulations may be altered by inseason actions, sport fishers should monitor either the telephone hotline or U.S. Coast Guard broadcasts for current information for the area in which they are fishing.

(4) Effective dates.

(a) Any action issued under this section is effective on the date specified in the publication or at the time that the action is filed for public inspection with the Office of the **Federal Register**, whichever is later.

(b) If time allows, NMFS will invite public comment prior to the effective date of any inseason action filed with the **Federal Register**. If the Regional Administrator determines, for good cause, that an inseason action must be filed without affording a prior

opportunity for public comment, public comments will be received for a period of 15 days after publication of the action in the **Federal Register**.

(c) Any inseason action issued under this section will remain in effect until the stated expiration date or until rescinded, modified, or superseded. However, no inseason action has any effect beyond the end of the calendar year in which it is issued.

(5) Availability of data. The Regional Administrator will compile, in aggregate form, all data and other information relevant to the action being taken and will make them available for public review during normal office hours at the Northwest Regional Office, NMFS, Sustainable Fisheries Division, 7600 Sand Point Way NE, Seattle, WA.

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■ 3. On page 9250, in the **Federal Register** document published on February 25, 2005, Section 26, "Fishery Election in Area 2A" is revised to read as follows:

26. Fishery Election in Area 2A

(1) A vessel that fishes in Area 2A may participate in only one of the following three fisheries in Area 2A:

(a) The sport fishery under Section 24;

(b) The commercial directed fishery for halibut during the fishing period(s) established in Section 8 and/or the incidental retention of halibut during the primary sablefish fishery described at 50 CFR 660.372; or

(c) The incidental catch fishery during the salmon troll fishery as authorized in Section 8.

(2) No person shall fish for halibut in the sport fishery in Area 2A under Section 24 from a vessel that has been used during the same calendar year for commercial halibut fishing in Area 2A or that has been issued a permit for the same calendar year for the commercial halibut fishery in Area 2A.

(3) No person shall fish for halibut in the directed halibut fishery during the fishing periods established in Section 8 and/or retain halibut incidentally taken in the primary sablefish fishery in Area 2A from a vessel that has been used during the same calendar year for the incidental catch fishery during the salmon troll fishery as authorized in Section 8.

(4) No person shall fish for halibut in the directed commercial halibut fishery and/or retain halibut incidentally taken in the primary sablefish fishery in Area 2A from a vessel that, during the same calendar year, has been used in the sport halibut fishery in Area 2A or that is licensed for the sport charter halibut fishery in Area 2A.

(5) No person shall retain halibut in the salmon troll fishery in Area 2A as authorized under Section 8 taken on a vessel that, during the same calendar year, has been used in the sport halibut fishery in Area 2A, or that is licensed for the sport charter halibut fishery in Area 2A.

(6) No person shall retain halibut in the salmon troll fishery in Area 2A as authorized under Section 8 taken on a vessel that, during the same calendar year, has been used in the directed commercial fishery during the fishing periods established in Section 8 and/or retain halibut incidentally taken in the primary sablefish fishery for Area 2A or that is licensed to participate in these commercial fisheries during the fishing periods established in Section 8 in Area 2A.

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■ 4. On page 9250, in the **Federal Register** document published on February 25, 2005, Section 27, "Area 2A Non-Treaty Commercial Fishery Closed Area" is revised to read as follows:

27. Area 2A Non-treaty Commercial Fishery Closed Areas

Non-treaty commercial vessels operating in the directed commercial fishery for halibut in Area 2A are required to fish outside of a closed area, known as the Rockfish Conservation Area (RCA), that extends along the coast from the U.S./Canada border south to 40°10′ N. lat. Coordinates for the specific closed area boundaries are as follows:

(1) Between the U.S./Canada border and 46°16′ N. lat., the eastern boundary of the RCA is the shoreline.

(2) Between 46°16′ N. lat. and 40°10′ N. lat., the eastern, inshore boundary of the RCA approximates the 30–fm (55–m) depth contour. The boundary is defined by straight lines connecting all of the following points in the order stated:

(1) 46°16.00′ N. lat., 124°13.05′ W. long.;

(2) 46°07.00′ N. lat., 124°07.01′ W. long.;

(3) 45°55.95′ N. lat., 124°02.23′ W. long.;

(4) 45°54.53′ N. lat., 124°02.57′ W. long.;

(5) 45°50.65′ N. lat., 124°01.62′ W. long.;

(6) 45°48.20′ N. lat., 124°02.16′ W. long.;

(7) 45°46.00′ N. lat., 124°01.86′ W. long.;

(8) 45°43.47′ N. lat., 124°01.28′ W. long.;

(9) 45°40.48′ N. lat., 124°01.03′ W. long.;

(10) 45°39.04′ N. lat., 124°01.68′ W. long.;

(11) 45°35.48′ N. lat., 124°01.89′ W. long.;

(12) 45°29.81′ N. lat., 124°02.45′ W. long.;

(13) 45°27.96′ N. lat., 124°01.89′ W. long.;

(14) 45°27.22′ N. lat., 124°02.67′ W. long.;

(15) 45°24.20′ N. lat., 124°02.94′ W. long.;

(16) 45°20.60′ N. lat., 124°01.74′ W. long.;

(17) 45°20.25′ N. lat., 124°01.85′ W. long.;

(18) 45°16.44′ N. lat., 124°03.22′ W. long.;

(19) 45°13.63′ N. lat., 124°02.70′ W. long.;

(20) 45°11.04′ N. lat., 124°03.59′ W. long.;

(21) 45°08.55′ N. lat., 124°03.47′ W. long.;

(22) 45°02.82′ N. lat., 124°04.64′ W. long.;

(23) 45°03.38′ N. lat., 124°04.79′ W. long.;

(24) 44°58.06′ N. lat., 124°05.03′ W. long.;

(25) 44°53.97′ N. lat., 124°06.92′ W. long.;

(26) 44°48.89′ N. lat., 124°07.04′ W. long.;

(27) 44°46.94′ N. lat., 124°08.25′ W. long.;

(28) 44°42.72′ N. lat., 124°08.98′ W. long.;

(29) 44°38.16′ N. lat., 124°11.48′ W. long.;

(30) 44°33.38′ N. lat., 124°11.54′ W. long.;

(31) 44°28.51′ N. lat., 124°12.03′ W. long.;

(32) 44°27.65′ N. lat., 124°12.56′ W. long.;

(33) 44°19.67′ N. lat., 124°12.37′ W. long.;

(34) 44°10.79′ N. lat., 124°12.22′ W. long.;

(35) 44°09.22′ N. lat., 124°12.28′ W. long ;

(36) 44°08.30′ N. lat., 124°12.30′ W. long.;

(37) 44°00.22′ N. lat., 124°12.80′ W. long.;

(38) 43°51.56′ N. lat., 124°13.17′ W. long.;

(39) 43°44.26′ N. lat., 124°14.50′ W. long.;

(40) 43°33.82′ N. lat., 124°16.28′ W. long.;

(41) 43°28.66′ N. lat., 124°18.72′ W. long.;

(42) 43°23.12′ N. lat., 124°24.04′ W. long.;

(43) 43°20.83′ N. lat., 124°25.67′ W. long.;

(44) 43°20.49′ N. lat., 124°25.90′ W. long.;

(45) 43°16.41′ N. lat., 124°27.52′ W. long.;
(46) 43°14.23′ N. lat., 124°29.28′ W. long.;
(47) 43°14.03′ N. lat., 124°28.31′ W. long.;
(48) 43°11.92′ N. lat., 124°28.26′ W. long.;
(49) 43°11.02′ N. lat., 124°29.11′ W. long.;
(50) 43°10.13′ N. lat., 124°29.15′ W. long.;
(51) 43°09.27′ N. lat., 124°31.03′ W. long.;
(52) 43°07.73′ N. lat., 124°30.92′ W. long.;
(53) 43°05.93′ N. lat., 124°29.64′ W. long.;
(54) 43°01.59′ N. lat., 124°30.64′ W. long.;
(55) 42°59.73′ N. lat., 124°31.16′ W. long.;
(56) 42°53.75′ N. lat., 124°36.09′ W. long.;
(57) 42°50.00′ N. lat., 124°38.39′ W. long.;
(58) 42°49.37′ N. lat., 124°38.81′ W. long.;
(59) 42°46.42′ N. lat., 124°37.69′ W. long.;
(60) 42°46.07′ N. lat., 124°38.56′ W. long.;
(61) 42°45.29′ N. lat., 124°37.95′ W. long.;
(62) 42°45.61′ N. lat., 124°36.87′ W. long.;
(63) 42°44.28′ N. lat., 124°33.64′ W. long.;
(64) 42°42.75′ N. lat., 124°31.84′ W. long.;
(65) 42°40.50′ N. lat., 124°29.67′ W. long.;
(66) 42°40.04′ N. lat., 124°29.19′ W. long.;
(67) 42°38.09′ N. lat., 124°28.39′ W. long.;
(68) 42°36.72′ N. lat., 124°27.54′ W. long.;
(69) 42°36.56′ N. lat., 124°28.40′ W. long.;
(70) 42°35.76′ N. lat., 124°28.79′ W. long.;
(71) 42°34.03′ N. lat., 124°29.98′ W. long.;
(72) 42°34.19′ N. lat., 124°30.58′ W. long.;
(73) 42°31.27′ N. lat., 124°32.24′ W. long.;
(74) 42°27.07′ N. lat., 124°32.53′ W. long.;
(75) 42°24.21′ N. lat., 124°31.23′ W. long.;
(76) 42°20.47′ N. lat., 124°28.87′ W. long.;
(77) 42°14.60′ N. lat., 124°26.80′ W. long.;
(78) 42°13.67′ N. lat., 124°26.25′ W. long.;
(79) 42°10.90′ N. lat., 124°24.57′ W. long.;
(80) 42°07.04′ N. lat., 124°23.35′ W. long.;
(81) 42°02.16′ N. lat., 124°22.59′ W. long.;
(82) 42°00.00′ N. lat., 124°21.81′ W. long.;
(83) 41°55.75′ N. lat., 124°20.72′ W. long.;
(84) 41°50.93′ N. lat., 124°23.76′ W. long.;
(85) 41°42.53′ N. lat., 124°16.47′ W. long.;
(86) 41°37.20′ N. lat., 124°17.05′ W. long.;
(87) 41°24.58′ N. lat., 124°10.51′ W. long.;
(88) 41°20.73′ N. lat., 124°11.73′ W. long.;
(89) 41°17.59′ N. lat., 124°10.66′ W. long.;
(90) 41°04.54′ N. lat., 124°14.47′ W. long.;
(91) 40°54.26′ N. lat., 124°13.90′ W. long.;
(92) 40°40.31′ N. lat., 124°26.24′ W. long.;
(93) 40°34.00′ N. lat., 124°27.39′ W. long.;
(94) 40°30.00′ N. lat., 124°31.32′ W. long.;
(95) 40°28.89′ N. lat., 124°32.43′ W. long.;
(96) 40°24.77′ N. lat., 124°29.51′ W. long.;
(97) 40°22.47′ N. lat., 124°24.12′ W. long.;
(98) 40°19.73′ N. lat., 124°23.59′ W. long.;
(99) 40°18.64′ N. lat., 124°21.89′ W. long.;
(100) 40°17.67′ N. lat., 124°23.07′ W. long.;
(101) 40°15.58′ N. lat., 124°23.61′ W. long.;
(102) 40°13.42′ N. lat., 124°22.94′ W. long.; and
(103) 40°10.00′ N. lat., 124°16.65′ W. long.

(3) Between the U.S./Canada border and 40°10′ N. lat., the western, offshore boundary of the RCA approximates the 100–fm (183–m) depth contour. The boundary is defined by straight lines connecting all of the following points in the order stated:
(1) 48°15.00′ N. lat., 125°41.00′ W. long.;
(2) 48°14.00′ N. lat., 125°36.00′ W. long.;
(3) 48°09.50′ N. lat., 125°40.50′ W. long.;
(4) 48°08.00′ N. lat., 125°38.00′ W. long.;
(5) 48°05.00′ N. lat., 125°37.25′ W. long.;
(6) 48°02.60′ N. lat., 125°34.70′ W. long.;
(7) 47°59.00′ N. lat., 125°34.00′ W. long.;
(8) 47°57.26′ N. lat., 125°29.82′ W. long.;
(9) 47°59.87′ N. lat., 125°25.81′ W. long.;
(10) 48°01.80′ N. lat., 125°24.53′ W. long.;
(11) 48°02.08′ N. lat., 125°22.98′ W. long.;
(12) 48°02.97′ N. lat., 125°22.89′ W. long.;
(13) 48°04.47′ N. lat., 125°21.75′ W. long.;
(14) 48°06.11′ N. lat., 125°19.33′ W. long.;
(15) 48°07.95′ N. lat., 125°18.55′ W. long.;
(16) 48°09.00′ N. lat., 125°18.00′ W. long.;
(17) 48°11.31′ N. lat., 125°17.55′ W. long.;
(18) 48°14.60′ N. lat., 125°13.46′ W. long.;
(19) 48°16.67′ N. lat., 125°14.34′ W. long.;
(20) 48°18.73′ N. lat., 125°14.41′ W. long.;
(21) 48°19.67′ N. lat., 125°13.70′ W. long.;
(22) 48°19.70′ N. lat., 125°11.13′ W. long.;
(23) 48°22.95′ N. lat., 125°10.79′ W. long.;
(24) 48°21.61′ N. lat., 125°02.54′ W. long.;
(25) 48°23.00′ N. lat., 124°49.34′ W. long.;
(26) 48°17.00′ N. lat., 124°56.50′ W. long.;
(27) 48°06.00′ N. lat., 125°00.00′ W. long.;
(28) 48°04.62′ N. lat., 125°01.73′ W. long.;
(29) 48°04.84′ N. lat., 125°04.03′ W. long.;
(30) 48°06.41′ N. lat., 125°06.51′ W. long.;
(31) 48°06.00′ N. lat., 125°08.00′ W. long.;
(32) 48°07.08′ N. lat., 125°09.34′ W. long.;
(33) 48°07.28′ N. lat., 125°11.14′ W. long.;
(34) 48°03.45′ N. lat., 125°16.66′ W. long.;
(35) 47°59.50′ N. lat., 125°18.88′ W. long.;
(36) 47°58.68′ N. lat., 125°16.19′ W. long.;
(37) 47°56.62′ N. lat., 125°13.50′ W. long.;
(38) 47°53.71′ N. lat., 125°11.96′ W. long.;
(39) 47°51.70′ N. lat., 125°09.38′ W. long.;
(40) 47°49.95′ N. lat., 125°06.07′ W. long.;
(41) 47°49.00′ N. lat., 125°03.00′ W. long.;
(42) 47°46.95′ N. lat., 125°04.00′ W. long.;

(43) 47°46.58′ N. lat., 125°03.15′ W. long.;
(44) 47°44.07′ N. lat., 125°04.28′ W. long.;
(45) 47°43.32′ N. lat., 125°04.41′ W. long.;
(46) 47°40.95′ N. lat., 125°04.14′ W. long.;
(47) 47°39.58′ N. lat., 125°04.97′ W. long.;
(48) 47°36.23′ N. lat., 125°02.77′ W. long.;
(49) 47°34.28′ N. lat., 124°58.66′ W. long.;
(50) 47°32.17′ N. lat., 124°57.77′ W. long.;
(51) 47°30.27′ N. lat., 124°56.16′ W. long.;
(52) 47°30.60′ N. lat., 124°54.80′ W. long.;
(53) 47°29.26′ N. lat., 124°52.21′ W. long.;
(54) 47°28.21′ N. lat., 124°50.65′ W. long.;
(55) 47°27.38′ N. lat., 124°49.34′ W. long.;
(56) 47°25.61′ N. lat., 124°48.26′ W. long.;
(57) 47°23.54′ N. lat., 124°46.42′ W. long.;
(58) 47°20.64′ N. lat., 124°45.91′ W. long.;
(59) 47°17.99′ N. lat., 124°45.59′ W. long.;
(60) 47°18.20′ N. lat., 124°49.12′ W. long.;
(61) 47°15.01′ N. lat., 124°51.09′ W. long.;
(62) 47°12.61′ N. lat., 124°54.89′ W. long.;
(63) 47°08.22′ N. lat., 124°56.53′ W. long.;
(64) 47°08.50′ N. lat., 124°57.74′ W. long.;
(65) 47°01.92′ N. lat., 124°54.95′ W. long.;
(66) 47°01.14′ N. lat., 124°59.35′ W. long.;
(67) 46°58.48′ N. lat., 124°57.81′ W. long.;
(68) 46°56.79′ N. lat., 124°56.03′ W. long.;
(69) 46°58.01′ N. lat., 124°55.09′ W. long.;
(70) 46°55.07′ N. lat., 124°54.14′ W. long.;
(71) 46°59.60′ N. lat., 124°49.79′ W. long.;
(72) 46°58.72′ N. lat., 124°48.78′ W. long.;
(73) 46°54.45′ N. lat., 124°48.36′ W. long.;
(74) 46°53.99′ N. lat., 124°49.95′ W. long.;
(75) 46°54.38′ N. lat., 124°52.73′ W. long.;
(76) 46°52.38′ N. lat., 124°52.02′ W. long.;
(77) 46°48.93′ N. lat., 124°49.17′ W. long.;
(78) 46°41.50′ N. lat., 124°43.00′ W. long.;
(79) 46°34.50′ N. lat., 124°28.50′ W. long.;
(80) 46°29.00′ N. lat., 124°30.00′ W. long.;
(81) 46°20.00′ N. lat., 124°36.50′ W. long.;
(82) 46°18.00′ N. lat., 124°38.00′ W. long.;
(83) 46°17.52′ N. lat., 124°35.35′ W. long.;
(84) 46°17.00′ N. lat., 124°22.50′ W. long.;
(85) 46°16.00′ N. lat., 124°20.62′ W. long.;
(86) 46°13.52′ N. lat., 124°25.49′ W. long.;
(87) 46°12.17′ N. lat., 124°30.75′ W. long.;
(88) 46°10.63′ N. lat., 124°37.95′ W. long.;
(89) 46°09.29′ N. lat., 124°39.01′ W. long.;
(90) 46°02.40′ N. lat., 124°40.37′ W. long.;
(91) 45°56.45′ N. lat., 124°38.00′ W. long.;
(92) 45°51.92′ N. lat., 124°38.49′ W. long.;
(93) 45°47.19′ N. lat., 124°35.58′ W. long.;
(94) 45°46.41′ N. lat., 124°32.36′ W. long.;
(95) 45°46.00′ N. lat., 124°32.10′ W. long.;
(96) 45°41.75′ N. lat., 124°28.12′ W. long.;
(97) 45°36.96′ N. lat., 124°24.48′ W. long.;
(98) 45°31.84′ N. lat., 124°22.04′ W. long.;
(99) 45°27.10′ N. lat., 124°21.74′ W. long.;
(100) 45°20.25′ N. lat., 124°18.54′ W. long.;
(101) 45°18.14′ N. lat., 124°17.59′ W. long.;
(102) 45°11.08′ N. lat., 124°16.97′ W. long.;
(103) 45°04.38′ N. lat., 124°18.36′ W. long.;
(104) 45°03.83′ N. lat., 124°18.60′ W. long.;
(105) 44°58.05′ N. lat., 124°21.58′ W. long.;
(106) 44°47.67′ N. lat., 124°31.41′ W. long.;
(107) 44°44.55′ N. lat., 124°33.58′ W. long.;
(108) 44°39.88′ N. lat., 124°35.01′ W. long.;
(109) 44°32.90′ N. lat., 124°36.81′ W. long.;
(110) 44°30.33′ N. lat., 124°38.56′ W. long.;
(111) 44°30.04′ N. lat., 124°42.31′ W. long.;
(112) 44°26.84′ N. lat., 124°44.91′ W. long.;
(113) 44°17.99′ N. lat., 124°51.03′ W. long.;
(114) 44°13.68′ N. lat., 124°56.38′ W. long.;
(115) 44°08.30′ N. lat., 124°55.99′ W. long.;
(116) 43°56.67′ N. lat., 124°55.45′ W. long.;
(117) 43°56.47′ N. lat., 124°34.61′ W. long.;
(118) 43°42.73′ N. lat., 124°32.41′ W. long.;
(119) 43°30.93′ N. lat., 124°34.43′ W. long.;
(120) 43°20.83′ N. lat., 124°39.39′ W. long.;
(121) 43°17.45′ N. lat., 124°41.16′ W. long.;
(122) 43°07.04′ N. lat., 124°41.25′ W. long.;
(123) 43°03.45′ N. lat., 124°44.36′ W. long.;
(124) 43°03.90′ N. lat., 124°50.81′ W. long.;
(125) 42°55.70′ N. lat., 124°52.79′ W. long.;
(126) 42°54.12′ N. lat., 124°47.36′ W. long.;
(127) 42°50.00′ N. lat., 124°45.33′ W. long.;
(128) 42°44.00′ N. lat., 124°42.38′ W. long.;
(129) 42°40.50′ N. lat., 124°41.71′ W. long.;
(130) 42°38.23′ N. lat., 124°41.25′ W. long.;
(131) 42°33.03′ N. lat., 124°42.38′ W. long.;
(132) 42°31.89′ N. lat., 124°42.04′ W. long.;
(133) 42°30.09′ N. lat., 124°42.67′ W. long.;
(134) 42°28.28′ N. lat., 124°47.08′ W. long.;
(135) 42°25.22′ N. lat., 124°43.51′ W. long.;
(136) 42°19.23′ N. lat., 124°37.92′ W. long.;
(137) 42°16.29′ N. lat., 124°36.11′ W. long.;
(138) 42°13.67′ N. lat., 124°35.81′ W. long.;
(139) 42°05.66′ N. lat., 124°34.92′ W. long.;
(140) 42°00.00′ N. lat., 124°35.27′ W. long.;
(141) 41°47.04′ N. lat., 124°27.64′ W. long.;
(142) 41°32.92′ N. lat., 124°28.79′ W. long.;
(143) 41°24.17′ N. lat., 124°28.46′ W. long.;
(144) 41°10.12′ N. lat., 124°20.50′ W. long.;
(145) 40°51.41′ N. lat., 124°24.38′ W. long.;
(146) 40°43.71′ N. lat., 124°29.89′ W. long.;
(147) 40°40.14′ N. lat., 124°30.90′ W. long.;

(148) 40°37.35′ N. lat., 124°29.05′ W. long.;
(149) 40°34.76′ N. lat., 124°29.82′ W. long.;
(150) 40°36.78′ N. lat., 124°37.06′ W. long.;
(151) 40°32.44′ N. lat., 124°39.58′ W. long.;
(152) 40°30.00′ N. lat., 124°38.13′ W. long.;
(153) 40°24.82′ N. lat., 124°35.12′ W. long.;
(154) 40°23.30′ N. lat., 124°31.60′ W. long.;
(155) 40°23.52′ N. lat., 124°28.78′ W. long.;
(156) 40°22.43′ N. lat., 124°25.00′ W. long.;
(157) 40°21.72′ N. lat., 124°24.94′ W. long.;
(158) 40°21.87′ N. lat., 124°27.96′ W. long.;
(159) 40°21.40′ N. lat., 124°28.74′ W. long.;
(160) 40°19.68′ N. lat., 124°28.49′ W. long.;
(161) 40°17.73′ N. lat., 124°25.43′ W. long.;
(162) 40°18.37′ N. lat., 124°23.35′ W. long.;
(163) 40°15.75′ N. lat., 124°26.05′ W. long.;
(164) 40°16.75′ N. lat., 124°33.71′ W. long.;
(165) 40°16.29′ N. lat., 124°34.36′ W. long.; and
(166) 40°10.00′ N. lat., 124°21.12′ W. long.;

* * * * *

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866 (E.O. 12866). In addition, the groundfish inseason action is taken under the authority of 50 CFR 660.370(c) and is exempt from review under E.O. 12866.

The groundfish inseason action is authorized by the Pacific Coast groundfish FMP and its implementing regulations, and is based on the most recent data available. The aggregate data upon which this action is based are available for public inspection at the Office of the Administrator, Northwest Region, NMFS, (see **ADDRESSES**) during business hours.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on the changes to the groundfish regulations, as notice and comment is impracticable and unnecessary. Notice and comment is impracticable because changes to Washington and Oregon's recreational groundfish fishery management measures to prohibit the landing or retention of groundfish, except sablefish when halibut are onboard the vessel, must be implemented in a timely manner to be effective when the sport halibut season starts on May 1, 2005, in areas off Washington and Oregon. Notice and comment is unnecessary because public notice and comment on this same provision in the halibut regulations was provided via the proposed rule for the Pacific halibut fisheries, which was published on February 7, 2005 (70 FR 6395). [NOTE: The proposed rule published later than expected because, as explained in the preamble, there was confusion over the Pacific Council's recommendation to prohibit the retention of all groundfish, except sablefish when allowed by groundfish regulation, in the Columbia River fishery during all days and in the Central Coast fisheries during "all-depth" days. NMFS was required to coordinate with the states and Council staff in an attempt to clarify the Council's recommendations. NMFS decided to explain the issue in the proposed rule and ask the Council to clarify their recommendation at their March meeting.] This notice implements the same provision in both the halibut and groundfish regulations.

The AA finds good cause to waive the requirement to provide a 30–day delay in effectiveness (5 U.S.C. 553(d)). This rule must be made effective for the first opening of the 2005 Pacific halibut fishing season on April 14, 2005. The annual halibut quotas and many management measures are determined by an international commission, the IPHC. Therefore, the AA cannot publish a final rule until after the IPHC has adopted the annual quotas and management measures for the year. The IPHC adopted annual quotas and management measures for 2005 on January 21, 2005. NMFS published a proposed rule for 2005 on February 7, 2005, and provided a comment period that ran until March 16, 2005, so that the Pacific Council could provide a clarification on one of its recommendations. In addition, after the IPHC meeting, the states hold public meetings with their constituents on which they base their recommendations to NMFS. Therefore, there was not sufficient time in which to draft and publish the final rule in the **Federal Register** and to allow for a 30–day delay in effectiveness before the scheduled April 14, 2005, start of the fishing season.

Delaying the opening of the fishing season would cause the Federal regulations implemented for 2004 to remain in place until they are replaced by these regulations. Therefore, if there were a 30–day delay in effectiveness for these regulations, the fishery would operate under last year's regulations for the first few weeks of the fishery. The start dates for most of the recreational fisheries off Washington and Oregon are slightly different in 2005 than they were in 2004. For example, in Puget Sound, the fishery started on May 6 in 2004, but is scheduled to start on April 14 in 2005. A delay in effectiveness of this rule would delay the season by a few weeks, which could cause economic harm to charter operators and lost harvest opportunity to recreational anglers due to a shorter season than projected necessary to attain the quota for this subarea. Because the number of days set for the season is based on how many days it would take to catch the available quota, a shortened season may not only keep anglers and charter operators from achieving the quota, but it would cause lost revenues from charter trips already booked for the beginning of the season. In addition, recreational fisheries start dates primarily differ from year to year because the Plan has a long history of managing the different subareas so that fisheries occur on particular days of the week. Thus, a Sunday through Thursday fishery will always occur Sundays through Thursdays, but will have different calendar dates from year to year. Although NMFS was able to provide a public comment period following the proposed rule (February 7, 2005 (70 FR 6395)), the agency did not have time to publish a final rule and allow a 30–day delay in effectiveness period prior to April 14. The states of Washington and Oregon have adopted recreational halibut regulations that match these regulations. A delay in effectiveness of 30 days would cause the state and Federal regulations to be in conflict, would cause confusion in the recreational fishing industry, and would result in fishing seasons that differ from the seasons carefully crafted by the states, the industry, and the Pacific Council. This delay could harm commercial and recreational fishermen by lost opportunity to harvest their available 2005 quota. For the charter industry, previously planned fishing trips would have to be cancelled, resulting in lost revenue, if the season were delayed. In addition, conflicting state and Federal regulations would make enforcement of regulations difficult and create public confusion. For the reasons described above, pursuant to 5 U.S.C. 553(d)(3), there is good cause to waive the requirement to provide a 30–day delay in effectiveness of this rule so that this final rule may

become effective in time for the first recreational halibut fishing season on April 14, 2005.

The recreational groundfish fishery regulatory changes off Washington and Oregon to prohibit the landing or retention of groundfish, except sablefish when halibut are onboard the vessel will be effective May 1, 2005.

NMFS prepared a final regulatory flexibility analysis (FRFA). The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. A copy of this analysis is available from the NMFS (see **ADDRESSES**) and a summary of the FRFA follows:

This rule is needed to implement the Plan and annual domestic management measures in Area 2A. The main objective for the Pacific halibut fishery in Area 2A is to manage fisheries to remain within the TAC for Area 2A, while also allowing each commercial, recreational and tribal fishery to target halibut in the manner most appropriate for the user's needs within that fishery. This rule is intended to enhance the conservation of Pacific halibut, to protect yelloweye and other overfished groundfish species from incidental catch in the halibut fisheries, and to provide greater angler opportunity where available.

The agency received three letters of comment on the proposed rule, but none of the comments received addressed the IRFA.

In determining the potential universe of entities subject to this rule, NMFS considered those entities to which this rule applies. Although many small and large nonprofit enterprises track fisheries management issues on the West Coast, the changes to the Plan and annual management measures will not directly affect those enterprises. Similarly, although many fishing communities are small governmental jurisdictions, no direct regulations for those governmental jurisdictions will result from this rule. However, charterboat operations and participants in the non-treaty directed commercial fishery off the coast of Washington and Oregon are small businesses that are directly regulated by this rule.

Approximately 700 vessels were issued IPHC licenses to retain halibut in 2004. IPHC issues licenses for: the directed commercial fishery in Area 2A, including licenses issued to retain halibut caught incidentally in the primary sablefish fishery (215 licenses in 2004); incidental halibut caught in the salmon troll fishery (344 licenses in 2004); and the charterboat fleet (138 licenses in 2004). No vessel may participate in more than one of these three fisheries per year. Individual recreational anglers and private boats are the only sectors that are not required to have an IPHC license to retain halibut.

Vessels participating in the directed commercial halibut fishery and incidental halibut caught in the salmon troll fishery are considered small entities if their annual receipts do not exceed $3.5 million. All of the vessels that participate in the Pacific halibut fisheries in Area 2A are considered small businesses under Small Business Administration guidance.

Specific data on the economics of halibut charter operations are unavailable. However, the Pacific States Marine Fisheries Commission (Commission) is completing a report on the overall West Coast charterboat fleet. In surveying charterboat vessels concerning their operations in 2000, the Commission estimated that there were about 315 charterboat vessels in operation off Washington and Oregon. Compared with the 138 IPHC licenses in 2004, this estimate suggests that approximately 44 percent of the charterboat fleet participates in the halibut fishery. The Commission has developed preliminary estimates of the annual revenues earned by this fleet and they vary by size class of the vessels and home state. Small charterboat vessels range from 15 to 30 feet and typically carry 5 to 6 passengers. Medium charterboat vessels range from 31 to 49 feet in length and typically carry 19 to 20 passengers. (Neither state has large vessels of greater than 49 feet in their fleet.) Average annual revenues from all types of recreational fishing, whalewatching and other activities ranged from $7,000 for small Oregon vessels to $131,000 for medium Washington vessels. These data confirm that charterboat vessels qualify as small entities under the Regulatory Flexibility Act.

This rule does not impose any new reporting or recordkeeping requirements.

For each of the 2005 revisions, NMFS is implementing a Plan or regulatory revision intended to either improve flexibility for anglers or ensure consistency between Federal groundfish and halibut regulations. NMFS does not expect any significant economic impacts for small entities from this proposed rule. The NEPA analysis for this action reviewed alternatives including no action, adopting a closed area on Stonewall Bank, prohibiting groundfish retention in the Columbia River and Oregon's Central coast areas, and removing the minimum length requirement. The preferred alternatives, which are part of the actions taken in this final rule, were to adopt both a closed area on Stonewall Bank and prohibit groundfish retention in the Columbia River and Oregon's Central coast areas as well as removing the minimum length requirement. There were no alternatives that could have similarly improved angler enjoyment of and participation in the fisheries while simultaneously protecting halibut and co-occurring groundfish species from overharvest.

The changes to the Plan and domestic management do not affect the process of evaluating quota-attainment. The changes to the Plan and domestic management measures increase flexibility in management and opportunity to harvest available quota. There are no large entities involved in the halibut fisheries, therefore, none of these changes to the Plan and domestic management measures will have a disproportionate negative effect on small entities versus large entities. None of these changes to the Plan and domestic management measures will significantly reduce profitability for small entities. In fact, increasing opportunity to harvest available sport halibut quota may increase profitability for some small entities.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of halibut management in Area 2A, NMFS maintains a toll-free telephone hotline where members of the public may call in to receive current information on seasons and requirements to participate in the halibut fisheries in Area 2A. This hotline also serves as small entity compliance guide. Copies of this final rule are available from the NMFS Northwest Regional Office upon request (See **ADDRESSES**). To hear the small entity compliance guide associated with this final rule, call the NMFS hotline at 800–662–9825.

Pursuant to Executive Order 13175, the Secretary of Commerce recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. At section 302(b)(5), the Magnuson-Stevens

Fishery Conservation and Management Act establishes a seat on the Pacific Council for a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho.

The U.S. government formally recognizes that the 12 Washington Tribes have treaty rights to fish for Pacific halibut. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of Pacific halibut available in the tribes' usual and accustomed (U and A) fishing areas (described at 50 CFR 300.64). Each of the treaty tribes has the discretion to administer their fisheries and to establish their own policies to achieve program objectives. Accordingly, tribal allocations and regulations, including changes tothe Plan, have been developed in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. This final rule was developed after meaningful consultation with the tribal representative on the Council who has agreed with the provisions that apply to tribal vessels.

This final rule does not contain policies with federalism implications under Executive Order 13132.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: April 12, 2005.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 660.384, paragraphs (c)(1) and (c)(2)(iii) are revised to read as follows:

§ 660.384 Recreational fishery management measures.

* * * * *

(c) * * *

(1) *Washington.* For each person engaged in recreational fishing in the EEZ seaward of Washington, the groundfish bag limit is 15 groundfish per day, including rockfish and lingcod, and is open year-round (except for lingcod). In the Pacific halibut fisheries, retention of groundfish is governed in part by annual management measures for Pacific halibut fisheries, which are published in the **Federal Register**. South of Leadbetter Point, WA to the Washington/Oregon border, when Pacific halibut are onboard the vessel, landing groundfish, except sablefish, is prohibited. The following sublimits and closed areas apply: * * *

* * * * *

(2) * * *

(iii) *Bag limits, size limits.* The bag limits for each person engaged in recreational fishing in the EEZ seaward of Oregon are two lingcod per day, which may be no smaller than 24 in (61 cm) total length; and 8 marine fish per day, which excludes Pacific halibut, salmonids, tuna, perch species, sturgeon, sanddabs, lingcod, striped bass, hybrid bass, offshore pelagic species and baitfish (herring, smelt, anchovies and sardines), but which includes rockfish, greenling, cabezon and other groundfish species. The minimum size limit for cabezon retained in the recreational fishery is 16 in (41 cm) and for greenling is 10 in (26 cm). Taking and retaining canary rockfish and yelloweye rockfish is prohibited. In the Pacific halibut fisheries, retention of groundfish is governed in part by the Pacific halibut regulations. South of the Washington/Oregon border to Cape Falcon, OR, when Pacific halibut are onboard the vessel, landing groundfish, except sablefish, is prohibited. South of Cape Falcon, OR, to Humbug Mountain, OR, when Pacific halibut are onboard the vessel, retention of groundfish, except sablefish, is prohibited during the Central Coast sport halibut "all-depth" season days. "All-depth" season days are established in the annual management measures for Pacific halibut fisheries, which are published in the **Federal Register** and are announced on the NMFS halibut hotline, 1–800–662–9825.

[FR Doc. 05–7721 Filed 4–14–05; 3:08 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 74
Tuesday, April 19, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–163314–03]

RIN 1545–BC88

Transactions Involving the Transfer of No Net Value; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking.

SUMMARY: This document contains corrections to a notice of proposed rulemaking that was published in the **Federal Register** on Thursday, March 10, 2005 (70 FR 11903). The proposed regulation provides guidance regarding corporate formations, reorganizations, and liquidations of insolvent corporations.

FOR FURTHER INFORMATION CONTACT: Jean Brenner, (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking (REG–163314–03) that is the subject of these corrections are under sections 332, 351 and 368 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking (REG–163314–03) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking (REG–163314–03), that was the subject of FR Doc. 04–4384, is corrected as follows:

1. On page 11904, column 1, in the preamble under the paragraph heading "*Explanation of Provisions*", the undesignated paragraph heading, "*Exchange of Net Value Requirement*" is correctly designated as "1. *Exchange of Net Value Requirement*".

2. On page 11904, column 1, in the preamble under the newly designated paragraph heading "1. *Exchange of Net Value Requirement*", the undesignated paragraph heading, "*Background*" is correctly designated as "A. *Background*".

3. On page 11904, column 3, in the preamble under the newly designated paragraph heading "1. *Exchange of Net Value Requirement*", the undesignated paragraph, "*Explanation of rules*" is revised and correctly designated as "B. *Explanation of Rules*".

4. On page 11904, column 3, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*Net Value Requirement*" is correctly designated as "(i) *Net Value Requirement*".

5. On page 11905, column 2, in the preamble under the newly designated paragraph heading, "B. *Explanation of Rules*", the undesignated paragraph heading, "*Scope of Net Value Requirement*" is correctly designated as "(ii) *Scope of Net Value Requirement*".

6. On page 11905, column 3, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*Definition of Liabilities*" is correctly designated as "(iii) *Definition of Liabilities*".

7. On page 11905, column 3, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*Amount of Liabilities*" is correctly designated as "(iv) *Amount of Liabilities*".

8. On page 11906, column 1, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*Assumption of Liabilities*" is correctly designated as "(v) *Assumption of Liabilities*".

9. On page 11906, column 1, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*In Connection With*" is correctly designated as "(vi) *In Connection With*".

10. On page 11906, column 2, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*Section 368(a)(1)(C)*" is correctly designated as "(vii) *Section 368(a)(1)(C)*".

11. On page 11906, column 2, in the preamble under the newly designated paragraph heading "B. *Explanation of Rules*", the undesignated paragraph heading, "*Section 721*" is correctly designated as "(viii) *Section 721*".

12. On page 11906, column 3, in the preamble under the paragraph heading "*Explanation of Provisions*", the undesignated paragraph heading, "*Continuity of Interest*" is correctly designated as "2. *Continuity of Interest*".

13. On page 11906, column 3, in the preamble under the newly designated paragraph heading "2. *Continuity of Interest*", the undesignated paragraph heading, "*Background*" is correctly designated as "A. *Background*".

14. On page 11907, column 1, in the preamble under the newly designated paragraph heading "2. *Continuity of Interest*", the undesignated paragraph heading, "*Explanation of Provisions*" is correctly designated as "B. *Explanation of Provisions*".

15. On page 11907, column 3, in the preamble under the newly designated paragraph heading, "*Explanations of Provisions*" the undesignated paragraph heading, "*Section 332*" is correctly designated as "3. *Section 332*".

16. On page 11907, column 3, in the preamble under the newly designated paragraph heading, "3. *Section 332*" the undesignated paragraph heading, "*Background*" is correctly designated as "A. *Background*".

17. On page 11907, column 3, in the preamble under the newly designated paragraph heading, "3. *Section 332*" the undesignated paragraph heading, "*Explanation of Provisions*" is correctly designated as "B. *Explanation of Provisions*".

LaNita Van Dyke,

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

[FR Doc. 05–7742 Filed 4–18–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Parts 43 and 50

[RIN 0790–AH87]

Personal Commercial Solicitation on DoD Installations

AGENCY: Office of the Secretary of Defense.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department regulations relating to policy and procedures on personal commercial solicitation on DoD installations. The proposed change incorporates current policy letters that were issued since the last publication of DoD Directive 1344.7 in February 1986. These include: policy on use of on-base financial institutions and non-profit, tax exempt, private organizations to provide financial education; limits on the use of commercial sponsorship to obtain personal contact information for solicitation; and required reporting of solicitation policy violations to higher headquarters. The proposed change also includes a new solicitation evaluation form to help installations detect solicitation policy violations. This document will not have a significant impact on the public.

DATES: Comments must be received by June 20, 2005.

ADDRESSES: Forward comments to: Colonel Michael A. Pachuta (*Michael.Pachuta@osd.mil*) or Mr. James M. Ellis (*James.Ellis@osd.mil*), at DUSD (MC&FP), 241 S. 18th St, Crystal Square #4, Suite 302, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Colonel Michael A. Pachuta or Mr. James M. Ellis at (703) 602–4994 or (703) 602–5009 respectively, or main (703) 602–5001.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed regulatory action is not a significant regulatory action, as defined by Executive Order 12866.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This proposed regulatory action will not have a significant adverse impact on a substantial number of small entities.

Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104–4)

This proposed regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of $100 million or more in any one year.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act. A new form is introduced, a sample of which is at attached. It will be made available on the DoD Forms Web site (*http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm*) upon release of the issuance. The agent will provide the form to the service member at the beginning of their meeting. The form will not be returned to the agent.

Federalism (Executive Order 13132)

This proposed regulatory action does not have federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. There are some changes in the DoD Instruction 1344.aa, mostly from existing policy memoranda issued since the last update of the DoDD 1344.7, Personal Commercial Solicitation on DoD Installations. It updates old and adds some new references. It also includes a new Personal Commercial Solicitation Evaluation form.

Section 202, Public Law 104–4, "Unfunded Mandates Reform Act"

It has been determined that this rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

List of Subjects in 32 CFR Parts 43 and 50

Consumer protection, Federal buildings and facilities, Government employees, Life insurance, Military personnel.

Accordingly, 32 CFR Chapter I, subchapter D is proposed to be amended as follows:

PART 43—[REMOVED]

1. Part 43 is removed.
2. Part 50 is added to read as follows:

PART 50—PERSONAL COMMERCIAL SOLICITATION ON DOD INSTALLATIONS

Subpart A—General Provisions

Subpart B—Procedures

Authority: 5 U.S.C. 301.

Subpart A—General Provisions

§ 50.1 Purpose.

This part updates policy for personal commercial solicitation on DoD installations and continues the established annual DoD registration requirements for life insurance companies operating on all DoD installations.

§ 50.2 Applicability.

This part applies to The Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components"). The term "Military Services" as used herein refers to the Army, the Navy, the Air Force, and the Marine Corps.

§ 50.3 Policy.

(a) The DoD shall safeguard and promote the welfare of DoD personnel as consumers by setting forth a uniform approach to the conduct of all personal commercial solicitation and sales to them by dealers and their agents. For those individuals and their companies that fail to follow this policy, the opportunity to solicit on military installations may be limited or denied as appropriate.

(b) Command authority shall include authority to approve or prohibit all commercial solicitation covered by this Directive. Nothing in this part limits an

installation commander's inherent authority to put time and place restrictions on commercial activities at the installation.

§ 50.4 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness shall:

(1) Develop and publish policies and procedures governing personal commercial solicitation on DoD installations consistent with the policies set forth in this part.

(2) Maintain, and make available to installation Commanders the current master file of all individual agents, dealers, and companies who have their privileges withdrawn at any DoD Installation.

(3) Develop and maintain a list of all State Insurance Commissioners' points of contact for DoD matters and forward this list to the Military Services.

(b) The Heads of the DoD Components, or their designees, shall ensure implementation of this subpart and subpart B.

Subpart B—Procedures

§ 50.6 Purpose.

(a) This subpart implements Subpart A of this part and establishes procedure for personal commercial solicitation on DoD installations.

(b) Continues the established annual DoD registration requirement for the sale of insurance and securities on DoD installations overseas.

(c) Identifies prohibited practices that may cause withdrawal of commercial solicitation privileges on DoD installations and establishes notification requirements when privileges are withdrawn.

(d) Establishes procedures for persons solicited on DoD installations to evaluate solicitors.

(e) Identifies procedures for providing financial education programs to military personnel.

§ 50.7 Applicability and scope.

(a) This subpart applies to the Office of the Secretary of Defense, the Military Departments, Chairman of the Joint Chiefs of Staff, the Combatant Commands, Defense Agencies, DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as "DoD Components").

(b) The provisions of this subpart do not apply to services furnished by residential service companies, such as deliveries of milk, laundry, newspapers and related services to personal residences on the installation when such services are requested by the resident and authorized by the installation commander.

(c) This subpart applies to all other personal commercial solicitation on DoD installations, including meetings on DoD installations of private, non-profit, tax-exempt organizations that involve commercial solicitation. Attendance at these meetings shall be voluntary and the time and place of such meetings are subject to the discretion of the installation commander or his or her designee.

§ 50.8 Definitions.

Agent. An individual who receives remuneration as a salesperson or whose remuneration is dependent on volume of sales of a product or products. (Also referred to as "commercial agent").

Authorized bank and/or credit union. Bank and/or credit union selected by the installation commander through open competitive solicitation to provide exclusive on-base delivery of financial services to the installation under a written operating agreement.

Banking institution. An entity chartered by a state or the Federal Government to provide financial services.

Commercial solicitation. The conduct of a private business, including the offering and sale of products and services, on a military installation. Solicitation on installations is a privilege as distinguished from a right, and its control is a responsibility vested in the DoD installation commander.

Commercial sponsorship. The act of providing assistance, funding, goods, equipment (including fixed assets), or services to an MWR program(s) event(s) by an individual, agency, association, company or corporation, or other entity (sponsor) for a specified (limited) period of time in return for public recognition or advertising promotions. Enclosure 9 of DoD Instruction 1015.10 [1] provides general policy governing commercial sponsorship.

Credit union. A cooperative nonprofit association, incorporated under the Credit Union Act, or similar State statute, for the purpose of encouraging thrift among its members and creating a source of credit at a fair and reasonable rate of interest.

DoD installation. Any Federally owned, leased, or operated base, reservation, post, camp, building, or other facility to which DoD personnel are assigned for duty, including barracks, transient housing, and family quarters.

[1] This issuance can be viewed at *http://www.dtic.mil/whs/directives/.*

DoD personnel. All active duty officers (commissioned and warrant) and enlisted members of the Military Departments and all civilian employees, including nonappropriated fund employees and special Government employees, of the Department of Defense.

Financial services. Those services commonly associated with financial institutions in the United States, such as electronic banking (*e.g.*, ATMs and personal computing banking), in-store banking, checking, share and savings accounts, fund transfers, sale of official checks, money orders and travelers checks, loan services, safe deposit boxes, trust services, sale and redemption of U.S. Savings Bonds, and acceptance of utility payments and any other services provided by financial institutions.

General agent. A person who has a legal contract to represent a company.

Insurance carrier. An insurance company issuing insurance through an association, reinsuring, or coinsuring such insurance.

Insurance product. A policy, annuity, or certificate of insurance issued by an insurer or evidence of insurance coverage issued by a self-insured association, including those with savings and investment features.

Insurer. Any company or association engaged in the business of selling insurance policies to DoD personnel.

Military services. The Army, the Navy, the Air Force, and the Marine Corps. Also includes the Coast Guard when operating as a service in the Navy.

Normal home enterprises. Sales or services that are customarily conducted in a domestic setting and do not compete with an installation's officially sanctioned commerce.

Personal. Pertaining to a particular individual's private affairs, interests, or activities.

Securities. Mutual funds, stocks, bonds, or any product registered with the Securities and Exchange Commission except for any insurance or annuity product issued by a corporation subject to supervision by State insurance authorities.

Solicitation. The conduct of any private business, including the offering and sale of insurance or securities on a military installation.

Suspension. Temporary termination of privileges pending completion of a commander's inquiry or investigation.

Withdrawal. Termination of privileges for a set period of time following completion of a commander's inquiry or investigation.

§ 50.9 Policy.

It is the policy of the Department of Defense to safeguard and promote the welfare of DoD personnel as consumers by setting forth a uniform approach to the conduct of all personal commercial solicitation and sales to them on DoD installations.

§ 50.10 Responsibilities.

(a) The Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDSUD (P&R)), under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Identify policy and develop procedures governing personal commercial solicitation activities conducted on DoD installations.

(2) Maintain the master file of all individuals and companies who have their privileges withdrawn at any DoD installation and disseminate this file to installation commanders.

(3) Maintain a list of State Insurance Commissioner points of contact for DoD matters and disseminate this list to the Military Services.

(b) The Heads of the DoD Components, or their designees, shall:

(1) Ensure implementation of this subpart and compliance with its provisions.

(2) Require installations under their cognizance report each instance of withdrawal of commercial solicitation privileges.

(3) Submit lists of all individuals and companies who have had their commercial solicitation privileges withdrawn at installations under their cognizance to the PDUSD(P&R) in accordance with this subpart.

§ 50.11 Procedures.

(a) *General.* (1) No person has authority to enter upon a DoD installation to transact personal commercial solicitation as a matter of right. Personal commercial solicitation will be permitted only if the following requirements are met:

(i) The solicitor is duly licensed under applicable Federal, State, or municipal laws and has complied with installation regulations in accordance with paragraph (c) of this section.

(ii) A specific appointment has been made for each meeting with the individual concerned and each meeting is conducted only in family quarters or in other areas designated by the installation commander.

(iii) The solicitor agrees to provide each person solicited the personal commercial solicitation evaluation included in Appendix A of this part during the initial appointment. The person being solicited is not required to complete the evaluation. However, completed evaluations should be sent by the person who was solicited to the office designated by the installation commander on the back of the evaluation form.

(2) Those seeking to transact personal commercial solicitation on overseas installations shall be required to observe, in addition to the above, the applicable laws of the host country and, upon request, present documentary evidence to the installation commander, or designee, that the company they represent, and its agents, meet the applicable licensing requirements of the host country.

(b) *Life insurance products and securities.* (1) Life insurance products and securities offered and sold to DoD personnel shall meet the prerequisites described in Appendix A of this part.

(2) Installation commanders may permit insurers and their agents to solicit on DoD installations if the requirements of paragraph (a) of this section are satisfied and if they are licensed under the insurance laws of the State in which the installation is located. In overseas areas, the DoD Components shall limit insurance solicitation to those insurers registered under the provisions of Appendix B of this part.

(3) The conduct of all insurance business on DoD installations shall be by specific appointment. When establishing the appointment, insurance agents shall identify themselves to the prospective purchaser as an agent for a specific company.

(4) Installation commanders shall designate areas where interviews by appointment may be conducted. The opportunity to conduct scheduled interviews shall be extended to all solicitors on an equitable basis. Where space and other considerations limit the number of agents using the interviewing area, the installation commander may develop and publish local policy consistent with this concept.

(5) Installation commanders shall make disinterested third-party counseling available to DoD personnel desiring counseling. DoD personnel shall be encouraged to seek legal assistance or other advice from a disinterested third-party prior to entering a contract for insurance.

(6) In addition to the solicitation prohibitions contained in paragraph (c) of this section, the DoD Components shall prohibit the following:

(i) DoD personnel from representing any insurer, dealing directly or indirectly on behalf of any insurer or any recognized representative of any insurer on the installation, or as an agent or in any official or business capacity with or without compensation.

(ii) The use of an agent as a participant in any Military Service-sponsored education or orientation program.

(iii) The designation of any agent or the use by any agent of titles (for example, "Battalion Insurance Counselor," "Unit Insurance Advisor," "Servicemen's Group Life Insurance Conversion Consultant") that in any manner suggests or implies any type of endorsement from the U.S. Government, the Armed Forces, or any State or Federal agency or government entity.

(iv) The assignment of desk space for interviews for other than a specific prearranged appointment. During such appointment, the agent shall not be permitted to display desk signs or other materials announcing his or her name or company affiliation.

(v) The use of an installation "daily bulletin," marquee, newsletter, web page or other official notice to announce the presence of an agent and/or his or her availability.

(c) *Supervision of on-base commercial activities.* (1) All pertinent installation regulations shall be posted in a place easily accessible to those conducting and receiving personal commercial solicitation on the installation.

(2) The installation commander shall make available a copy of installation regulations to anyone conducting on-base commercial solicitation activities with the warning that failure to abide by the regulations may result in the loss of solicitation privileges.

(3) The installation commander, or designated representative, shall inquire into any alleged violations of this Subpart or questionable solicitation practices. The DD Form 2885, Personal Commercial Solicitation Evaluation, at Appendix A of this part is provided as a means to supervise solicitation activities on the installation. The DD Form 2885 is available at the Department of Defense Forms web site under DefenseLink, Publications.

(d) *Prohibited practices.* The following commercial solicitation practices shall be prohibited on all DoD installations:

(1) Solicitation in a "mass" or "captive audience" of any personnel, civilian or military, to include recruits, trainees, and transient personnel.

(2) Making appointments with or soliciting military and DoD civilian personnel who are in an "on-duty" status.

(3) Soliciting without appointment in areas utilized for the housing or processing of transient personnel, in barracks areas used as quarters, in unit

areas, in family quarters areas, and in areas provided by installation commanders for interviews by appointment.

(4) Use of official military identification cards or DoD vehicle decals by active duty, retired or reserve members of the Military Services to gain access to DoD installations for the purpose of soliciting. When entering the installation for the purpose of solicitation, solicitors with military identification cards and/or DoD vehicle decals must present documentation issued by the installation authorizing solicitation.

(5) Procuring, attempting to procure, supplying, or attempting to supply listings of DoD personnel for purposes of commercial solicitation, except for releases made in accordance with DoD Directive 5400.7.[2]

(6) Offering unfair, improper, or deceptive inducements to purchase or trade.

(7) Using promotional incentives to facilitate transactions or to eliminate competition.

(8) Using manipulative, deceptive, or fraudulent devices, schemes, or artifices, including misleading advertising and sales literature. All financial products, which contain insurance features, must clearly explain the insurance features of those products.

(9) Using oral or written representations to suggest or give the appearance that the Department of Defense sponsors or endorses any particular company, its agents, or the goods, services, and commodities it sells.

(10) DoD personnel making personal commercial solicitations or sales to DoD personnel who are junior in rank or grade except as authorized in DoD Directive 5500.7.[3]

(11) Entering into any unauthorized or restricted area.

(12) Using any portion of installation facilities, including quarters, as a showroom or store for the sale of goods or services, except as specifically authorized by DoD Directives 1330.9[3] and 1330.17[4] and DoD Instructions 1015.10[5] and 1000.15[6]. This does not apply to normal home enterprises that comply with applicable State and local laws and installation rules.

(13) Soliciting door to door.

(14) Unauthorized advertising of addresses or telephone numbers of commercial sales activities conducted on the installation, or the use of military rank and/or titles for the purpose of personal commercial solicitation.

(15) Contacting DoD personnel by calling a government telephone, faxing to a government fax machine or by sending e-mail to a government computer, unless a pre-existing relationship exists between the parties.

(e) *Denial, suspension and withdrawal of installation solicitation privileges.* (1) The installation commander shall deny, suspend or withdraw permission for a company and its agents, to conduct commercial activities on the base if such action is in the best interests of the command. The grounds for taking these actions may include, but are not limited to, the following:

(i) Failure to meet the licensing and other regulatory requirements prescribed in this subpart, including paragraphs (a) and (b) of this section.

(ii) Commission of any of the practices prohibited in paragraph (d)(6) and paragraph (d) of this section.

(iii) Substantiated complaints and/or adverse reports regarding the quality of goods, services, and/or commodities and the manner in which they are offered for sale.

(iv) Knowing and willful violations of Pub. L. 90–321.

(v) Personal misconduct by a company's agent or representative while on the installation.

(vi) The possession of or any attempt to obtain supplies of allotment forms used by the Military Departments, or possession or use of facsimiles thereof.

(vii) Failure to incorporate and abide by the Standards of Fairness policies contained in DoD Directive 1344.9.[7]

(2) The installation commander may determine that circumstances dictate the immediate suspension of solicitation privileges while an investigation is conducted. Upon suspending solicitation privileges, the commander shall promptly inform the agent and the company the agent represents, as well as the Office of the PDUSD(P&R)), in writing.

(3) In suspending or withdrawing solicitation privileges, the commander shall determine whether to limit it to the agent alone or extend it to the company the agent represents. This decision shall be based on the circumstances of the particular case, including, but not limited to, the nature of the violations, frequency of violations, the extent to which other agents of the company have engaged in such practices, and any other matters tending to show the individual's and the company's culpability.

(4) If the investigation determines an agent or company does not possess a valid license or has failed to meet other State or Federal regulatory requirements, the installation commander shall notify the appropriate regulatory authorities.

(5) In a withdrawal action, the commander shall afford the individual or company an opportunity to present facts on an informal basis for the consideration of the installation commander. The installation commander shall make a final decision regarding withdrawal based upon the entire record in each case.

(6) The installation commander shall inform the Military Department concerned of any denial, suspension or withdrawal of solicitation privileges and the Military Department shall inform the Office of the PDUSD(P&R). If warranted, the installation commander may recommend to the Military Department concerned that the action taken be extended to other DoD installations. The Military Department may extend the action to other military installations in the Military Department. The PDUSD(P&R), following consultation with the Military Department concerned, may order the action extended to other Military Departments.

(7) All suspensions or withdrawals of privileges shall be for a set period of time, at the end of which the individual or company may reapply for permission to solicit through the installation commander or Military Department originally imposing the restriction. The Office of the PDUSD(P&R) shall be notified when such suspensions or withdrawals are lifted.

(8) The Secretaries of the Military Departments may direct the Armed Forces Disciplinary Control Boards in all geographical areas in which the grounds for withdrawal action have occurred to consider all applicable information and take action the Boards deem appropriate.

(9) Nothing in this subpart limits the authority of the installation commander or other appropriate authority from requesting or instituting other administrative and/or criminal action against any person including those who violate the conditions and restrictions upon which installation entry is authorized.

(f) *Advertising and commercial sponsorship.* (1) The Department of Defense expects voluntary observance of the highest business ethics by commercial enterprises soliciting DoD personnel through advertisements in

[2] *See* footnote 1 to paragraph § 50.8.
[3] *See* footnote 1 to paragraph § 50.8.
[4] *See* footnote 1 to paragraph § 50.8.
[5] *See* footnote 1 to paragraph § 50.8.
[6] *See* footnote 1 to paragraph § 50.8.
[7] *See* footnote 1 to paragraph § 50.8

unofficial military publications in describing goods, services, commodities, and the terms of the sale (including guarantees, warranties, and the like).

(2) The advertising of credit terms shall conform to the provisions of 15 U.S.C. 1601 as implemented by Federal Reserve Board Regulation Z.

(3) Solicitors may provide commercial sponsorship to DoD MWR programs or events in accordance with DoD Instruction 1015.10.[8] However, sponsorship may not be used as a means to obtain personal contact information for any participant at these events without written permission from the individual participant. In addition, commercial sponsors may not use sponsorship to advertise products and/or services not specifically agreed to in the sponsorship agreement.

(4) The Commander may permit organizations to display sales literature in designated locations subject to command policies. Distribution of competitive literature or forms by off-base banks and/or credit unions is prohibited on installations where an authorized on-base bank and/or credit union exists.

(g) *Educational programs.* (1) The Military Departments shall develop and disseminate information and provide educational programs for members of the Military Services on their personal financial affairs, including such subjects as 15 U.S.C. 1601 insurance, Government benefits, savings, and budgeting. The services of representatives of authorized on-base banks and credit unions may be used for this purpose. Under no circumstances shall commercial agents, including representatives of loan, finance, insurance or investment companies be used for this purpose. Presentations shall only be conducted at the express request of the installation commander.

(2) The Military Departments shall also make qualified personnel and facilities available for individual counseling on loans and consumer credit transactions in order to encourage thrift and financial responsibility and promote a better understanding of the wise use of credit, as prescribed in DoD Directive 1344.9.[9]

(3) Military members shall be encouraged to seek advice from a legal assistance officer, the installation finance counselor, their own lawyer or a financial counselor, before making a substantial loan or credit commitment.

(4) Each Military Department shall provide advice and guidance to military personnel who have a complaint under 15 U.S.C. 1601 or who allege a criminal violation of its provisions, including referral to the appropriate regulatory agency for processing of the complaint.

(5) Banks and credit unions operating on DoD installations are required to provide financial counseling services as an integral part of their financial services offerings. Representatives of and materials provided by authorized banks and/or credit unions located on military installations may be used to provide the educational programs and information required by this subpart subject to the following conditions:

(i) If the bank or credit union operating on a DoD installation has any affiliation with a company that sells or markets insurance or other financial products, the installation commander shall consider that company's history of complying with this subpart prior to requesting the on-base financial institution provide financial education.

(ii) All prospective educators must agree to use appropriate disclaimers in their presentations and on their educational materials, which clearly indicate that they do not endorse or favor any commercial supplier, product or service or promote the services of a specific financial institution.

(6) Use of other non-governmental organizations to provide financial education programs is limited as follows:

(i) Under no circumstances shall commercial agents, including employees or representatives of commercial loan, finance, insurance or investment companies, be used.

(ii) The limitation in paragraph (g)(6)(i) of this section does not apply to educational programs and information regarding the Survivor Benefits Program and other governmental benefits provided by tax-exempt organizations under 26 U.S.C. 501(c)(23) or by any organization providing such a benefit pursuant to a contract with the Government.

(iii) Educators from non-governmental, non-commercial organizations expert in personal financial affairs and their materials may, with appropriate disclaimers, provide the educational programs and information required by this subpart if approved by a Presidentially-appointed, Senate-confirmed civilian official of the Military Department concerned. Presentations by approved organizations shall be conducted only at the express request of the installation commander. The following criteria shall be used when considering whether to permit a non-governmental, non-commercial organization to present an educational program or provide materials on personal financial affairs:

(A) The organization must qualify as a tax-exempt organization under section 501(c)(3) or 501(c)(23) of 26 U.S.C.

(B) If the organization has any affiliation with a company that sells or markets insurance or other financial products, the approval authority shall consider that company's history of complying with this subpart.

(C) All prospective educators must use appropriate disclaimers in their presentations and on their educational materials, which clearly indicate that they and the Department of Defense do not endorse or favor any commercial supplier, product, or service or promote the services of a specific financial institution.

§ 50.12 Information requirements.

(a) The reporting requirements concerning the withdrawal of solicitation privileges have been assigned Reporting Control Symbol (RCS) DD–P&R(AR)2182.

(b) The information collected on the DD Form 2885, "Personal Commercial Solicitation Evaluation" has been assigned Report Control Symbol (RCS) DD–P&R(AR)XXXX.

(c) These reporting requirements have been assigned in accordance with DoD Publication 8910.1–M.[10]

Appendix A to Part 50—Life Insurance Products and Securities

A. Life Insurance Product Content Prerequisites

1. Companies must provide DoD personnel a separate written description for each product or service they intend to market to DoD personnel on DoD installations. These descriptions must be written in a manner that DoD personnel can easily understand, and fully disclose the fundamental nature of the policy.

2. Insurance products, other than certificates or other evidence of insurance issued by a self-insured association, offered and sold worldwide to personnel on DoD installations, must:

a. Comply with the insurance laws of the State or country in which the installation is located and the requirements of this Instruction.

b. Contain no restrictions by reason of military service or military occupational specialty of the insured, unless such restrictions are clearly indicated on the face of the contract.

c. Plainly indicate any extra premium charges imposed by reason of military service or military occupational specialty.

d. Contain no variation in the amount of death benefit or premium based upon the length of time the contract has been in force, unless all such variations are clearly described therein.

[8] *See* footnote 1 to paragraph § 50.8.

[9] *See* footnote 1 to paragraph § 50.8.

[10] *See* footnote 1 to paragraph § 50.8.

3. To comply with paragraphs A.1.a. through A.1.d. of this appendix, an appropriate reference stamped on the first page of the contract shall draw the attention of the policyholder to any restrictions by reason of military service or military occupational specialty, extra premium charges and any variations in the amount of death benefit or premium based upon the length of time the contract has been in force.

4. Variable life insurance products may be offered provided they meet the criteria of the appropriate insurance regulatory agency and the Securities and Exchange Commission.

5. Insurance products shall not be sold disguised as investments. If there is a savings component to an insurance product, the agent shall provide the customer written documentation, which clearly explains how much of the premium goes to the savings component per year broken down over the life of the policy. This document must also show the total amount per year allocated to insurance premiums. The customer must be provided a copy of this document that is signed by the insurance agent.

B. Sale of Securities

1. All securities must be registered with the Securities and Exchange Commission.

2. All sales of securities must comply with the appropriate Securities and Exchange Commission regulations.

3. All securities representatives must apply to the commander of the installation on which they desire to solicit the sale of securities for permission to solicit.

4. Where the accredited insurer's policy permits, an overseas accredited life insurance agent—if duly qualified to engage in security activities either as a registered representative of the National Association of Securities Dealers or as an associate of a broker or dealer registered with the Securities and Exchange Commission—may offer life insurance and securities for sale simultaneously. In cases of commingled sales, the allotment of pay for the purchase of securities cannot be made to the insurer.

C. Use of the Allotment of Pay System

1. Allotments of military pay for life insurance products shall be made in accordance with DoD Publication 7000.14–R.[11]

2. For personnel in pay grades E–1, E–2, and E–3, at least 7 calendar days shall elapse for counseling between the signing of a life insurance application and the certification of an allotment. The purchaser's commanding officer may grant a waiver of this requirement for good cause, such as the purchaser's imminent permanent change of station.

D. Associations—General

The recent growth and general acceptability of quasi-military associations offering various insurance plans to military personnel are acknowledged. Some associations are not organized within the supervision of insurance laws of either a State or the Federal Government. While some are organized for profit, others function as nonprofit associations under Internal Revenue Service regulations. Regardless of the manner in which insurance is offered to members, the management of the association is responsible for complying fully with the policies contained in this part.

[11] *See* footnote 1 to paragraph § 50.8.

Appendix B to Part 50—Overseas Life Insurance Registration Program

A. Registration Criteria

1. *Initial registration.*

a. Insurers must demonstrate continuous successful operation in the life insurance business for a period of not less than 5 years on December 31 of the year preceding the date of filing the application.

b. Insurers must be listed in Best's Life-Health Insurance Reports and be assigned a rating of B+ (Very Good) or better for the business year preceding the Government's fiscal year for which registration is sought.

2. *Re-registration.*

a. Insurers must demonstrate continuous successful operation in the life insurance business, as described in paragraph A.1.a. of this appendix.

b. Insurers must retain a Best's rating of B+ or better, as described in paragraph A.1.b. of this appendix.

c. Insurers must demonstrate a record of compliance with the policies found in this Instruction.

3. *Waiver provisions.* Waivers of the initial registration or re-registration provisions shall be considered for those insurers demonstrating substantial compliance with the aforementioned criteria.

B. Application Instructions

1. *Applications Filed Annually.* Insurers must apply by June 30th of each year for solicitation privileges on overseas U.S. military installations for the next fiscal year beginning October 1st. Applications e-mailed, faxed or postmarked after June 30, shall not be considered.

2. *Application prerequisites.* A letter of application, signed by the President, Vice President, or designated official of the insurance company shall be forwarded to the Principal Deputy Under Secretary of Defense (Personnel and Readiness), Attention: Morale, Welfare and Policy Directorate, 4000 Defense, The Pentagon, Washington, DC 20301–4000. The registration criteria in paragraph A.1.a. or b. of this appendix, must be met to satisfy application prerequisites. The letter shall contain the information set forth in the following paragraphs, submitted in the order listed. Where not applicable, state in the letter.

a. The overseas commands (*e.g.*, U.S. European Command, U.S. Pacific Command, U.S. Central Command, U.S. Southern Command) where the company is presently soliciting, or planning to solicit on U.S. military installations.

b. A statement that the company has complied with, or shall comply with, the applicable laws of the country or countries wherein it proposes to solicit. "Laws of the country" means all national, provincial, city, or county laws or ordinances of any country, as applicable.

c. A statement that the products to be offered for sale conform to the standards prescribed in appendix A of this part and contain only the standard provisions such as those prescribed by the laws of the State where the company's headquarters are located.

d. A statement that the company shall assume full responsibility for the acts of its agents with respect to solicitation. If warranted, the number of agents may be limited by the overseas command concerned.

e. A statement that the company shall only use agents who have been licensed by the appropriate State and registered by the overseas command concerned to sell to DoD personnel on DoD installations.

f. Any explanatory or supplemental comments that shall assist in evaluating the application.

g. If the Department of Defense requires facts or statistics beyond those normally involved in registration, the company shall make separate arrangements to provide them.

h. A statement that the company's general agent and other registered agents are appointed in accordance with the prerequisites established in section C. of this appendix.

3. If a company is a life insurance company subsidiary, it must be registered separately on its own merits.

C. Agent Requirements

The overseas Combatant Commanders shall apply the following principles:

1. An agent must possess a current State license. This requirement may be waived for a registered agent continuously residing and successfully selling life insurance in foreign areas, who, through no fault of his or her own, due to State law (or regulation) governing domicile requirements, or requiring that the agent's company be licensed to do business in that State, forfeits eligibility for a State license. The request for a waiver shall contain the name of the State or jurisdiction that would not renew the agent's license.

2. The general agents and agents may represent only one registered commercial insurance company. This principle may be waived by the overseas commander if multiple representations are in the best interest of DoD personnel.

3. An agent must have at least 1 year of successful life insurance underwriting experience in the United States or its territories, generally within the 5 years preceding the date of application, in order to be approved for overseas solicitation.

4. The overseas commanders may exercise further agent control procedures as deemed necessary.

5. An agent, once registered in an overseas area, may not change affiliation from the staff of one general agent to another and retain registration.

D. Announcement of Registration

1. Registration by the Department of Defense upon annual applications of insurers shall be announced as soon as practicable by notice to each applicant and by a list released annually in September to the appropriate overseas commanders. Approval does not constitute DoD endorsement of the insurer or its products. Any advertising by insurers or verbal representation by its agents, which suggests such endorsement, is prohibited.

2. In the event registration is denied, specific reasons for the denial shall be submitted to the applicant.

a. The insurer shall have 30 days from the receipt of notification of denial of registration (sent certified mail, return receipt requested) in which to request reconsideration of the original decision. This request must be accompanied by substantiating data or information in rebuttal of the specific reasons upon which the denial was based.

b. Action by the PDUSD(P&R) or designee on a request for reconsideration is final.

c. An applicant that is presently registered as an insurer shall have 90 calendar days from final action denying registration in which to close out operations.

3. Upon receiving an annual letter approving registration, each company shall send to the applicable overseas Combatant Commander a verified list of agents currently registered for overseas solicitation. Where applicable, the company shall also include the names and prior military affiliation of new agents for whom original registration and permission to solicit on base is requested. Insurers initially registered shall be furnished instructions by the Department of Defense for agent registration procedures in overseas areas.

4. Material changes affecting the corporate status and financial conditions of the company that may occur during the fiscal year of registration must be reported to MWR Policy at the address in paragraph B.2. of this appendix, as they occur.

a. The Office of the PDUSD(P&R) reserves the right to terminate registration if such material changes appear to substantially affect the financial and operational criteria described in section A of this appendix on which registration was based.

b. Failure to report such material changes may result in termination of registration regardless of how it affects the criteria.

5. If an analysis of information furnished by the company indicates that unfavorable trends are developing that may possibly adversely affect its future operations, the Office of the PDUSD(P&R) may, at its option, bring such matters to the attention of the company and request a statement as to what action, if any, is contemplated to deal with such unfavorable trends.

Dated: April 14, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7810 Filed 4–18–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD01–05–028]

RIN 1625–AA09

Drawbridge Operation Regulations; Housatonic River, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily change the drawbridge operating regulations governing the operation of the U.S. 1 Bridge, mile 3.5, across the Housatonic River at Stratford, Connecticut. Under this temporary rule only one of the two-bascule leafs at the bridge would open for the passage of vessel traffic from June 18, 2005 through December 30, 2005, except holidays. Two-leaf, full bridge openings, would be provided upon a three-day advance notice. This temporary rulemaking is necessary to facilitate rehabilitation repairs at the bridge.

DATES: Comments and related material must reach the Coast Guard on or before May 19, 2005.

ADDRESSES: You may mail comments and related material to Commander (obr), First Coast Guard District Bridge Branch, 408 Atlantic Avenue, Boston, Massachusetts, 02110, or deliver them to the same address between 6:30 a.m. and 3 p.m., Monday through Friday, except, Federal holidays. The telephone number is (617) 223–8364. The First Coast Guard District, Bridge Branch, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the First Coast Guard District, Bridge Branch, 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Judy Leung-Yee, Project Officer, First Coast Guard District, (212) 668–7195.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments or related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD01–05–028), 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 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.

If, as we anticipate we make this temporary final rule effective less than 30 days after publication in the **Federal Register**, we will explain in that publication, as required by 5 U.S.C. (d)(3), our good cause for doing so.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the First Coast Guard District, Bridge Branch, 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

The U.S. 1 Bridge has a vertical clearance in the closed position of 32 feet at mean high water and 37 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.207(a).

The owner of the bridge, the Connecticut Department of Transportation, requested a temporary change to the drawbridge operation regulations to facilitate rehabilitation maintenance at the bridge.

Under this temporary rule only one of the two-bascule leafs at the U.S. 1 Bridge would open for the passage of vessel traffic from June 18, 2005 through December 30, 2005.

The Monday through Friday closures to facilitate vehicular commuter traffic in the existing operation regulations, 7 a.m. to 9 a.m. and 4 p.m. to 5:45 p.m., would continue to be in effect during this temporary rule.

Two-leaf openings would be provided on the following holidays: the Fourth of July, Friday July 1 through Monday July 4; Labor Day, Friday September 2 through Monday September 5; Thanksgiving, Thursday November 24 through Sunday November 27; and Christmas, Saturday December 24 through Monday December 26, 2005.

In addition, full two leaf bridge opening would also be provided at any time, except during the closed periods for vehicular commuter traffic, after at least a three-day advance notice is given

by calling the number posted at the bridge.

Discussion of Proposal

This proposed change would suspend paragraph (a) in § 117.207 and temporarily add a new paragraph (c).

Under this temporary rule only one of the two-bascule leafs at the bridge would open for the passage of vessel traffic from April 1, 2005 through May 27, 2005.

Two leaf openings would be provided on holidays or at any time, except during the closed periods for vehicular commuter traffic, after at least a three-day advance notice is given by calling the number posted at the bridge.

The closed periods for vehicular commuter traffic in the existing operation regulations, 7 a.m. to 9 a.m. and 4 p.m. to 5:45 p.m., Monday through Friday, would also continue to be in effect during the effective period of this temporary rule.

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 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.

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

This conclusion is based on the fact that the bridge will fully open at anytime after a three-day notice is given.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we 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 section 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 conclusion is based on the fact that the bridge will fully open at anytime after a three-day advance notice is given.

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.

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 E.O. 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 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 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 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.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

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

rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environment documentation because it has been determined that the promulgation of operating regulations or procedures for drawbridges are categorically excluded.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons set out in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. From June 18, 2005 through December 30, 2005, paragraph (a) in section 117.207 is suspended and a new paragraph (c) is added to read as follows:

§ 117.207 Housatonic River

* * * * *

(c) From June 18, 2005 through December 30, 2005, the U.S. 1 Bridge, mile 3.5, at Stratford, shall open on signal, except that, it may open only one of the two-bascule leafs for the passage of vessel traffic.

(1) From 7 a.m. to 9 a.m. and 4 p.m. to 5:45 p.m., Monday through Friday, the bridge may remain closed for the passage of vessel traffic.

(2) Two-leaf, full bridge openings, shall be provided on holidays as follows: the Fourth of July, Friday July 1 through Monday July 4; Labor Day, Friday September 2 through Monday September 5; Thanksgiving, Thursday November 24 through Sunday November 27; and Christmas, Saturday December 24 through Monday December 26, 2005.

(3) Two-leaf, full bridge openings, shall be provided at any time, except as provided in (c)(1), after at least a three-day advance notice is given by calling the number posted at the bridge.

Dated: April 11, 2005.

David P. Pekoske,

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

[FR Doc. 05–7906 Filed 4–15–05; 12:37 pm]

BILLING CODE 4910–15–P

AMERICAN BATTLE MONUMENTS COMMISSION

36 CFR Parts 401, 402, 403

American Battle Monuments Commission Policies on Overseas Memorials

AGENCY: American Battle Monuments Commission.

ACTION: Proposed regulation.

SUMMARY: The American Battle Monuments Commission is updating its regulations on overseas memorials in order to reflect actual practice and current statutory requirements.

DATES: Submit comments on or before May 18, 2005.

ADDRESSES: You may submit comments, by any of the following methods: Federal Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. Agency Web site: *http://www.abmc.gov*. Follow the instructions for submitting comments on the Web site.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Sole, Director of Engineering and Maintenance, American Battle Monuments Commission, Suite 500, 2300 Clarendon Blvd., Arlington, VA 22201–3367; telephone: (703) 696–6899; FAX: (703) 696–6666.

SUPPLEMENTARY INFORMATION:

Pursuant to Chapter 21, Title 36 United States Code, the American Battle Monuments Commission (ABMC) is generally responsible for overseas memorials and monuments honoring the sacrifices of the American Armed Forces. ABMC's regulations on the performance of this function have not been updated since 1970. Since that time Congress has established within ABMC a Memorial Trust Fund Program the terms of which are codified at 36 U.S.C. 2106(b–e). The purpose of this proposed regulation is to set forth agency policy implementing 36 U.S.C. 2106(b–e) and to place all agency guidance on overseas memorial responsibilities in one comprehensive document. This proposed part 401 would supersede existing part 401 and rescind existing parts 402 and 403.

List of Subjects in 36 CFR Parts 401, 402, and 403

Monuments and memorials.

For the reasons set forth in the preamble, American Battle Monuments Commission proposes to amend 36 CFR chapter IV as follows:

1. Part 401 is revised to read as follows:

PART 401—MONUMENTS AND MEMORIALS

Sec.

Authority: 36 U.S.C 2105; 36 U.S.C. 2106.

§ 401.1 Purpose.

This part provides guidance on the execution of the responsibilities given by Congress to the American Battle Monuments Commission (Commission) regarding memorials and monuments commemorating the service of American Armed Forces at locations outside the United States.

§ 401.2 Applicability and scope.

This part applies to all agencies of the United States Government, State and local governments of the United States and all American citizens, and private and public American organizations that have established or plan to establish any permanent memorial commemorating the service of American Armed Forces at a location outside the United States. This chapter does not address temporary monuments, plaques and other elements that deployed American Armed Forces wish to erect at a facility occupied by them outside the United States. Approval of any such temporary monument, plaque or other element is a matter to be determined by the concerned component of the Department of Defense consistent with host nation law and any other constraints applicable to the presence of American Armed Forces at the overseas location.

§ 401.3 Background.

Following World War I many American individuals, organizations and governmental entities sought to create memorials in Europe commemorating the service of American Armed Forces that participated in that war. Frequently such well intended efforts were undertaken without adequate regard for many issues including host nation approvals, design adequacy, and funding for perpetual maintenance. As a result, in 1923 Congress created the American Battle Monuments Commission to generally

oversee all memorials created by Americans or American entities to commemorate the service of American Armed Forces at locations outside the United States.

§ 401.4. Responsibility.

The Commission is responsible for building and maintaining appropriate memorials commemorating the service of American Armed Forces at any place outside the United States where Armed Forces have served since April 6, 1917.

§ 401.5. Control and supervision of materials, design, and building.

The Commission controls the design and prescribes regulations for the building of all memorial monuments and buildings commemorating the service of American Armed Forces that are built in a foreign country or political division of the foreign country that authorizes the Commission to carry out those duties and powers.

§ 401.6 Approval by National Commission of Fine Arts.

A design for a memorial to be constructed at the expense of the United States Government must be approved by the National Commission of Fine Arts before the Commission can accept it.

§ 401.7 Cooperation with other than Government entities.

The Commission has the discretion to cooperate with citizens of the United States, States, municipalities, or associations desiring to build war memorials outside the United States.

§ 401.8 Requirement for Commission approval.

No administrative agency of the United States Government may give assistance to build a memorial unless the plan for the memorial has been approved by the Commission. In deciding whether to approve a memorial request the Commission will apply the criteria set forth in the following Part 405 of this chapter.

§ 401.9 Evaluation criteria.

Commission consideration of a request to approve a memorial will include, but not be limited to, evaluation of the following criteria:

Criteria	Discussion
(a) How long has it been since the events to be honored took place? ...	Requests made during or immediately after an event are not generally subject to approval. The Commission will not approve a memorial until at least 10 years after the officially designated end of the event. It should be noted that this is the same period of time made applicable to the establishment of memorials in the District of Columbia and its environs by the Commemorative Works Act.
(b) How will the perpetual maintenance of the memorial be funded?	Available adequate funding or other specific arrangements addressing perpetual care are a prerequisite to any approval.
(c) Has the host nation consented?	Host nation approval is required.
(d) Is an overseas site appropriate for the proposed permanent memorial?	In many circumstances a memorial located within the United States will be more appropriate.
(e) Is the proposed memorial intended to honor an individual or small unit?	Memorials to elements smaller than a division or comparable unit or to an individual will not be approved unless the services of such unit or individual clearly were of such distinguished character as to warrant a separate memorial.
(f) Is the memorial historically accurate?	Representations should be supported by objective authorities.
(g) Is the proposed memorial intended to honor an organizational element of the American Armed Forces rather than soldiers from a geographical area of the United States?	As a general rule, memorials should be erected to organizations rather than to troops from a particular locality of the United States.
(h) Does the contribution of the element to be honored warrant a separate memorial?	The commemoration should normally be through a memorial that would have the affect of honoring all of the American Armed Forces personnel who participated rather than a select segment of the organizational participants.

§ 401.10 Monument Trust Fund Program.

Pursuant to the provisions of 36 U.S.C. 2106(d), the Commission operates a Monument Trust Fund Program (MTFP) in countries where there is a Commission presence. Under the MTFP, the Commission may assume both the sponsor's legal interests in the monument and responsibility for its maintenance. To be accepted in the Monument Trust Fund Program, an organization must develop an acceptable maintenance plan and transfer sufficient monies to the Commission to fully fund the maintenance plan for at least 30 years. The Commission will put this money into a trust fund of United States Treasury instruments that earn interest. Prior to acceptance into the MTFP, the sponsor must perform any deferred maintenance necessary to bring the monument up to a mutually agreeable standard. At that time, the Commission may assume the sponsoring organization's interest in the property and responsibility for all maintenance and other decisions concerning the monument. Once accepted into the program, the Commission will provide for all necessary maintenance of the monument and charge the cost to the trust fund. The sponsoring organization or others interested in the monument may add to the trust fund at any time to insure that adequate funds remain available. The Commission will maintain the monument for as long a period as the trust fund account permits.

§ 401.11 Demolition criteria.

As authorized by the provisions of 36 U.S.C. 2106(e), the Commission may take necessary action to demolish any war memorial built outside the United States by a citizen of the United States, a State, a political subdivision of a State, a governmental authority (except a department, agency, or instrumentality of the United States Government), a foreign agency, or a private association and to dispose of the site of the memorial in a way the Commission decides is proper, if—

(a) The appropriate foreign authorities agree to the demolition; and

(b) (1) The sponsor of the memorial consents to the demolition; or

(2) The memorial has fallen into disrepair and a reasonable effort by the Commission has failed—

(i) To persuade the sponsor to maintain the memorial at a standard acceptable to the Commission; or

(ii) To locate the sponsor.

PART 402—[REMOVED]

2. Part 402 is removed.

PART 403—[REMOVED]

3. Part 403 is removed.

Theodore Gloukhoff,

Director, Personnel and Administration.

[FR Doc. 05–7743 Filed 4–18–05; 8:45 am]

BILLING CODE 6120–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–P–7685]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, 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 and modified 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, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency 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.

These proposed BFEs 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 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 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 record keeping 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:

Source of flooding and location of referenced elevation	*Elevation in feet (NGVD)		Communities affected
	Existing	Modified	
Rosillo Creek (Lower Reach):			
At the confluence with Salado Creek (Lower Reach)	None	*531	Bexar County (Unincorporated Areas) City of San Antonio City of Kirby
Approximately 580 feet upstream of Walzem Road	None	*754	
Salado Creek (lower Reach):			
Approximately 300 feet downstream of South Presa Street	None	*521	Bexar County (Unincorporated Areas) City of San Antonio
At U. S. Interstate 410	None	*538	

Source of flooding and location of referenced elevation	*Elevation in feet (NGVD)		Communities affected
	Existing	Modified	
Unincorporated Areas of Bexar County, Texas:			
Maps are available for inspection at the Bexar County Public Works Department, 233 North Pecos, Suite 420, San Antonio, Texas.			
Send comments to The Honorable Nelson W. Wolff, Judge, Bexar County, 100 Dolorosa, Suite 108, San Antonio, Texas 78205.			
City of Kirby, Bexar County, Texas:			
Maps are available for inspection at 112 Bauman Street, Kirby, Texas.			
Send comments to The Honorable Ray Martin, Mayor, City of Kirby, 112 Bauman Street, Kirby, Texas 78219.			
City of San Antonio, Bexar County, Texas:			
Maps are available for inspection at the Municipal Plaza, 114 West Commerce, 7th Floor, San Antonio, Texas.			
Send comments to The Honorable Ed Garza, Mayor, City of San Antonio, City Hall, Office of the Mayor, 100 Military Plaza, San Antonio, Texas 78205.			
East Fork to Soap Creek:			
At the confluence with Soap Creek	None	*593	Ellis County (Unincorporated Areas)
At Weatherford Road	None	*616	City of Midlothian
Newton Branch:			
At the confluence with Soap Creek	None	*546	Ellis County (Unincorporated Areas)
At NRCS Dam No. 10 (Mountain Creek Watershed)	None	*564	City of Midlothian
Plains Creek:			
At the confluence with Newton Branch	None	*550	Ellis County (Unincorporated Areas)
Approximately 4,900 feet upstream of Old Fort Worth Road	None	*574	
Soap Creek:			
At approximately 300 feet upstream of the confluence with Grassy Creek.	None	*538	Ellis County (Unincorporated Areas) City of Midlothian
Approximately 1,900 feet upstream of the confluence of East Fork to Soap Creek.	None	*598	
Tributary No. 6 to Soap Creek:			
At the confluence with Soap Creek	None	*570	Ellis County (Unincorporated Areas)
Approximately 2,600 feet upstream of the confluence with Soap Creek	None	*574	
West Fork to Soap Creek:			
At the confluence with Soap Creek	None	*581	Ellis County (Unincorporated Areas)
Approximately 2,500 feet upstream of Ray White Road	None	*601	
Lake Joe Pool:			
Entire shoreline	None	*538	Ellis County (Unincorporated Areas)
Unincorporated Areas of Ellis County, Texas:			
Maps are available for inspection at the Ellis County Courthouse, 101 West Main Street, Waxachachie, Texas.			
Send comments to the Honorable Chad Adams, Judge, Ellis County, 101 West Main Street, Waxachachie, Texas 75165.			
City of Midlothian, Ellis County, Texas:			
Maps are available for inspection at City Hall, 104 West Avenue East, Midlothian, Texas.			
Send comments to the Honorable David K. Setzer, Mayor, City of Midlothian, 104 West Avenue East, Midlothian, Texas 76065.			

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

Dated: April 13, 2005.

David I. Maurstad,

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

[FR Doc. 05–7756 Filed 4–18–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–P–7683]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, 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 and modified 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, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency 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.

These proposed BFEs 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 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 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 record keeping 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 ♦(NAVD)	
				Existing	Modified
NM	Jal (City) Lea County	Flow Path 1	Approximately 2,900 feet downstream of Whitworth Drive.	None	♦3,000
			Approximately 1,250 feet upstream of East Kansas Avenue.	None	♦3,071
		Flow Path 2	At the confluence with Flow Path 1	None	♦3,054
			Approximately 400 feet upstream of Ocho Road.	None	♦3,082
		Flow Path 3	At the confluence with Flow Path 1	None	♦3,051
			Approximately 80 feet upstream of West Kansas Avenue.	None	♦3,087
		Flow Path 4	Approximately 200 feet downstream of West Nevada Avenue.	None	♦3,025
			Approximately 225 feet upstream of West Wyoming Avenue.	None	♦3,080
		Flow Path 5	Approximately 200 feet downstream of West Minnesota Avenue.	None	♦3,019
			Approximately 175 feet downstream of West Colorado Avenue.	None	♦3,080
		Flow Path 6	Approximately 1,775 feet upstream of West Minnesota Avenue.	None	♦3,007
			Approximately 1,350 feet downstream of West Missouri Avenue.	None	♦3,046

Maps are available for inspection at 523 Main Street, Jal, New Mexico.

Send comments to The Honorable Claydean Claiborne, Mayor, City of Jal, P. O. Drawer, 340, Jal, New Mexico 88252.

State	City/town/county	Source of flooding	Location	# Depth in feet above ground *Elevation in Feet *(NAVD)	
				Existing	Modified
TX	El Paso (City) El Paso County.	Flow Path No. 28 Mesa Drain and Interceptor.	Just upstream of Southern Pacific Railroad	*3,668	*3,665
			Approximately 2,030 feet upstream of Bucher Road.	None	*3,693

State	City/town/county	Source of flooding	Location	# Depth in feet above ground *Elevation in Feet *(NAVD)	
				Existing	Modified
		Flow Path No. 29	Approximately 200 feet downstream of Del Monte Street.	*3,737	3.736
			Approximately 250 feet upstream of Cimarron Street.	*3,671	3.769
		Flow Path No. 30	At the confluence of Flow Path No. 28 Mesa Drain and Interceptor.	*3,681	3,678
			Approximately 380 feet upstream of North Carolina Drive.	*3,727	*3,721
		Flow Path No. 32	At the confluence with Flow Path No. 28 Mesa Drain and Interceptor.	*3,671	*3,668
			Approximately 35 feet downstream of Escobar Avenue.	*3,713	*3,714
		Flow Path No. 33 Middle Drain.	Just upstream of confluence with Iowenstein Lateral.	*3,667	*3,666
			Approximately 85 feet downstream of North Zarogosa Road.	*3,667	*3,668

Maps are available for inspection at 2 Civic Center Plaza, El Paso, Texas.

Send comments to The Honorable Joe Wardy, Mayor, City of El Paso, 2 Civic Center Plaza, 10th Floor, El Paso, Texas 79901.

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

Dated: April 13, 2005.

David I. Maurstad,

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

[FR Doc. 05–7755 Filed 4–18–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 36

[FAR Case 2004-023]

Federal Acquisition Regulation; Application of the Brooks Act to Mapping Services; Analysis of Comments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice; Analysis of Comments.

SUMMARY: The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) have reviewed the public comments received in response to the request for comments on the application of the Brooks Architect-Engineers Act to mapping services. The Councils have determined that no change to the FAR is necessary. In the interest of transparency, this notice sets forth the rationale supporting this determination.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis, at (202) 219-0202. Please cite FAR case 2004-023.

SUPPLEMENTARY INFORMATION:

I. Background

On October 27, 1972, the Brooks Architect-Engineers Act (Pub. L. 92-582) (40 U.S.C. 541 *et seq.*, recodified now at 40 U.S.C. 1101 *et seq.*) required that all requirements for Architect-Engineers (A-E) services be publicly announced, and be negotiated on the basis of demonstrated competence and qualifications for the type of professional services required, at fair and reasonable prices. The Act established a specific qualification based procurement process to be used in procurements for architect-engineer services, which the Act defined as "those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform."

Since enactment, Congress has expanded the definition of A-E services (Pub. L. 100-656, Pub. L. 100-679, Pub. L. 101- 574). Of specific note here, Section 403 of Pub. L. 101-574 (SBA Reauthorization and Amendments Act of 1990) required that, pursuant to Section 742 of Public Law 100-656, modifications to FAR Part 36 shall specify that "the definition of architectural and engineering services includes surveying and mapping services to which the selection procedures of Subpart FAR 36.6 of the Federal Acquisition Regulation apply." Some interpret this to mean that all mapping services are subject to FAR Subpart 36.6. Others interpret the phrase "to which the selection procedures of Subpart 36.6 of the Federal Acquisition Regulation apply" as a limitation modifying "mapping services." On October 10, 1991, then OFFP Administrator issued a letter to the FAR Committee stating that "the determining factor in deciding whether mapping services should be procured through the A-E process or through normal competitive procedures is whether mapping services are associated with 'traditionally understood or accepted architectural or engineering activities.'"

The FAR states concerning professional surveying and mapping services of an architectural or engineering nature:

Surveying is considered to be an architectural and engineering service and shall be procured pursuant to section 36.601 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to section 36.601. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services shall be procured pursuant to provisions in Parts 13, 14, and 15. FAR 36.601(a)(4).

During the years since enactment of the Brooks Act in 1972, the mapping

services industry has evolved extensively to become a producer of commercial data (digital) products with broad applications—quite distinct from the practice of architecture or engineering.

This case was initiated after review of comments received in response to FAR Case 98-023, Application of the Brooks Act. FAR case 98-023 was undertaken in response to enactment of Section 8101 of the National Defense Appropriations Act (Pub. L. 105-262), which required the National Imagery and Mapping Agency (NIMA) to procure mapping and charting services using Fiscal Year 1999 monies in accordance with the Brooks Act. Prior to enactment of Section 8101, FAR at 36.601-4(a) prescribing the use of the Brooks Act qualification-based process listed NIMA mapping services as an example of services that were not subject to the qualification-based process. After enactment of Section 8101, the listing of NIMA at FAR 36.601- 4(a) was no longer appropriate. As a result, FAR case 98-023 deleted the NIMA example.

That case was published as a final rule as part of FAC 97- 12, at 64 FR 32740, June 17, 1999. Although there was some objection to publication as a final rule without request for comment, the FAR Council found that removal of an example could not alter the fundamental meaning of the surrounding statements. Removal of an example did not change the FAR policies relating to application of the Brooks Act to mapping services.

However, at the request of the FAR Council, DoD, GSA, and NASA published a notice in the **Federal Register** at 69 FR 13494, March 23, 2004, requesting comments on the application of the Brooks Act to mapping services. Public comments were due May 24, 2004.

II. Analysis of Comments

Fifty-two respondents submitted comments, of which more than half were government employees.

Some of the respondents think that the Brooks Act should apply to all acquisition of mapping services.

More respondents agree that the Brooks Act applies only to some mapping services. A few of the respondents in this later category want to clarify the FAR so that the Brooks Act is less applicable to the acquisition of mapping services. Most do not recommend any change to the FAR.

1. *Comments that the Brooks Act applies to the acquisition of all mapping services.*

Some respondents recommend that we amend the FAR to clearly require Brooks Act procedures for all acquisition of mapping services. These respondents maintain that contracting officers have no discretion to decide whether mapping services or surveying work requires Brooks Act procedures. These respondents support their position by assertions that—

a. Credentialing requirements for mapping services identify these services as subject to the Brooks Act procedures;

b. Qualification based procedures are necessary to avoid a broad range of public safety calamities;

c. Prohibitions exist at the state-level on A-E competitive bidding in securing work; and

d. Legislative history clearly supports these views.

Response: The Councils believe that the Brooks A-E Act, state law, GAO cases, and accepted formal guidelines controlling the professions of architecture, engineering and surveying do not support the views of these respondents. The pertinent foundational guidelines authored by The National Council of Examiners for Engineering and Surveying (NCEES) explicitly exclude mapping services from the professions of engineering and surveying.

Assertion 1. Credentialing requirements for mapping services identify these services as subject to the Brooks Act procedures.

To test this assertion, the Councils looked at the public guidance authored by the professional councils that advise states in governing the practice of architecture and engineering. These councils are National Council of Architectural Registration Boards (NCARB) and the NCEES. NCEES governs over Engineering (journeyman credential being Professional Engineer or PE) and Land Surveying (journeyman credential being Professional Land Surveying or PLS) as two distinct professions. NCEES also advises in areas of engineering not normally associated with development of real property (*e.g.*, aerospace, automotive, industrial engineering). Moreover, NCEES and NCARB are charged with moderating the full range of professional practice rules and regulations to balance professional interest with public interest. In coordination with industry, state regulators, and building officials, these two organizations provide guidance over issues of credentialing (education, experience and exam requirements) and professional boundaries. These councils render their opinions within the general context of the law, profession and public interest. These opinions must survive public criticism from industry and non-federal national, state and local officials charged with protecting public interest including safety. As such, the Councils view the guidance of these councils as decisive and definitive in matters relating to the practice of architecture and engineering, individually and respectively.

NCARB notes in their guidance to state governments: "By far the great majority of state legislatures have demonstrated their statutory intent to distinguish between the practice of architecture and engineering." From NCEES's *Model Law*, (revised August 2004), (*http://www.ncees.org/introduction/about_ncees/ncees_model_law. pdf*), the "practice of engineering" is defined as follows:

The term "Practice of Engineering," within the intent of this Act, shall mean any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, expert technical testimony, evaluation, planning, design and design coordination of engineering works and systems, planning the use of land, air, and water, teaching of advanced engineering subjects, performing engineering surveys and studies, and the review and/or management of construction for the purpose of monitoring and/or ensuring compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, communication systems, transportation systems, and industrial or consumer products, or equipment of a control systems, communications, mechanical, electrical, hydraulic, pneumatic, chemical, environmental, or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress, and completion of any engineering services. (Paragraph 110.20A.5. Definitions).

NCEES goes on to discern among the professionals involved in the development of real property:

Design coordination includes the review and coordination of those technical submissions prepared by others, including as appropriate and without limitation, consulting engineers, architects, landscape architects, surveyors, and other professionals working under the direction of the engineer. (Paragraph 110.20A.5. Definitions).

NCEES further clarifies the control hierarchy between engineers and surveyors:

Engineering surveys include all survey activities required to support the sound conception, planning, design, construction, maintenance, and operation of engineered projects, but exclude the surveying of real property for the establishment of land

boundaries, rights-of-way, easements, and the dependent or independent surveys or resurveys of the public land survey system. (Paragraph 110.20A.5. Definitions).

This sets context for NCEES to define the profession of surveying, apart from engineering. Distinct from Engineering, NCEES defines the practice of Land Surveying:

The term "Practice of Surveying," within the intent of this Act, shall mean providing, or offering to provide, professional services using such sciences as mathematics, geodesy, and photogrammetry, and involving both (1) the making of geometric measurements and gathering related information pertaining to the physical or legal features of the earth, improvements on the earth, the space above, on, or below the earth and (2) providing, utilizing, or developing the same into survey products such as graphics, data, maps, plans, reports, descriptions or projects. Professional services include acts of consultation, investigation, testimony evaluation, expert technical testimony, planning, mapping, assembling, and interpreting gathered measurements and information related to any one or more of the following:

a. Determining by measurement the configuration or contour of the earth's surface or position of fixed objects thereon.

b. Determining by performing geodetic surveys the size and shape of the earth or the position of any point of earth.

c. Locating, relocating, establishing, reestablishing, or retracing property lines or boundaries of any tract of land, road, right of way, or easement.

d. Making any survey for the division, subdivision, or consolidation of any tract(s) of land.

e. Locating or laying out alignments, positions, or elevations for the construction of fixed works.

f. Determining, by the use of principles of surveying, the position for any survey monument (boundary or non-boundary) or reference point; establishing or replacing any such monument or reference point.

g. Creating, preparing, or modifying electronic or computerized or other data, relative to the performance of the activities in the above described items a. through f.

Any person shall be construed to practice or offer to practice surveying, within the meaning and intent of this Act, who engages in surveying or who by verbal claim, sign, advertisement, letterhead, card, or any other way represents themselves to be a professional surveyor, through the use of some other title implies that they are able to perform, or who does perform any surveying service or work or any other service designated by the practitioner which is recognized as surveying. (Paragraph 110.20B.4. Definitions).

Despite the broadly encompassing verbiage of the NCEES definitions of engineering and surveying practice, NCEES makes no mention of general mapping services as produced or procured only by the Federal Government. NCEES provides a detailed list of "Inclusions and Exclusions of Surveying Practice." In fact, NCEES explicitly excludes any such academic, defense and political administration mapping efforts. The essence of the breakdown is that professional "surveying work" is tied to real property (boundaries, location of fixed, manmade works, and topography). Excluded items line up consistently with the Part 12 items mentioned. The Councils, therefore, note that NCEES holds surveying work to be distinct from engineering and mapping services.

NCARB defines the Practice of Architecture in its *Legislative Guidelines and Model Law, Model Regulations 2004- 2005*, (revised August 2004) (*http://www.ncarb.org/Forms/legisgl.PDF*) as follows:

* * * consisting of providing or offering to provide certain services, hereafter described, in connection with the design and construction, enlargement or alteration of a building or group of buildings and the space within and the site surrounding such buildings, which have as their principal purpose human occupancy or habitation. The services referred to include pre-design; programming; planning; providing designs, drawings, specifications and other technical submissions; the administration of construction contracts; and the coordination of any elements of technical submissions prepared by others including, as appropriate and without limitation, consulting engineers and landscape architects. The practice of architecture shall not include the practice of engineering, but an architect may perform such engineering work as is incidental to the practice of architecture. (Legislative Guidelines Paragraph I.A.)

The NCARB control hierarchy recognizes that an architect may do engineering, including surveying work, related and incidental to the creation of real property under their charge. Likewise, NCEES recognizes that an engineer may do surveying work related and incidental to the creation of real property under their charge. A surveyor, however, may never practice architecture or engineering in any capacity.

Since professional credentialing has been used to identify Brooks Act application, the Councils broadly considered credentialing of commercial activity. The Councils note that credentialing occurs at both the state and local levels and is established for reasons outside of public safety. The broadest credentialing of individuals takes place in the broad realm of consumer protection. This ranges from credentialing tradesman, contractors, architects and engineers directly involved in the making of buildings; to surveyors, certified interior designers and landscape architects indirectly involved; to medical doctors, boxing and wrestling promoters, hair stylists, funeral directors or waste-water plant operators which have no direct connection to public safety relative to real property.

Cadastral surveying work (land boundary surveying) is licensed distinct from the building design professions of architecture and engineering. Whereas architecture and engineering carry degree and examination requirements relating to theory and practical application of theory taught in an academic setting, cadastral surveying credentialing springs from hands-on training in the field working for a licensed surveyor.

Construction itself is professionally credentialed by numerous states, yet procured under openly competitive means. When the Federal Government procures wastewater operations or medical related services that, for example, are licensed under dire public safety concerns, it does so under Part 15 not Part 36.

The Councils conclude that state credentialing, even for public safety reasons, is not sufficient to distinguish a task as falling under Brooks Act procedures. The Councils also conclude that the credentialing that is pertinent to Brooks Act relates to the credentialing well established outside of the non-federal setting for the protection of public safety in the development of real property as discussed above.

In summary, the Councils find that credentialing does not clarify distinctions with regards to surveying and mapping services. Credentialing provides meaningful distinctions only to the extent that the services are performed as part of design, construction, alteration and repair of real property.

Assertion 2. Brooks Act qualification-based selection procedures are necessary to avoid a broad range of public safety calamities.

Numerous products and services for which safety and public safety are critical are not procured using Brooks Act procedures. There is no question that the collective experience in Federal procurement finds the government procuring some of the most critical systems, products and services outside Part 36 selection procedures without public safety calamity or inconvenience. The Councils questioned the unstated premise of Brooks Act—that safety concerns necessitate Part 36 selection

procedures as the preferred method of selection. There are numerous counter-examples to this presumption. Namely, complex life saving and transportation systems (even extra-planetary), charting and disposal of unexploded ordnance, and medical services all are procured successfully without use of Part 36 procedures.

The assertion appears to be based on the premise that "government procurement procedures properly emphasized awarding contracts to the lowest bidder, or using price as a dominant factor." This comment ignores a decade of procurement reform, and presents an argument that predated the Competition in Contracting Act of 1984. It does not recognize current competitive practices associated with negotiated procurements such as negotiated best value source selection procurement or streamlined commercial items procedures.

How is public safety governed in non-federal Real Property work? Public safety in non-federal real property work is maintained through layers of protection. Credentialing of Architects and Engineers by states is but one layer. This is accomplished either by state-run examinations or standardized exams provided nationally through not-for-profit organizations. Architects and engineers both have secondary school educational requirements and on-the-job professional experience requirements. National Architectural Accrediting Board (NAAB) and the Accrediting Board for Engineering and Technology (ABET) accredits degree programs for both architecture and engineering. Furthermore, NCEES and NCARB deliberations place the architect in the lead role in the creation of habitable buildings. Protection also derives from codified National and International standards of building. Zoning controls the safe and healthful disposition of structures and uses and other planning ordinances coordinated by architects. These codes are enforced by plan reviews (county or city building departments) and credentialing enforcement actions. At each step, the real property solution is checked against accepted standards. In the non-federal setting, surveying and mapping services are not overseen and controlled as part of the public safety protection, except where they involve real property development.

In Federal procurement of A-E services, licensed professional civil servants perform analogous real property public safety and health oversight as part of their quality assurance functions in the acceptance of finished designs obtained under contract.

Assertion 3. Prohibitions exist at the state-level on A-E competitive bidding in securing work.

The Councils note that NCARB provides the most detailed analysis of trends and current accepted practice in area of profession rules of conduct. In general, NCARB guidance to state boards notes a general professional shift towards favoring public interest (transparency and price competition) over rules that protect professional interests.

NCARB in its Rules of Conduct, 2004-2005 (revised August 2004) (*http://www.ncarb.org/Forms/roconduct.pdf*) organizes rules of conduct into five subject areas: 1) Competence; 2) Conflict of Interest; 3) Full Disclosure; 4) Compliance with Laws; 5) Professional Conduct. NCARB states:

> There are, however, various rules of conduct found in many existing state board rules which seem more directed at protecting the profession than advancing the public interest. Such a rule is the prohibition against allowing one architect to supplant another. . . . Similarly, prohibitions against brokers selling architects' services, fee competition, advertising, free sketches, and the like, seem more appropriately included in professional ethical standards than in rules to be enforced by state agencies. (Rules of Conduct, Introduction.)

It appears that state restriction against A-Es competing for work has faded as an issue for state regulation. If this is true for states, this must influence the question whether *Federal* regulation should preserve non-competitive A-E procedures associated with real property work under the Brooks Act. The Councils could not find any guidance prohibiting Engineers and Surveyors from competing for projects. It seems likely, therefore, that surveyors and engineers can and do routinely compete for their non-federal assignments.

Assertion 4. Legislative history clearly supports the application of the Brooks Act to all mapping services.

GAO decisions do not support this assertion. For example, the GAO's leading case regarding mapping services is *Forest Service, Department of Agriculture—Request for Advance Decision*, B-233987, 233987.2, July 14, 1989, 68 Comp. Gen. 555, 89-2 CPD § 47, in which the GAO interpreted the 1988 Brooks Act revision clarifying the definition of A-E services. Prior to 1988, the Brooks Act defined architect and engineer services were defined as "those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform." 40 USC 541(3) (1982).

In 1988, the Brooks Act was amended to encompass "surveying and mapping." In *Forest Service*, the Comptroller General modified its previous two-part test for Brooks Act applicability and noted the legislative history to the Brooks Act amendment stated that "the amendment is intended to clarify the definition of A-E services in response to General Accounting Office decisions issued since the enactment of the Brooks Act, 'which have had the effect of narrowing the application of the law, particularly in the field of surveying and mapping.'"

The *Forest Service* case also established that the new statutory definition clarified that "incidental services" refers to those services incidental to or part of A-E services, not, as previously held, incidental to an A-E project. As such, the Comptroller General restated its test for applicability of the Brooks Act as being a question of whether the service "is the type which is incidental to professional services of an architectural or engineering nature, and if so, whether the service is one which members of the architectural and engineering profession may logically or justifiably perform." GAO also stated that "The definition of A-E services includes traditional surveying and mapping services, whether or not incidental to an A-E project * * *"

The Comptroller General interpreted the FAR language implementing the amended statute to leave to the contracting officer's discretion the decision whether a specific procurement falls within the Brooks Act, considering whether the services, "independent of any project, are of an A-E nature which should logically or justifiably be performed by A-E professionals." Because the applicability of Brooks Act procedures should be determined on a case-by-case basis, the Comptroller General chose not to establish a blanket rule in anticipation of future Forest Service procurements for road, trail and bridge construction, but concluded that it would review any such protest under its abuse of discretion standard.

GAO reaffirmed its use of this standard in subsequent protest decisions. See *White Shield, Inc.*, B-235522, Sept. 21, 1989, 68 Comp. Gen. 696, 89-2 CPD § 257 (sustaining a protest against use of non-Brooks Act procedures for cadastral mapping surveying services because there was no indication that the surveying and mapping services work involved was not traditional A-E in nature; the CO improperly relied on outdated case law

by using the test of whether the services were incidental to an A-E project, instead of the test of whether the services were traditional A-E services) and *Fodrea Land Surveys*, B-236413, Oct. 19, 1989, 89-2 CPD § 364 (denying a protest where agency planned to use Brooks Act procedures to secure cadastral land surveying services because the record did not indicate that the surveying and mapping services were not traditional A-E services).

2. Comments that the Brooks Act applies to acquisition of some mapping services.

Most respondents (including all Government respondents) concur that the Brooks Act does not apply to acquisition of all mapping services.

A few recommend that the FAR should be modified to make the Brooks Act procedures less applicable to the acquisition of mapping services.

Most respondents recommend no change to the FAR. Though these respondents offer different agency, mission-specific decision criteria for using Brooks Act procedures, all Government respondents agreed the exercise of this discretion was currently available in the FAR and strongly object to any change that would reduce or remove this flexibility.

Response: The Councils have determined, based on interpretation of the Brooks Act and decisions of the Comptroller General, reaffirmed by NCEES and NCARB guidance, that the best solution is to retain FAR Part 36 without revision.

Any criticism of the Brooks Act itself is outside the scope of this case.

Questions as to whether or not a specific procurement of mapping services comes within the scope of the Act, must continue to be resolved by the contracting officers and their technical representatives in line with the policies and procedures of each Federal agency.

Dated: April 12, 2005.

Julia Wise,

Director, Contract Policy Division.

[FR Doc. 05–7734 Filed 4–18–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

[FRA–2005–20680, Notice No. 1]

RIN 2130–AB65

Revision of Method for Calculating Monetary Threshold for Reporting Rail Equipment Accidents/Incidents

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

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA is proposing to amend a portion of the accident reporting regulations. Specifically, FRA proposes to amend the method for calculating the monetary threshold for reporting rail equipment accidents/incidents. The amendment is necessary because, in 2001, the Bureau of Labor Statistics (BLS) ceased collecting and publishing railroad wage data used by FRA in the calculation. Consequently, FRA has had to seek a new source of publicly-available data. FRA is recommending the use of wage data collected and maintained by the Surface Transportation Board (STB) in place of the unavailable BLS wage data. As equipment data remain available from the BLS, no change is proposed in the source of the equipment component of the reporting threshold. The purpose of the rule is to ensure and maintain comparability between different years of accident data by having the threshold keep pace with any increases or decreases in equipment and labor costs so that each year accidents involving the same minimum amount of railroad property damage are included in the reportable accident counts.

DATES: (1) Written comments: Must be received on or before June 20, 2005. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) Public Hearing: If any person desires an opportunity for oral comment, he or she should notify FRA in writing and specify the basis for the request. FRA will schedule a public hearing in connection with this proceeding if the agency receives a written request for a hearing by June 3, 2005.

ADDRESSES: Anyone wishing to file a comment should refer to the FRA docket and notice numbers (Docket No. FRA–2005–20860, Notice No. 1). You may submit your comments and related material by only one of the following methods:

By mail to the Docket Management System, United States Department of Transportation, room PL–401, 400 7th Street, SW., Washington, DC 20590–0001; or electronically through DOT's Web site for the Docket Management System at *http://dms.dot.gov*. For instructions on how to submit comments electronically, visit the Docket Management System Web site and click on the "Help" menu.

The Docket Management Facility maintains the public docket for this rulemaking. Comments and documents, as indicated in this preamble, will become part of this docket, and will be available for inspection or copying at room PL–401 on the Plaza Level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Robert L. Finkelstein, Special Assistant to the Director, Office of Safety Analysis, RRS–22, Mail Stop 17, FRA, 1120 Vermont Ave., NW., Washington, DC 20590 (telephone 202–493–6280) or Roberta Stewart, Trial Attorney, Office of Chief Counsel, RCC–12, Mail Stop 10, FRA, 1120 Vermont Ave., NW., Washington, DC 20590 (telephone 202–493–6027).

SUPPLEMENTARY INFORMATION:

Background

A "rail equipment accident/incident" is a collision, derailment, fire, explosion, act of God, or other event involving the operation of railroad on-track equipment (standing or moving) that causes reportable damages greater than the reporting threshold for the year in which the event occurs to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and materials. 49 CFR 225.19(c). Each rail equipment accident/incident must be reported to FRA using the Rail Equipment Accident/Incident Report (Form FRA F 6180.54). 49 CFR 225.19(b), (c). As revised, effective in 1997, paragraphs (c) and (e) of 49 CFR 225.19 provide that the dollar figure that constitutes the reporting threshold for rail equipment accidents/incidents will be adjusted, if necessary, every year in accordance with the procedures outlined in appendix B to part 225, to reflect any cost increases or decreases. 61 FR 30942, 30969 (June 18, 1996); 61 FR 60632, 60634 (Nov. 29, 1996); 61 FR 67477, 67490 (Dec. 23, 1996). As stated in the procedures in appendix B, data from the BLS are used to calculate the

threshold. "The equation used to adjust the reporting threshold uses the average hourly earnings reported for Class I railroads and Amtrak, and an overall railroad equipment cost index determined by the BLS." 49 CFR Part 225, App. B, paragraph 1. The formula set forth in appendix B is consistent with 49 U.S.C. 20901(b), which reads as follows:

(b) Monetary threshold for reporting.

(1) In establishing or changing a monetary threshold for the reporting of a railroad accident or incident, the Secretary shall base damage cost calculations only on publicly available information obtained from—

(A) the Bureau of Labor Statistics; or

(B) another department, agency, or instrumentality of the United States Government if the information has been collected through objective, statistically sound survey methods or has been previously subject to a public notice and comment process in a proceeding of a Government department, agency, or instrumentality.

(2) If information is not available as provided in paragraph (1)(A) or (B) of this subsection, the Secretary may use any other source to obtain the information. However, use of the information shall be subject to public notice and an opportunity for written comment.

The Current Reporting Threshold and Formula for Computing It

Approximately two years have passed since the rail equipment accident/incident reporting threshold was last reviewed and revised. 67 FR 79533 (Dec. 30, 2002). At that time, FRA published an interim final rule carrying over the $6,700 threshold from calendar year 2002 to 2003 and subsequent years until a new threshold is adopted. 49 CFR 225.19(c). The calendar year 2002 threshold has been kept in place because the BLS ceased publishing certain data required to compute the wage component of the calculation, *i.e.*, the average hourly earnings of production workers for Class I railroads and Amtrak, due to inadequate sampling data. Specifically, the Class I railroads and Amtrak did not provide the monthly hours and earnings data for production workers that BLS needed to publish these numbers for calendar year 2002. BLS did not foresee a better response rate in future years and, as a result, changed its methodology and the information that it publishes. Therefore, it was not possible for FRA to calculate a new threshold for calendar years 2003 and beyond based on the existing formula.

Starting with the calculation of the 1997 calendar year threshold, FRA has used the method described in Appendix B to Part 225—Procedure for Determining Reporting Threshold. This procedure uses data from the BLS to update both labor and equipment prices. The threshold is currently calculated according to the following formula:

Tnew = Tprior * [1 + 0.5(Wnew − Wprior)/Wprior + 0.5(Enew − Eprior)/100]

Where:

Tnew = New threshold.

Tprior = Prior threshold.

With reference to the threshold, "prior" refers to the previous threshold rounded to the nearest $100, as reported in the **Federal Register**.

Wnew = New average hourly wage rate, in dollars.

Wprior = Prior average hourly wage rate, in dollars.

Enew = New equipment average PPI [Producer Price Index] value

Eprior = Prior equipment average PPI value.

With reference to wages and equipment, "prior" refers to the previous wage and equipment averages used to calculate the prior threshold, Tprior. "Prior" does not necessarily refer to the wage and equipment averages for the immediately preceding year (although it may if the threshold is calculated annually). In calculating the threshold, the goal is to capture the change between the old wage and equipment prices and the new prices for these inputs.

The existing formula represents the general assumption that damage repair costs, at levels at or near the threshold, are split approximately evenly between labor and materials. Thus, labor and materials each comprise 50%, or 0.5 of the total cost. For the equipment component, BLS reports prices under LABSTAT Series Report, Producer Price Index (PPI) for Commodities, Series ID WPU144 for Railroad Equipment. These prices are reported as a monthly index number. For the wage component, BLS reported the wage in LABSTAT Series Report, Standard Industrial Code (SIC) 4011 for Class I Railroad Average Hourly Earnings. The wage was reported monthly in dollars. In calculating the threshold, the monthly labor and equipment figures for the 12-month period ending in June are summed and then divided by 12, to provide a monthly average of each component. After calculating the new threshold, it is rounded to the nearest $100.

FRA's Proposed Revision of the Formula

Since publishing that interim final rule, FRA has conducted research to find a new source of similar wage data, and evaluated possible revisions of the existing formula. FRA last revised the monetary threshold formula in 1996. 61 FR 30940 (June 18, 1996); 61 FR 60632 (November 29, 1996). Currently, the accident/incident reporting threshold adjustment is calculated utilizing two components. The first component is the average hourly earnings for Class I railroads and Amtrak workers. BLS was collecting these data and reporting them under LABSTAT Series Report, Standard Industrial Code (SIC) 4011 for Class I Railroad Average Hourly Earnings, Series ID EEU41401106, Not Seasonally Adjusted. These data are no longer available from BLS.

In order to update the reporting threshold, FRA has searched for a new source of the wage component used in the reporting threshold formula. FRA found that railroads report wage data to the DOT/Surface Transportation Board (STB), and proposes to use these data as an alternative to the obsolete BLS data. The Class I railroads and Amtrak report hours of service and compensation data quarterly to the STB, on Form A—STB Wage Statistics. Form A organizes hours of service and compensation by five reporting groups: Executives, Officials, and Staff Assistants (Group No. 100); Professional and Administrative (Group No. 200); Maintenance of Way and Structures (Group No. 300); Maintenance of Equipment and Stores (Group No. 400); and Transportation, other than train and engine (Group No. 500). By dividing the compensation by the corresponding hours of service, the wage rate for any reporting group can be found. FRA proposes to use the average wage rate of reporting Groups No. 300 and 400 as a substitute for the BLS wage data.

FRA feels that the STB wage data are a suitable substitute for several reasons. Most significantly, the data directly measure the wages for the two groups of employees whose skills are most used in repairing or replacing damaged railroad equipment. In contrast, BLS wage data were a broader measure of all Class I and Amtrak employee wages. Alternative BLS wage data currently available also provide only broad measures.

STB data are, additionally, consistent with Congressional requirements set forth in 49 U.S.C. 20901(b). The STB data are publicly available, although currently only in paper hardcopy, and the information is statistically sound. STB data are almost a census of Class I and Amtrak railroads (though the occasional railroad may be late in reporting) and should therefore represent a more accurate and statistically valid account of railroad wages.

To further ascertain the suitability of STB wage data as a substitute for unavailable BLS wage data, FRA recalculated the 1997 to 2002 reporting thresholds using STB data. This a posteriori comparison of STB- and BLS-based thresholds showed STB data are a reasonable substitute. The analysis also showed that weighting the wage component by 40% and the equipment component by 60%, rather than the 50/50 current weights, produced a threshold that better approximated the existing threshold. The STB-based threshold, however, does increase at a faster rate than the BLS-based threshold. With 40/60 weights on wages and equipment, the new reporting threshold formula changes to:

Tnew = Tprior * [1 +
0.4(Wnew − Wprior)/Wprior +
0.6(Enew − Eprior)/100]

where the broad definitions of the variables remain the same as before but the underlying definitions of "Wnew" and "Wprior" are revised to reflect the use of STB wage data.

In applying this new formula to periodically update the reporting threshold, FRA proposes using the latest data that would be available when the threshold is updated, instead of an average based on yearly data. As the threshold is typically calculated in the second half of the calendar year, and STB wage data are due 30 days after the close of a quarter, the latest STB data available will be second-quarter data. For example, if the new proposed formula is adopted, the calculation for the 2005 threshold would use the second-quarter 2004 wage data from the STB. For equipment costs, FRA would continue to use the corresponding BLS railroad equipment index in the equation. As the equipment index is reported monthly rather than quarterly, the average for the months of April, May, and June would be inputted into the threshold calculation. The newly calculated threshold would reflect the changes in wages and equipment from the last time the threshold was updated to the present.

For example, the values inserted into the proposed new formula for calculating a new threshold would be as follows:

Tprior = Prior threshold. The previously calculated threshold, rounded to the nearest $100. For 2002 and subsequent years, until further notice, the threshold has been $6,700.

Wnew = New average hourly wage rate, in dollars. Based on STB wage data, Wnew is the average of Group No. 300 and Group No. 400 employee wages for the second quarter 2004, equal to about $20.53. All railroads had reported, except Amtrak, at the time of calculation.

Wprior = Prior average hourly wage rate, in dollars. Based on STB wage data, Wprior is the average of the same STB wage data as used for Wnew, for the second quarter of 2001 in this case, equal to about $20.62.

Enew = New equipment average PPI value. Based on the BLS railroad equipment index, Enew is the average of the index values for April, May, and June (*i.e.*, the second quarter) of 2004, equal to 142.63.

Eprior = Prior equipment average PPI value. Based on the BLS railroad equipment index, Eprior is the average of the index values for the second quarter of 2001, equal to 135.60.

Substituting the above values into the proposed new formula would yield a threshold value of $6,971.35, rounded to $7,000, for calendar year 2005. Explicitly, the threshold is calculated by the following steps. The result is rounded at the end of the calculation.

Tnew = Tprior × [1 +
0.4(Wnew − Wprior)/Wprior +
0.6(Enew − Eprior)/100]
Tnew = $6,700 × [1 +
0.4($20.52902 − $20.61667)/
$20.61667 +
0.6(142.63333 − 135.60)/100]
Tnew = $6,700 × [1 + 0.4(−0.00425) +
0.6(0.07033)]
Tnew = $6,700 × [1 + (−0.00170) +
(0.04220)]
Tnew = $6,700 + (−$11.39) + $282.74
Tnew = $6,971.35, which rounded to
the nearest $100 is Tnew = $7,000.

By way of explanation, the −$11.39 amount represents the change in the wage component and the $282.74 amount represents the change in the equipment component. The new threshold is found by adding the changes to the prior threshold. t number, 312 were reported by small railroads. In 2002, 2,738 rail equipment accidents/incidents were reported, with small railroads reporting 255 of them. Most recently, 2,950 rail equipment accidents/incidents were reported in 2003, and small railroads reported 269 of them. In each of those three calendar years, small railroads reported ten percent or less of the total number of rail equipment accidents/incidents.

Notice-and-Comment Procedures

In accordance with Executive Order 12866, FRA is allowing 60 days for comments. FRA believes that a 60-day comment period is appropriate to allow the public to comment on this proposed rule. FRA solicits written comments on all aspects of this proposed rule.

Regulatory Impact and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979).

Regulatory Flexibility Act of 1980 and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities. Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FRA has issued a final policy that formally establishes "small entities" as including railroads that meet the line-haulage revenue requirements of a Class III railroad. 49 CFR part 209, app. C. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity. *Id.*

About 630 of the approximately 680 railroads in the United States are considered small entities by FRA. FRA certifies that this proposed rule will have no significant economic impact on a substantial number of small entities. To the extent that this rule has any impact on small entities, the impact will be neutral or insignificant. The frequency of rail equipment accidents/incidents, and therefore also the frequency of required reporting, is generally proportional to the size of the railroad. A railroad that employs thousands of employees and operates trains millions of miles is exposed to greater risks than one whose operation is substantially smaller. Small railroads may go for months at a time without have a reportable occurrence of any type, and even longer without having a rail equipment accident/incident. For example 3,023 rail equipment accidents/incidents were reported as occurring in calendar year 2001. Of that number, 312 were reported by small railroads. In 2002, 2,738 rail equipment accidents/incidents were reported, with small railroads reporting 255 of them. Most recently, 2,950 rail equipment accidents/incidents were reported in 2003, and small railroads reported 269 of them. In each of those three calendar years, small railroads ten percent or less of the total number of rail equipment accidents/incidents.

Absent this rulemaking (*i.e.*, any increase in the monetary reporting threshold), the number of reportable accidents/incidents would increase, as keeping the 2002 threshold in place would not allow it to keep pace with the increasing dollar amounts of wages and rail equipment repair costs. Therefore, this rule will be neutral in effect. Increasing the reporting threshold will slightly decrease the recordkeeping burden for railroads over time. Any recordkeeping burden would not be significant, and would affect the large railroads more than the small entities, due to the higher proportion of reportable rail equipment accidents/incidents experienced by large entities.

Paperwork Reduction Act of 1995

There are no new information collection requirements associated with this proposed rule. Therefore, no estimate of a public reporting burden is required.

Federalism Implications

Executive Order 13132, entitled, "Federalism," issued on August 4, 1999, requires that each agency "in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State and local officials have been met. * * *" This rulemaking action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This rule will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and the responsibilities among the various levels of government, as specified in the Executive Order 13132. Accordingly, FRA has determined that this rule will not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a Federalism Assessment. Accordingly, a Federalism Assessment has not been prepared.

Environmental Impact

FRA has evaluated this regulation in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28545, 28547, May 26, 1999. Section 4(c)(20) reads as follows:

(c) Actions Categorically Excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded:

* * * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of [$120,700,000 or more (as adjusted for inflation)] in any 1 year and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of $120,700,000 or more in any one year, and thus preparation of such a statement is not required.

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this proposed rule in accordance with Executive Order 13211. FRA has determined that this proposed rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

Privacy Act

Anyone is able to search the electronic form of all our 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*.

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

In consideration of the foregoing, FRA proposes to amend part 225, chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 225—RAILROAD ACCIDENTS/INCIDENTS: REPORTS CLASSIFICATION, AND INVESTIGATIONS

1. The authority citation for part 225 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49.

2. Appendix B to part 225 is amended by revising paragraphs 1, 2, 3, 4, 7, and 8 to read as follows:

Appendix B to Part 225—Procedure for Determining Reporting Threshold

1. Wage data used in the calculation are collected from railroads by the Surface Transportation Board (STB) on Form A—STB Wage Statistics. Rail equipment data from the U.S. Department of Labor, Bureau of Labor Statistics (BLS), LABSTAT Series reports are used in the calculation. The equation used to adjust the reporting threshold has two components: (a) The average hourly earnings of certain railroad maintenance employees as reported to the STB by the Class I railroads and Amtrak; and (b) an overall rail equipment cost index determined by the BLS. The wage component is weighted by 40% and the equipment component by 60%.

2. For the wage component, the average of the data from Form A—STB Wage Statistics for Group No. 300 (Maintenance of Way and Structures) and Group No. 400 (Maintenance of Equipment and Stores) employees are used.

3. For the equipment component, LABSTAT Series Report, Producer Price Index (PPI) Series WPU 144 for Railroad Equipment is used.

4. In the month of October, second-quarter wage data are obtained from the STB. For equipment costs, the corresponding BLS railroad equipment indices for the second quarter are obtained. As the equipment index is reported monthly rather than quarterly, the average for the months of April, May and June is used for the threshold calculation.

* * * * *

7. The weightings result from using STB wage data and BLS equipment cost data to produce a reasonable estimation of the previous reporting threshold, which had assumed that damage repair costs, at levels at or near the threshold, were split approximately evenly between labor and materials.

8. Formula:

$$\text{New Threshold} = \text{Prior Threshold} \times [1 + 0.4(\text{Wnew} - \text{Wprior})/\text{Wprior} + 0.6(\text{Enew-Eprior})/100]$$

Where:
Wnew = New average hourly wage rate ($).
Wprior = Prior average hourly wage rate ($).
Enew = New equipment average PPI value.
Eprior = Prior equipment average PPI value.

Issued in Washington, DC, on April 12, 2005.

Robert D. Jamison,

Acting Administrator, Federal Railroad Administration.

[FR Doc. 05–7740 Filed 4–18–05; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 230

[Docket No. FRA 2005–20044, Notice No. 1]

RIN 2130–AB64

Inspection and Maintenance Standards for Steam Locomotives

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to correct an inadvertent, small omission from FRA Form 4 ("Boiler Specification Card") in the Steam Locomotive Inspection and Maintenance Standards. The form is used to record information about inspections of steam locomotive boilers.

DATES: (1) *Written comments:* Written comments on this NPRM must be submitted by May 19, 2005. Comments received after the date will be considered to the extent possible without incurring additional expense or delay.

(2) *Public Hearing:* If any person desires an opportunity for oral comment, he or she must notify FRA in writing and specify the basis for the request. FRA will schedule a public hearing in connection with this proceeding if the agency receives a request for a public hearing by May 19, 2005.

ADDRESSES: You may submit comments, identified by DOT DMS Docket No. FRA 2005–20044, by any of the following methods:

Website: http://dms.dot.gov. Follow the submitting comments on the DOT electronic site.

Fax: (202) 493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.

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.

Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://dms.dot.gov*, including personal information provided. Please see the "Privacy Act" section under "Regulatory Impact."

Docket: For access to the docket to read background 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: George Scerbo, Motive Power and Equipment Safety Specialist, 1120 Vermont Avenue, NW., Mail Stop 25, Washington, DC 20590, (202) 493–6249, *George.Scerbo@fra.dot.gov*; or Melissa L. Porter, Trial Attorney, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590, (202) 493–6034, *Melissa.Porter@fra.dot.gov.*

SUPPLEMENTARY INFORMATION: On November 17, 1999, FRA published a final rule revising the agency's inspection and maintenance standards for steam locomotives (49 CFR part 230). (64 FR 62828). As part of the final rule, FRA included forms in Appendix C to part 230 that railroads operating steam locomotives are required to use in order to comply with the rule. On FRA Form 4 entitled "Boiler Specification Card," FRA inadvertently omitted three lines in the "Calculations" section that should have been included to record the shearing stress on rivets. The omitted language is as follows:

"Shearing stress on rivets:
Greatest shear stress on rivets in longitudinal seam _____ psi
Location (course #); _____; Seam Efficiency _____"

FRA proposes to correct this oversight by adding the above language to Form 4. Because the purpose of Form 4 is to document for FRA the current condition of the boiler and to keep up-to-date documentation of all repairs that have been made to the boiler, this omitted language is necessary on the form so that the current condition of the boiler can be documented accurately.

Although the language was also omitted from the NPRM issued on September 25, 1998 in the proceeding that led to the 1999 final rule amendments to the steam locomotive rule, the omitted language was still intended by FRA to be on Form 4. A review of meeting minutes from the Tourist and Historic Railroads Working Group of FRA's Railroad Safety Advisory Committee, which was tasked with developing recommendations for revising the rule, indicates that there was no substantive discussion about the specific requirements to record the

shearing stress on rivets, unlike other issues that were controversial. There was discussion about how to calculate the stress, but not about the recording requirements. In addition, the prior version of the rule required persons and entities to record similar information (*i.e.*, shearing stress on rivets in pounds per square inch). (*See*, for example, 49 CFR 230.54 (1978)). In all of the meetings and comments, there was no discussion between any parties of eliminating this language from Form 4. Moreover, in a March 18, 2003, letter to FRA, the Secretary of the Engineering Standards Committee for Steam Locomotives states the "[t]he original final drafts [of Form 4] supplied to the FRA and agreed to by the task group contained this section [for 'Shearing Stress on Rivets']." The letter requests that the section of the form "be reinstated * * *."

In light of the foregoing explanation, FRA proposes to amend Form 4 as stated above.

Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures. It is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This proposed rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation. The economic impact of the proposed rule would be minimal to the extent that preparation of a regulatory evaluation is not warranted.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. This rule proposes to correct a minor omission from the final rule. Therefore, FRA certifies that proposed rule would not have a significant economic impact on a substantial number of small entities.

C. Federalism

This proposed rule would not have a substantial effect on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 13132, preparation of a Federalism assessment is not warranted.

D. Paperwork Reduction Act

There are no new information collection requirements in this proposed rule.

E. Compliance With the Unfunded Mandates Reform Act of 1995

The proposed rule issued today would not result in the expenditure, in the aggregate, of $120,700,000 or more in any one year by State, local, or Indian Tribal governments, or the private sector, and thus preparation of a statement is not required.

F. Environmental Assessment

There would be no significant environmental impacts associated with this proposed rule.

G. Energy Impact

According to definitions set forth in Executive Order 13211, there would be no significant energy action as a result of the issuance of this proposed rule.

H. Privacy Act

Anyone is able to search the electronic form of all comments received in 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*.

Request for Public Comments

FRA proposes to amend Form 4 in Appendix C to 49 CFR Part 230, as set forth below. FRA solicits comments on the NPRM through written submissions. FRA may make changes to the final rule based on comments submitted in response to this proposed rule.

List of Subjects in 49 CFR Part 230

Steam locomotives, Railroad safety, Penalties, Reporting and recordkeeping requirements.

The Proposed Rule

In consideration of the foregoing, FRA proposes to amend chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 230—[AMENDED]

1. The authority citation for part 230 continues to read as follows:

Authority: 49 U.S.C. 20103, 20701, 20702; 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. Appendix C to part 230 is amended by revising "FRA Form 4" to read as follows:

Appendix C to Part 230—FRA Inspection Forms

* * * * *

BILLING CODE 4910–06–U

FRA Form 4

BOILER SPECIFICATION CARD

Locomotive No._____; **Boiler No.**_____; **Date built**_____
Boiler built by:_____
Owned by:_____
Operated by:_____
Type of boiler:_____; **Dome, where located:**_____

BOILER SURVEY DATA

Where **condition** is called for, use: **New** - New material at the time of the boiler survey; **Good** - Little or no wear and/or corrosion; **Fair** - Obvious wear and/or corrosion.

Boiler Shell Sheets

Material:	Type of Material (wrought iron, carbon steel, or alloy steel)	Carbon Content	Condition
1st course (front)	_____	_____	_____
2nd course	_____	_____	_____
3rd course	_____	_____	_____
Rivets	_____	n/a	n/a

Documentation of how material was determined shall be attached to this form.

Measurements:		At Seam	Thinnest	
Front flue sheet,	thickness	n/a	_____	
1st course,	thickness	_____,	_____,	ID_____,ID_____
2nd course,	thickness	_____,	_____,	ID_____,ID_____
3rd course,	thickness	_____,	_____,	ID_____,ID_____

When courses are not cylindrical give ID at each end

Is boiler shell circular at all points?_____
If shell is flattened, state location and amount_____
Are all flattened areas of shell stayed adequately for the pressure allowed by this form?_____

Water Space at Mud Ring: Sides_____, Front_____, Back_____
Width of water space at sides of fire box measured at center line of boiler: Front_____, Back_____

Firebox and Wrapper Sheets

Firebox sheets:	Thickness	Material	Condition
Rear flue sheet	_____	_____	_____
Crown	_____	_____	_____
Sides	_____	_____	_____
Door	_____	_____	_____
Combustion chamber	_____	_____	_____
Inside throat	_____	_____	_____
Wrapper sheets:			
Throat	_____	_____	_____
Back head	_____	_____	_____
Roof	_____	_____	_____
Sides	_____	_____	_____

Steam Dome

Dome is made of _____pieces (not including seam welts, if any), Top opening diameter_____
Middle cylindrical portion - ID_____, Opening in boiler shell, longitudinally - _____

Dome sheets:	Thickness	Material	Condition
Base	_____	_____	_____
Middle cylindrical portion	_____	_____	_____
Top	_____	_____	_____
Lid	_____	_____	_____
Boiler shell liner for steam dome opening:	_____	_____	_____

Is liner part of longitudinal seam?_____

Arch Tubes, Flues, Circulators, Thermic Siphons, Water Bar Tubes, Superheaters, and Dry Pipe

Arch tubes: OD_____, wall thickness_____; number _____; condition_____

Flues:
OD_____, wall thickness_____, length_____; number_____; condition_____
OD_____, wall thickness_____, length_____; number_____; condition_____
OD_____, wall thickness_____, length_____; number_____; condition_____

Circulators: OD_____, wall thickness_____; number _____; condition_____

Thermic siphons: number_____; plate thickness_____; condition_____
neck OD_____, neck thickness_____; condition_____

Water bar tubes: OD_____, wall thickness_____

Superheater units directly connected to boiler with no intervening valve:
Type_____, Tube OD_____, wall thickness_____; number_____; condition_____

Dry pipe subject to pressure:
OD_____, wall thickness_____, material_____; condition_____

Stay Bolts, Crown Bar Rivets, and Braces

Stay bolts:
Smallest crown stay diameter_____, avg. spacing_____X_____; condition_____
Smallest stay bolt diameter_____, avg. spacing_____X_____ ; condition_____
Smallest combustion chamber stay bolt dia._____,
avg. spacing_____X_____; condition_____

Measurement at smallest diameter

Crown bar bolts & rivets:
Roof sheet rivets, smallest dia._____, ave. spacing_____X_____; condition_____
Roof sheet bolts, smallest dia._____, ave. spacing_____X_____; condition_____
Crown sheet rivets, smallest dia._____, ave. spacing_____X_____; condition_____
Crown sheet bolts, smallest dia._____, ave. spacing_____X_____;condition_____

Braces:		Total Cross Sectional Area of Braces	
Number	Total Area Stayed	Actual	Equivalent Direct Stay

Backhead	_____	_____	_____	_____
Throat sheet	_____	_____	_____	_____
Front tube sheet	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Safety Valves, Heating Surface, and Grate Area

Safety valves: Total number of safety valves on locomotive_____

Valve Size	Manufacturer	No. valves of this size and manufacture
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Heating Surface:

Heating surface, as part of a circulating system in contact on one side with water or wet steam being heated and on the other side with gas or refractory being cooled, shall be measured on the side receiving heat.

Firebox and Combustion Chamber	_____ square feet
Flue Sheets (less flue ID areas)	_____ square feet
Flues	_____ square feet
Circulators	_____ square feet
Arch Tubes	_____ square feet
Thermic Siphons	_____ square feet
Water Bar Tubes	_____ square feet
Superheaters (front end throttle only)	_____ square feet
Other	_____ square feet
Total Heating Surface	_____ square feet

Grate area:_____square feet

Water Level Indicators, Fusible Plugs, and Low Water Alarms

Height of lowest reading of gauge glasses above crown sheet:_____ _____

Height of lowest reading of gauge cocks above crown sheet:_____

Is boiler equipped with fusible plug(s)? _____, number_____

Is boiler equipped with low water alarm(s)? _____, number_____

Calculations

Staybolt stresses:

Stay bolt under greatest load, maximum stress _____psi
Location _____

Crown stay, crown bar rivet, or crown bar bolt under greatest load, max. stress _____psi
Location _____

Combustion chamber stay bolt under greatest load, maximum stress _____psi
Location _____

Braces:

Round or rectangular brace under greatest load, maximum stress _____psi
Location _____

Gusset brace under greatest load, maximum stress _____psi
Location _____

Shearing stress on rivets:

Greatest shear stress on rivets in longitudinal seam _____psi
Location (course #)_____ ; Seam Efficiency_____

Boiler shell plate tension:

Greatest tension on net section of plate in longitudinal seam _____psi
Location (course #)_____ ; Seam Efficiency_____

Boiler plate and components, minimum thickness required @ tensile strength:

Front tube sheet	_____@_____	Rear flue sheet	_____@_____
1st course at seam	_____@_____	1st course not at seam	_____@_____
2nd course at seam	_____@_____	2nd course not at seam	_____@_____
3rd course at seam	_____@_____	3rd course not at seam	_____@_____
Roof sheet	_____@_____	Crown sheet	_____@_____
Side wrapper sheets	_____@_____	Firebox side sheets	_____@_____
Back head	_____@_____	Door sheet	_____@_____
Throat sheet	_____@_____	Inside throat sheet	_____@_____
Combustion chamber	_____@_____	Dome, top	_____@_____
Dome, middle	_____@_____	Dome, base	_____@_____
Arch tubes	_____@_____	Dome, lid	_____@_____
Water bar tubes	_____@_____	Thermic siphons	_____@_____
Dry pipe	_____@_____	Circulators	_____@_____

Notes. 1. If tensile strength used is greater than 50,000 psi for steel or greater than 45,000 psi for wrought iron, supporting documentation must be furnished.

2. Any shell dimension less than 1/4" in thickness may not be adequate for support of or by other structures, particularly where threads or staybolts are concerned. Applicable codes should be consulted.

Boiler Steam Generating Capacity: _____pounds per hour

The following may be used as a guide for estimating steaming capacity:

Pounds of Steam Per Hour Per Square Foot of Heating Surface:

Hand fired	8 lbs. per hr.
Stoker fired	10 lbs. per hr.
Oil, gas or pulverized fuel fired	14 lbs. per hr.

Record of Alterations

Description of Alteration	Date of Alteration

Record of Waivers

Waiver No.	Section No. Affected	Scope and Content of Waiver

Calculations done by:_____; Verified by:_____

Data used to verify the foregoing specifications is current and accurate. Based upon the information contained in this document and all necessary calculations, this boiler of Locomotive (Initial & number)_____ is safe for a working pressure of _____psi.

_____ Date_____; _____ Date_____

Locomotive Owner **Locomotive Operator**

Make working sketch here or attach drawing of longitudinal and circumferential seams used in shell of boiler, indicating on which courses used and give calculated efficiency of weakest longitudinal seam.

* * * * *

Issued in Washington, DC, on April 12, 2005.

Robert D. Jamison,

Acting Administrator, Federal Railroad Administration.

[FR Doc. 05–7739 Filed 4–18–05; 8:45 am]

BILLING CODE 4910–06–U

Notices

Federal Register
Vol. 70, No. 74
Tuesday, April 19, 2005

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

Agricultural Marketing Service

[Docket No. LS–05–03]

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension of the currently approved information collection used to compile and generate grain and molasses market news reports.

DATES: Comments received by June 20, 2005, will be considered.

Additional Information or Comments: Contact Jimmy A. Beard; Assistant to the Chief; Livestock and Grain Market News Branch, Livestock and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; 1400 Independence Avenue SW.; STOP 0252; Room 2619–S; Washington, DC 20250–0252; Phone (202) 720–8054; Fax (202) 690–3732; or e-mailed to *marketnewscomments@usda.gov.* All comments received will be available for public inspection at this address during the hours of 8 a.m. to 4 p.m. Monday through Friday, and on the Internet at *http://www.ams.usda.gov/lsmnpubs.*

SUPPLEMENTARY INFORMATION: *Title:* Grain Market News Reports and Molasses Market News Reports.

OMB Number: 0581–0005.

Expiration Date of Approval: 08–31–2005.

Type of Request: Extension of a currently approved information collection.

Abstract: The Agricultural Marketing Act of 1946 (7 U.S.C. 1621, *et seq.*), section 203(g) directs and authorizes the collection and dissemination of marketing information, including adequate outlook information, on a market area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and to bring about a balance between production and utilization.

The grain industry has requested that USDA continue to issue market news reports on grain and molasses. These reports are compiled by AMS in cooperation with the grain and feed industry. Market news reporting must be timely, accurate, and continuous if it is to be useful to producers, processors, and the trade in general. Industry traders can use market news information to make marketing decisions on when and where to buy and sell. For example, a producer could compare prices being paid at local, terminal, or export elevators to determine which location will provide the best return. Some traders might choose to chart prices over a period of time in order to determine the most advantageous day of the week to buy or sell, or to determine the most favorable season. In addition, the reports are used by other Government agencies to evaluate market conditions and calculate price levels, such as USDA's Farm Service Agency, that administers the Farmer-owned Reserve Program. Economists at most major agricultural colleges and universities use the grain and feed market news reports to make short and long-term market projections. Also, the Government is a large purchaser of grain and related products. A system to monitor the collection and reporting of data, therefore is needed.

The information must be collected, compiled, and disseminated by an impartial third-party, in a manner which protects the confidentiality of the reporting entity. AMS is in the best position to provide this service.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .0333 hours per response.

Respondents: Business or other for-profit entities, individuals or households, farms, and the Federal Government.

Estimated Number of Respondents: 202.

Estimated Number of Responses: 3864.

Estimated Number of Responses per Respondent: 19.

Estimated Total Annual Burden on Respondents: 129 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Jimmy A. Beard; Assistant to the Chief; Livestock and Grain Market News Branch, Livestock and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; 1400 Independence Ave; STOP 0252; Room 2619–S; Washington, DC 20250–0252; Phone (202) 720–8054; Fax (202) 690–3732; or e-mailed to *marketnewscomment@usda.gov.* All comments received will be available for public inspection at this address during the hours of 8 a.m. to 4 p.m. Monday through Friday, and on the Internet at *http://www.ams.usda.gov/lsmnpubs.* All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: April 14, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 05–7764 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. LS–05–04]

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension of the currently approved information collection used to compile and generate the Federally Inspected Estimated Daily Slaughter Report for the Livestock and Grain Market News Branch.

DATES: Comments received by June 20, 2005, will be considered.

Additional Information or Comments: Contact Jimmy A. Beard; Assistant to the Chief; Livestock and Grain Market News Branch, Livestock and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; 1400 Independence Avenue SW.; STOP 0252; Room 2619–S; Washington, DC 20250–0252; Phone (202) 720–8054; Fax (202) 690–3732; or e-mailed to *marketnewscomments@usda.gov.* All comments received will be available for public inspection at this address during the hours of 8 a.m. to 4 p.m. Monday through Friday, and on the Internet at *www.ams.usda.gov/lsmnpubs.*

SUPPLEMENTARY INFORMATION: *Title:* Plan for Estimating Daily Livestock Slaughter Under Federal Inspection.

OMB Number: 0581–0050.

Expiration Date of Approval: 09–30–2005.

Type of Request: Extension of a currently approved information collection.

Abstract: The Agricultural Marketing Act of 1946 (7 U.S.C. 1621, et seq), section 203(g) directs and authorizes the collection and dissemination of marketing information including adequate outlook information, on a market area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and to bring about a balance between production and utilization.

Under this market news program, USDA issues a market news report estimating daily livestock slaughter under Federal inspection. This report is compiled by AMS on a voluntary basis in cooperation with the livestock and meat industry. Market news reporting must be timely, accurate, and continuous if it is to be useful to producers, processors, and the trade in general. The daily livestock slaughter estimates are provided at the request of industry and are used to make production and marketing decisions.

The Daily Estimated Livestock Slaughter Under Federal Inspection Report is used by a wide range of industry contacts, including packers, processors, producers, brokers and retailers of meat and meat products. The livestock and meat industry requested that USDA issue slaughter estimates (daily and weekly), by species, for cattle, calves, hogs and sheep in order to assist them in making immediate production and marketing decisions and as a guide to the volume of meat in the marketing channel. The information requested from respondents includes their estimation of the current day's slaughter at their plant(s) and the actual slaughter for the previous day. Also, the Government is a large purchaser of meat and related products and this report assists other Government agencies in providing timely information on the quantity of meat entering the processing channels.

The information must be collected, compiled, and disseminated by an impartial third-party, in a manner which protects the confidentiality of the reporting entity. AMS is in the best position to provide this service.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .0333 hours per response.

Respondents: Business or other for-profit entities, individuals or households, farms, and the Federal Government.

Estimated Number of Respondents: 72.

Estimated Number of Responses: 18,720.

Estimated Number of Responses per Respondent: 260.

Estimated Total Annual Burden on Respondents: 624 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Contact Jimmy A. Beard; Assistant to the Chief; Livestock and Grain Market News Branch, Livestock and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; 1400 Independence Ave; STOP 0252; Room 2619–S; Washington, DC 20250–0252; Phone (202) 720–8054; Fax (202) 690–3732; or e-mailed to *marketnewscomments@usda.gov.* All comments received will be available for public inspection during regular business hours at the same address and on the Internet at *http://www.ams.usda.gov/lsmnpubs.*

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: April 14, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 05–7765 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[No. TM–05–04]

Nominations for Members of the National Organic Standards Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Organic Foods Production Act (OFPA) of 1990, as amended, requires the establishment of a National Organic Standards Board (NOSB). The NOSB is a 15-member board that is responsible for developing and recommending to the Secretary a proposed National List of Approved and Prohibited Substances. The NOSB also advises the Secretary on other aspects of the National Organic Program. The U.S. Department of Agriculture (USDA) is requesting nominations to fill six (6) upcoming vacancies on the NOSB. The positions to be filled are: organic producer (2 positions), consumer/public interest (3 positions), and USDA accredited certifying agent (1 position). The Secretary of Agriculture will appoint a person to each position to serve a 5-year term of office that will commence on January 24, 2006, and run until January 24, 2011. USDA

encourages eligible minorities, women, and persons with disabilities to apply for membership on the NOSB.

DATES: Written nominations, with résumés, must be post-marked on or before July 15, 2005.

ADDRESSES: Nominations should be sent to Ms. Katherine E. Benham, Advisory Board Specialist, USDA–AMS–TMP–NOP, 1400 Independence Avenue, SW., Room 4008–So., Ag Stop 0268. Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Ms. Katherine E. Benham, (202) 205–7806; E-mail: *katherine.benham@usda.gov;* Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION: The OFPA of 1990, as amended (7 U.S.C. 6501 *et seq.*), requires the Secretary to establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods. In developing this program, the Secretary is required to establish an NOSB. The purpose of the NOSB is to assist in the development of a proposed National List of Approved and Prohibited Substances and to advise the Secretary on other aspects of the National Organic Program.

The NOSB made recommendations to the Secretary regarding the establishment of the initial organic program. It is anticipated that the NOSB will continue to make recommendations on various matters, including recommendations on substances it believes should be allowed or prohibited for use in organic production and handling.

The NOSB is composed of 15 members; 4 organic producers, 2 organic handlers, a retailer, 3 environmentalists, 3 public/consumer representatives, a scientist, and a certifying agent. Nominations are being sought to fill the following six (6) upcoming NOSB vacancies: organic producer (2 positions), consumer/public interest (3 positions), and USDA accredited certifying agent (1 position). Individuals desiring to be appointed to the NOSB at this time must be either an owner or operator of an organic production operation, an individual who represents public interest or consumer interest groups, or an individual who is a USDA accredited organic certifying agent. Selection criteria will include such factors as: demonstrated experience and interest in organic production, organic certification, and support of consumer and public interest organizations; demonstrated experience with respect to agricultural products produced and handled on certified organic farms; and such other factors as may be appropriate for specific positions.

Nominees will be supplied with a biographical information form that must be completed and returned to USDA within 10 working days of its receipt. Completed biographical information forms are required for a nominee to receive consideration for appointment by the Secretary.

Equal opportunity practices will be followed in all appointments to the NOSB in accordance with USDA policies. To ensure that the members of the NOSB take into account the needs of the diverse groups that are served by the Department, membership on the NOSB will include, to the extent practicable, individuals who demonstrate the ability to represent minorities, women, and persons with disabilities.

The information collection requirements concerning the nomination process have been previously cleared by the Office of Management and Budget (OMB) under OMB Control No. 0505–0001.

Dated: April 14, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 05–7763 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 05–014–1]

Notice of Request for Extension of Approval of an Information Collection

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations to prevent the interstate spread of plant pests from Hawaii and U.S. territories.

DATES: We will consider all comments that we receive on or before June 20, 2005.

ADDRESSES: You may submit comments by any of the following methods:

EDOCKET: Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the "View Open APHIS Dockets" link to locate this document.

Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 05–014–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 05–014–1.

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

Other Information: You may view APHIS documents published in the **Federal Register** and related information on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: For information regarding the movement of fruits and vegetables from Hawaii and U.S. territories, contact Ms. Susan Dublinski, Import Specialist, Phytosanitary Issues Management, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737; (301) 734–6799. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

SUPPLEMENTARY INFORMATION:

Title: Hawaiian and Territorial Quarantine Notices.

OMB Number: 0579–0198.

Type of Request: Extension of approval of an information collection.

Abstract: As authorized by the Plant Protection Act (7 U.S.C. 7701–7772) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to

implement the PPA. Regulations governing the interstate movement of plants and plant products from Hawaii and U.S. territories, including Guam, Puerto Rico, and the U.S. Virgin Islands, are contained in 7 CFR part 318, "Hawaiian and Territorial Quarantine Notices."

These regulations are necessary to prevent the interstate spread of plant pests such as the Mediterranean fruit fly, the melon fly, the Oriental fruit fly, green coffee scale, the bean pod borer, and other plant pests to noninfested areas of the United States.

Administering these regulations requires APHIS to collect information from a variety of individuals who are involved in growing, packing, handling, and transporting plants and plant products. This information serves as supporting documentation required for the issuance of forms and documents that authorize the movement of regulated articles and is vital to help ensure that injurious plant pests are not spread interstate from Hawaii and U.S. territories to noninfested areas of the United States.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.0786158 hours per response.

Respondents: State plant regulatory officials, irradiation facility personnel, and individuals involved in growing, packing, handling, and transporting plants and plant products.

Estimated annual number of respondents: 1,129.

Estimated annual number of responses per respondent: 11.108945.

Estimated annual number of responses: 12,542.

Estimated total annual burden on respondents: 986 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 13th day of April 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E5–1837 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal And Plant Health Inspection Service

[Docket No. 05–013–1]

Notice of Request for Extension of Approval of an Information Collection

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations to prevent the interstate spread of plant diseases within the United States.

DATES: We will consider all comments that we receive on or before June 20, 2005.

ADDRESSES: You may submit comments by any of the following methods:

- EDOCKET: Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the "View Open APHIS Dockets" link to locate this document.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 05–013–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 05–013–1.

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

Other Information: You may view APHIS documents published in the **Federal Register** and related information on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

FOR FURTHER INFORMATION CONTACT: For information regarding domestic quarantine regulations, contact Mr. Charles Brown, Senior Staff Officer, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737; (301) 734–4838: For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

SUPPLEMENTARY INFORMATION:

Title: Domestic Quarantine Regulations.

OMB Number: 0579–0088.

Type of Request: Extension of approval of an information collection.

Abstract: As authorized by the Plant Protection Act (7 U.S.C. 7701–7772) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA.Regulations governing the interstate movement of plants, plant products, and other articles are contained in 7 CFR part 301, "Domestic Quarantine Notices."

These regulations prohibit or restrict the interstate movement of certain articles from infested areas to noninfested areas to prevent the spread of plant pests such as the Asian longhorned beetle, emerald ash borer, imported fire ant, Mexican fruit fly, and

the West Indian fruit fly. For example, if an area of the United States has been placed under quarantine because of a fruit fly infestation, then certain plants and plant products that may present a risk of spreading the fruit fly may be moved interstate from the infested area only under certain conditions (e.g., after treatment or inspection). In this way, we prevent the fruit flies from being spread to noninfested areas of the United States via the movement of the plants and plant products.

Administering these regulations requires APHIS to collect information from a variety of individuals who are involved in growing, packing, handling, and transporting plants and plant products. The information we collect serves as the supporting documentation required for the issuance of forms and documents that authorize the movement of regulated plants and plant products and is vital to help prevent the spread of injurious plant pests within the United States.

Collecting this information requires us to use a number of forms and documents, including certificates, limited permits, transit permits, and outdoor household article documents.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.0990402 hours per response.

Respondents: State plant regulatory officials, State cooperators, and individuals involved in growing, packing, handling, and transporting plants and plant products.

Estimated annual number of respondents: 191,866.

Estimated annual number of responses per respondent: 5.7993026.

Estimated annual number of responses: 1,112,689.

Estimated total annual burden on respondents: 110,201 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 13th day of April 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E5–1838 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Natural Resources Conservation Service Conservation Security Program

AGENCY: Natural Resources Conservation Service and Commodity Credit Corporation, USDA.

ACTION: Notice; correction.

DATES: The administrative actions announced in this notice are effective on April 19, 2005.

SUMMARY: The Natural Resources Conservation Service published in the **Federal Register** of March 25, 2005 (70 FR 15277), a document concerning the FY 2005 CSP sign-up process. The notice contained a typographic error that may impact program implementation. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Craig Derickson, Branch Chief—Stewardship Programs, Financial Assistance Programs Division, NRCS, P.O. Box 2890, Washington, DC 20013–2890, telephone: (202) 720–1845; fax: (202) 720–4265. Submit e-mail to: *craig.derickson@usda.gov*, Attention: Conservation Security Program.

SUPPLEMENTARY INFORMATION: The Natural Resources Conservation Service published a document in the **Federal Register** on March 25, 2005, (70 FR 15277) announcing the CSP–05–01 sign-up that is being held from March 28, 2005, through May 27, 2005, in selected 8-digit watersheds in all 50 States and the Caribbean. The sign-up notice contained two typographic errors on the "2005 CSP Enrollment Categories—Criteria by Land Use and Category" matrix found on pages 15280 and 15281 of the **Federal Register** notice. In the "Pasture" portion of the matrix at the bottom of page 15280, the criteria for Category A in the column under "Stewardship practices and activities (from list below) in place for at least two years," as corrected, is to read as follows: "At least 2 unique practices or activities from each area of Soil Quality and Water Quality, and 1 from Wildlife Habitat." In addition, in the "Range" portion of the matrix at the top of page 15281, the criteria for Category D in the column under "Stewardship practices and activities (from list below) in place for at least two years," as corrected, is to read as follows: "Prescribed Grazing plus at least 1 unique practice or activity from any of the following areas of Soil Quality, Water Quality, and Wildlife Habitat."

Dated: April 13, 2005.

Teressa Davis,

Federal Register Liaison, Natural Resources Conservation Service.

[FR Doc. 05–7793 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Forest Service

Colville National Forest, WA; Growden Dam and Sherman Creek Restoration

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an environmental impact statement.

SUMMARY: On March 1, 2004, the Forest Service published a Notice of Intent to prepare an environmental impact statement for the Growden Dam and Sherman Creek Restoration Project in the **Federal Register** (69 FR 9569). The Forest Service is revising the project title, the proposed action, the date the EIS is expected to be available for public review and comment, the expected date of release of the final EIS, and the name of the Responsible Official.

The project title will be changed to Growden Dam, Sherman Creek Restoration Project and Forest Plan Amendment #28.

The proposed action is modified to include Forest Plan Amendment #28, which would change the visual quality objective for the Growden Dam area from "Retention" to "Restoration" until such time as the vegetation recovers. The immediate foreground area around Growden Dam, a significant dispersed recreation site, would be a construction

zone visible from Washington State Highway 20 under each of the three action alternatives.

Depending on the alternative selected, there would be up to eight acres of unvegetated landscape next to the highway in the first year of construction. A change in visual quality objective to "Restoration" would be in effect until vegetation is reestablished. Within one season grass is expected to cover most of the site and trees and shrubs will have been planted. It is expected that trees and shrubs would be established within five years and the area will appear more natural.

DATES: The date the draft EIS should be available for comment is April 29, 2005, and the date of release of the final EIS is expected to be in July 2005.

Responsible Official

The Responsible Official is Rick Brazell, Forest Supervisor, 765 South Main, Colville, WA 99114, phone (509) 684–7000, fax (509) 684–7280.

FOR FURTHER INFORMATION CONTACT: Karen Honeycutt, Fisheries Biologist, Colville National Forest (*see* address above).

Dated: April 13, 2005.

Donald N. Gonzalez,

Acting Forest Supervisor.

[FR Doc. 05–7785 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

McNally Reforestation EIS

AGENCY: Forest Service, USDA.

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

SUMMARY: The Department of Agriculture, Forest Service, is preparing an environmental impact statement (EIS) to re-establish conifers and hardwoods in key areas that burned during the McNally and Manter fires on the Sequoia National Forest.

DATES: The public is asked to submit any issues (points of concern, debate, dispute, or disagreement) regarding potential effects of the proposed action by May 23, 2005. The draft EIS is expected to be available for public comment in June, 2005, and the final EIS is expected to be published in December, 2005.

ADDRESSES: Send written comments to: Jim Whitfield, EIS Team Leader, USDA Forest Service, Sequoia National Forest, 900 West Grand Avenue, Porterville, CA 93257.

FOR FURTHER INFORMATION CONTACT: Jim Whitfield, EIS Team Leader, Sequoia National Forest, at the address listed above. The phone number is (559) 784–1500. Public field trips will be held to allow the public to view the project areas prior to a decision on the project. Information on the times, dates, locations, and agendas for these meetings will be provided in local newspapers, on the Sequoia National Forest and Giant Sequoia National Monument Web site, and by direct mailings.

SUPPLEMENTARY INFORMATION:

Background

In July and August of 2000 and 2002, the Sequoia National Forest and the Giant Sequoia National Monument experienced two large wildfires that burned extensive areas of the forest and fragmented important wildlife habitats. The Manter fire in 2000, burned over 74,000 acres and the McNally fire in 2002, burned over 150,000 acres for a total of approximately 224,000 acres. Restoration projects were analyzed and approved in an environmental assessment for the Manter fire area and in an environmental impact statement for the Sherman Pass portion of the McNally fire area.

Following initial implementation of these two decisions, the site conditions in portions of the burned areas that were already planned for reforestation changed. In addition, portions of the Chico and Rincon Roadless Areas and the Giant Sequoia National Monument, which were not dealt with in either the Manter or McNally-Sherman Pass environmental documents, are in need of treatment. In all, surveys indicate that up to 8,000 acres will need treatment to re-establish desired forest conditions within 200 years. Competing vegetation and populations of pocket gophers have become established at levels that will reduce the survival of planted trees. Due to the current condition of these areas, successful reforestation in a timely manner will require planting in some areas and may require the use of herbicides, pesticides, and rodenticides to control competing vegetation, the spread of root disease, and the harmful effects from gophers.

Purpose and Need for Action

The need for management action arises when conditions on the ground do not meet desired conditions. It is important to restore certain burned areas of native forest habitat, both conifer and hardwood, in order to move the land toward its desired conditions, as fully described in the Sequoia's Land and Resource Management Plan, as amended. The desired conditions for the project area are briefly described below:

(1) Provide forest structure and function across old forest emphasis areas that generally resemble pre-settlement conditions, with high levels of horizontal and vertical diversity.

(2) Maintain on re-establish key wildlife habitat for species including the California spotted owl, northern goshawk, and Pacific fisher.

Conditions on the ground are not moving toward desired conditions in a timely manner without active management, primarily due to vegetation competition for water. The areas affected by the fires experience extended summer drought, typical of our Mediterranean climate, and the coarse, rocky soils do not hold much water. Due to these conditions, moisture is the most limiting factor for timely conifer establishment and growth in the project area. Shrubs, forbs, and grasses have colonized and now fully occupy portions of the burned areas. Where the roots of these competing plants occupy the soil profile, very little moisture is available to planted or natural conifer seedlings unless the competing plants are treated in some manner. Experience in the Sequoia National Forest, the Giant Sequoia National Monument, and throughout the region clearly shows that successful reforestation of conifers is dependent on active management to control competing shrubs, forbs, and grasses for the first one to five years following planting. This allows the young conifers to establish and develop. Once the planted trees are established and their roots well developed, more competing plants can be tolerated.

In addition to competing vegetation, pocket gopher populations have increased in the burned areas. Gophers feed on young trees, as well as forbs and grasses. In the winter, when other vegetation is unavailable to the gophers, evergreen conifers become a primary source of food. Gophers feed on the roots and stems of the trees as they burrow underground and through the snow. Roots and bark of young seedlings are totally stripped away and the girdled seedlings die. Even a few active gopher colonies per acre can decimate young plantations. In order to assure successful reforestation where gophers are present, it is essential to control their populations before planting and during the first few years of conifer establishment, until the planted trees reach a size where they are more resistant to damage.

There are large areas of the fire where all or most of the conifers were killed. In these areas there will be little or no

natural seed available for natural regeneration of conifers. In areas where natural seed is not available, reforestation of conifers will require planting for successful regeneration to occur in a timely manner.

Some areas burned in the fire will be reforested with hardwood species. In some cases, reforesting the burned area with native hardwoods will be easier than reforesting native conifers due to the ability of some hardwood species to sprout from roots that remain following the fire.

The tree of heaven, a non-native weed tree, is present and expanding its range along the Kern River within the McNally fire area. It is producing abundant root sprouts and creating dense thickets, which are displacing the native cottonwood/willow forest.

Proposed Action

In order to meet the above Purpose and Need the Cannell Meadow and Hot Springs Ranger Districts propose to reforest key areas burned during the McNally fire of 2002 and the Manter fire of 2000. Approximately 40% of the proposed reforestation areas are located within roadless areas. The project area encompasses approximately 8,000 acres and is located in Townships 20, 21, 22, and 23 South, Ranges 32, 33, 34, and 35 East, Mount Diablo Base and Meridian (MDB&M). The project area is in Tulare County, California.

In order to move toward the desired condition for diverse forest habitat, reforestation will reestablish conifer and hardwood species. Reestablishing native forest will be accomplished with a combination of planting, natural seeding, and sprouting of native trees. In addition to reforestation, approximately 20 acres of non-native, invasive trees (tree of heaven) will be eliminated.

Potential reforestation activities include preparing the planting sites to improve planting success, planting trees, reducing live vegetation that may compete with planted or naturally regenerated trees, reducing gopher populations that may damage or kill young conifers, reducing standing or down fuels to reduce short and long-term impacts to regenerated trees, and eliminating the invasive tree of heaven. Methods may include the use of mechanical equipment such as excavators and bulldozers for masticating or clearing competing live vegetation or dead trees and plants; the use of ground or aerial equipment for applying herbicides; and the use of hand-held equipment for planting trees, applying herbicides, applying poisoned bait to control gophers, applying pesticides to cut stumps to prevent the spread of root disease, removing competing vegetation, piling dead trees and plants, and burning undesirable live or dead vegetation.

The analysis will be consistent with the Sequoia National Forest Land Management Plan (LRMP) as amended by the Sierra Nevada Forest Plan Amendment, 2004 (SNFPA) and the Giant Sequoia National Monument Plan, 2004 (GSNM).

Preliminary Issues

Recent experience indicates that the use of herbicides, pesticides, and rodenticides to control competing vegetation and gophers and the need to quickly re-establish hardwood and conifer habitat are controversial. There is also controversy over actively replanting an area with conifers, along with the associated site preparation and release work, versus allowing nature to take its course by letting conifers and other native trees seed in from residual trees.

Decisions To Be Made and Responsible Official

The decision to be made is whether to implement the Proposed Action as described above, or to meet the purpose and need for action through some other combination of management actions, or to defer any action at this time.

The Responsible Official is District Ranger David M. Freeland, Sequoia National Forest, Greenhorn/Cannell Meadow Ranger Districts, P.O. Box 3810, Lake Isabella, CA 93240.

Coordination With Other Agencies

In the preparation of the EIS, the Forest Service will consult with the State Historic Preservation Office, and other federal and state agencies as appropriate, as well as Native American Tribes.

Commenting

Comments received in response to this invitation to participate in public scoping or any future solicitation for public comments on a draft environmental impact statement, including names and addresses of those who comment, will be considered part of the public record and will be available for public inspection. Comments submitted anonymously will be accepted and considered. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that under the FOIA confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address.

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register.**

The Forest Service believes that, at this early stage, it is very important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of a draft environmental impact statement must structure their participation in the environmental review of the proposal so that it is meaningful and alerts the agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 533 (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 (E.D. Wis. 1980). Because of these court rulings, it is very important that persons 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 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.

Dated: April 13, 2005.

Arthur L. Gaffrey,

Forest Supervisor, Sequoia National Forest.

[FR Doc. 05–7788 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Lincoln County Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Public Law 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106–393) the Kootenai National Forest's Lincoln County Resource Advisory Committee will meet on Wednesday, May 4, 2005 at 6 p.m. at the Supervisor's Office in Libby, Montana for a business meeting. The meeting is open to the public.

DATES: May 4, 2005.

ADDRESSES: Kootenai National Forest, Supervisor's Office, 1101 U.S. Hwy 2 West, Libby, Montana.

FOR FURTHER INFORMATION CONTACT: Barbara Edgmon, Committee Coordinator, Kootenai National Forest at (406) 293–6211, or email *bedgmon@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda topics include acceptance of project proposals for funding in fiscal year 2006, status of approved projects, and receiving public comment. If the meeting date or location is changed, notice will be posted in the local newspapers, including the Daily Interlake based in Kalispell, Montana.

Dated: April 12, 2005.

Bob Castaneda,

Forest Supervisor.

[FR Doc. 05–7786 Filed 4–18–05; 8:45 am]

BILLING CODE 3410–11–M

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings: Access Board

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has scheduled its regular business meetings to take place in Washington, DC from Monday through Wednesday, May 9–11, 2005, at the times and location noted below.

DATES: The schedule of events is as follows:

Monday, May 9, 2005

10:30 a.m.–Noon, Technical Programs Committee.

1:30–3 p.m., Ad Hoc Committee on Board Election Process.

3–4, Briefing on Outdoor Developed Areas Rulemaking.

4–5, Demonstration of the Board's New Web site.

Tuesday, May 10, 2005

9 a.m.–5 p.m., Ad Hoc Committee on Public Rights-of-Way (Closed Session).

Wednesday, March 10, 2005

9–10 a.m., Planning and Budget Committee.

10–Noon, Executive Committee.

1:30–3 p.m., Board Meeting.

ADDRESSES: The meetings will be held at the Westin Embassy Row Hotel, 2100 Massachusetts Avenue, NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact Lawrence W. Roffee, Executive Director, (202) 272–0001 (voice) and (202) 272–0082 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting, the Access Board will consider the following agenda items:

- Approval of the March 9, 2005 Board Meeting Minutes.
- Ad Hoc Committee on Board Election Process Report.
- Ad Hoc Committee on Public Rights-of-Way Report.
- Technical Programs Committee Report.
- Planning and Budget Committee Report.
- Executive Committee Report.

All meetings are accessible to persons with disabilities. An assistive listening system will be available at the Board meetings. Members of the general public who require sign language interpreters must contact the Access Board by April 29, 2005. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 05–7767 Filed 4–18–05; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Former Field Representative and Enumerator Exit Questionnaire.

Form Number(s): BC–1294, BC–1294(D).

Agency Approval Number: 0607–0404.

Type of Request: Revision of a currently approved collection.

Burden: 84 hours.

Number of Respondents: 645.

Avg Hours Per Response: BC–1294—7 minutes, BC–1294(D)—10 minutes.

Needs and Uses: Field interviewers are the foundation of U.S. Census Bureau data collection programs. Retention of trained field interviewing staff is a major concern for the Census Bureau because of both the monetary costs associated with employee turnover, as well as the potential impact on data quality. High turnover among interviewers can result in a reduction in the quality of data collected, as well as increases in the cost of collecting data. In a continuous effort to devise policies and practices aimed at reducing turnover among interviewers, the Census Bureau collects data on the reasons interviewers leave the Census Bureau. The exit questionnaires (Forms BC–1294 and BC–1294(D)) are used to collect data from a sample of former survey interviewers (field representatives) and decennial census interviewers (listers and enumerators).

The purpose of the exit questionnaires is to determine the reasons for interviewer turnover and what the Census Bureau might have done, or can do to influence interviewers not to leave. As the demographics of our labor force, the nature of the surveys conducted, and the environment in which surveys take place continue to change, it is important that we continue to examine the interviewers' concerns. Information provided by respondents to the exit questionnaire provides insight on the measures the Census Bureau might take to decrease turnover, and is useful in helping to determine if the reasons for interviewer turnover appear to be systemic or localized.

The exit questionnaires seek reasons interviewers quit, inquire about motivational factors that would have kept the interviewers from leaving,

identify training program strengths and weaknesses as they impact on the decision to quit, identify supervisory style strengths and weaknesses as they impact on the decision to leave, identify the impact of automation on the decision to leave, and identify the impact of pay and other working conditions on the interviewer's decision to leave the job. The exit questionnaires have been shown to be useful and we want to continue their use.

The information collected via the Field Representative (BC–1294) and Enumerator (BC–1294D) Exit Questionnaires will help the Census Bureau develop plans to reduce turnover in its current survey and decennial interviewing staff. This, in turn, allows for better informed decisions regarding the field workforce and implementation of more effective pay plans, selection procedures, interviewer training, and retention strategies for both current and decennial interviewers.

Affected Public: Individuals.
Frequency: One time.
Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Section 23; Title 5 U.S.C., Section 3101.

OMB Desk Officer: Susan Schechter, (202) 395–5103.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Susan Schechter, OMB Desk Officer either by fax (202–395–7245) or e-mail (*susan_schechter@omb.eop.gov*).

Dated: April 15, 2005.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–7770 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Southeast Region Tilefish Quota Monitoring.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Regular submission.

Burden Hours: 19.

Number of Respondents: 4.

Average Hours Per Response: 20 minutes.

Needs and Uses: This family of forms includes data collection activities for monitoring fishery quotas, routine collections of monthly statistics from seafood dealers and interviews with fishermen to collect catch/effort and biological data. This request extends the existing collection to seafood dealers that handle the four species in the tilefish complex. This collection is necessary to monitor the fishery quota for this complex as established by the Gulf of Mexico Reef Fish Fishery Management Plan.

Affected Public: Business or other for-profit organizations; Individuals or households.

Frequency: Monthly for 10 months and every 2 weeks for last 2 months of year.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: April 14, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–7775 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: National Marine Sanctuary Permits.

Form Number(s): None.

OMB Approval Number: 0648–0141.

Type of Request: Regular submission.

Burden Hours: 1,138.

Number of Respondents: 381.

Average Hours Per Response: 1 hour and 20 minutes.

Needs and Uses: The National Marine Sanctuary (NMS) regulations list specific activities that are prohibited in the sanctuaries. These otherwise prohibited activities are permissible if a permit is issued by the NMS program. The persons wanting permits must submit applications, and persons obtaining permits must submit reports on the activity conducted under the permit. The information is needed by NMS to protect and manage the sanctuaries.

Affected Public: Business or other for-profit organizations; Individuals or households; Not-for-profit institutions; Federal government; State, local or tribal government.

Frequency: Annually and on occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: April 14, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–7776 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the emergency provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Coastal Zone Management Program Administration.

Form Number(s): None.

OMB Approval Number: 0648–0119.

Type of Request: Emergency submission.

Burden Hours: 17,974.

Number of Respondents: 35.

Average Hours Per Response: 514 hours.

Needs and Uses: Coastal zone management grants provide funds to states and territories to implement federally approved coastal zone management plans; to revise assessment documents and multi-year strategies; to submit requests to approve amendments or program changes; to submit section 306A documentation on their approved coastal zone management plans; and to submit coastal management performance measurement data. The funds are also provided to states and territories to develop their coastal management documents. The information submitted will be used to determine if activities achieve national coastal management and enhancement objectives, and if states and territories are adhering to their approved plans.

Affected Public: State, local or tribal government.

Frequency: Annually; semiannually; and on occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent before May 30, 2005 to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: April 14, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–7777 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Assessing Stakeholder Attitudes and Concerns Toward Ecosystem Management.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Regular submission.

Burden Hours: 3,333.

Number of Respondents: 10,000.

Average Hours Per Response: 20 minutes.

Needs and Uses: The NOAA National Marine Fisheries Service supports an ecosystem approach to fisheries management. However, relatively little information has been collected in a systematic manner concerning stakeholder perceptions of an ecosystem approach to management. An understanding and knowledge of stakeholder preferences for broad-level management objectives, as well as opinions toward the current management system and status of marine resources, would assist the agency in making decisions that maximize the total societal benefits from marine resources. Given the increasing emphasis on ecosystem issues, NOAA Fisheries will conduct a survey of key stakeholders concerning their preferences and perceptions of both current fisheries management and an ecosystem approach to management. The survey is well timed to establish a baseline measure of attitudes toward ecosystem approaches to management and to provide key stakeholders with the opportunity to express their preferences for the types of goals and objectives that should be pursued.

Affected Public: Business or other for-profit organizations; Individuals or households; Not-for-profit institutions; Federal government; State, local or tribal government.

Frequency: One time only.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: April 14, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–7778 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Current Population Survey, Basic Demographics.

Form Number(s): CPS–263, CPS–263(SP), CPS–263A, CPS–264, CPS–264(SP), CPS–264A, CPS–266, BC–1428, BC–1428(SP), BC–1433, BC–1433(SP), CPS–692, CPS–504.

Agency Approval Number: 0607–0049.

Type of Request: Extension of a currently approved collection.

Burden: 18,012 hours.

Number of Respondents: 55,000.

Avg Hours Per Response: 1.58 minutes.

Needs and Uses: The U.S. Census Bureau requests continued Office of Management and Budget clearance for the collection of basic demographic information on the Current Population Survey (CPS).

The CPS has been the source of official government statistics on employment and unemployment for over 50 years. The Bureau of Labor Statistics (BLS) and the Census Bureau jointly sponsor the basic monthly survey, and the Census Bureau prepares and conducts all the field work. The Census Bureau provides the BLS with data files and tables. The BLS seasonally adjusts, analyzes, and publishes the results for the labor force data in conjunction with the demographic characteristics. In accordance with the OMB's request, the Census Bureau and the BLS divide the clearance request in order to reflect the joint sponsorship and funding of the CPS program.

The demographic information provides a unique set of data on selected characteristics for the civilian noninstitutional population. Some of the demographic information we collect is age, marital status, gender, Armed Forces status, education, race, origin, and family income. We use these data in conjunction with other data, particularly the monthly labor force data, as well as periodic supplement data. We use these data also independently for internal analytic research and for evaluation of other surveys. In addition, we need these data to correctly control estimates of other characteristics to the proper proportions of age, gender, race, and origin.

We use the data from the CPS on household size and composition, age, education, ethnicity, and marital status to compile monthly averages or other aggregates for national and subnational estimates. We use these data in four principal ways: In association with other data, such as monthly labor force or periodic supplement publications; for internal analytic research; for evaluation of other surveys and survey results; and as a general purpose sample and survey.

Affected Public: Individuals or households.

Frequency: Monthly.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

OMB Desk Officer: Susan Schechter, (202) 395–5103.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Susan Schechter, OMB Desk Officer either by fax (202–395–7245) or e-mail (*susan_schechter@omb.eop.gov*).

Dated: April 15, 2005.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–7779 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[T–1–2005]

Foreign–Trade Zone 61 San Juan, Puerto Rico, Application for Temporary/Interim Manufacturing Authority, Shell Chemicals Yabucoa, Inc., (Petrochemical Complex), Notice of Approval

On February 11, 2005, an application was filed by the Executive Secretary of the Foreign–Trade Zones (FTZ) Board by the Puerto Rico Trade and Exports Company, grantee of FTZ 61, requesting temporary/interim manufacturing (T/IM) authority for certain petroleum and petrochemical products within Subzone 61I, at the Shell Chemicals Yabucoa, Inc. petrochemical complex in Yabucoa, Puerto Rico.

The application has been processed in accordance with T/IM procedures, as authorized by FTZ Board Order 1347, including notice in the **Federal Register** inviting public comment (70 FR 9614–9615, 2/28/05). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval under T/IM procedures. Pursuant to the authority delegated to the FTZ Board Executive Secretary in Board Order 1347, the application is approved, effective this date, until April 11, 2007, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Dated: April 11, 2005.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 05–7792 Filed 4–18–05; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Johns Hopkins University, School of Medicine, et al., Notice of Consolidated Decision on Applications for Duty–Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Suite 4100W, Franklin Court Building, U.S. Department of Commerce, 1099 14th Street, NW, Washington, D.C.

Docket Number: 05–011. Applicant: Johns Hopkins University, School of Medicine, Baltimore, MD 21205. Instrument: Electron Microscope, Model H–7600–I. Manufacturer: Hitachi High–Technologies Corporation, Japan. Intended Use: See notice at 70 FR 13011, March 17, 2005. Order Date: July 27, 2004.

Docket Number: 05–013. Applicant: National Institute of Standards and Technology, Gaithersburg, MD 20899. Instrument: Electron Microscope, Model Nova 600 Nanolab. Manufacturer: FEI Company, The Netherlands. Intended Use: See notice at 70 FR 13011, March 17, 2005. Order Date: September 23, 2004.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. Reasons: Each foreign instrument is an electron microscope and is intended for research or scientific educational uses. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States either at the time of order of each instrument OR at the time of receipt of application by U.S. Customs and Border Protection.

Gerald A. Zerdy,

Program Manager Statutory Import Programs Staff.

[FR Doc. E5–1846 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

University of Chicago, Notice of Decision on Application for Duty–Free Entry for Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW, Washington, D.C.

Docket Number: 05–012. Applicant: University of Chicago, Chicago, IL 60637. Instrument: Pattern Selection Triggers (63). Manufacturer: Hytec Electronics, Ltd., United Kingdom. Intended Use: See notice at 70 FR 13011, March 17, 2005. Comments: None received. Decision: Approved. No apparatus of equivalent scientific value to the foreign apparatus, for such purposes as it is intended to be used, is

being manufactured in the United States.

Reason: These articles are compatible accessories for the operation of the Very Energetic Radiation Imaging Telescope Array System in Arizona by an international consortium to study high–energy gamma rays of astronomical origin. The accessories are pertinent to the applicant's intended contribution to the project and we know of no similar domestic accessories which can be readily adapted for use with this telescope.

Gerald A. Zerdy,

Program Manager Statutory Import Programs Staff.

[FR Doc. E5–1847 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty–Free Entry of Scientific Instrument

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW, Washington, D.C.

Docket Number: 05–017. Applicant: University of Wisconsin, Madison, 1500 Engineering Drive, Madison, WI 53706. Instrument: High Power Pulsed Ultra–Fast Fiber Laser, Model FCPA µJewel B–250. Manufacturer: Aisin Seiki Co., Ltd., Japan.

Intended Use: The instrument is intended to be used to direct a laser beam through gas cells containing water vapor in order to measure the transmission spectrum of the water vapor, infer the water vapor properties and perform a detailed uncertainty analysis for the measured properties. Portable operation and high signal–to-noise ratio are required and the wavelength (1300 nm) must be suitable for H^2O vapor absorption. Application Accepted by Commissioner of Customs: March 29, 2005.

Gerald A. Zerdy,

Program Manager Statutory Import Programs Staff.

[FR Doc. E5–1848 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 041405C]

North 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 North Pacific Fishery Management Council (Council) Ecosystem Committee will meet by teleconference - 907–271–2896.

DATES: May 11, 2005, 8:30am (AST).

ADDRESSES: North Pacific Fishery Management Council, Anchorage, AK.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Chris Oliver, Council staff, Phone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The Committee will discuss recommendations on the Aleutian Islands area-specific management discussion paper. The Committee may also receive updates on the development of National 1 guidelines for ecosystem-based fishery management and the Council Chairs/Executive Directors' meeting; and may discuss the role of the North Pacific Fishery Management Council in developing an ecosystem approach to management.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at 907–271–2809 at least 7 working days prior to the meeting date.

April 14, 2005.

Emily Menashes,

Acting Director, Office of Sustainable Fisheries, National marine Fisheries Service.

[FR Doc. E5–1842 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 041505B]

North Pacific Fishery Management Council; Committee Meeting

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

ACTION: Committee Meeting

SUMMARY: The North Pacific Fishery Management Council's (Council) Crab Plan Team will meet in Seattle, WA May 16–18, 2005 at the Traynor Room at the Alaska Fishery Science Center, 7600 Sand Point Way NE, Bldg 4, Seattle, WA.

DATES: May 16, 17, and 18, 2005.

ADDRESSES: *Council address:* North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, NPFMC, 907–271–2809.

SUPPLEMENTARY INFORMATION: The meeting will begin on Monday, May 16, 12 noon - 5 pm. Tuesday, May 17, 8:30am to 5 pm. Wednesday May 18, 8:30am–3pm.

The committee's agenda includes the following: Issues related to snow crab abundance estimates based on trawl survey data, discuss analysis of spatial distribution of snow crab surveyed abundance and harvest. Review of State/Federal action plan for Crab Fishery Management Plan (FMP). Review 2004 Bering Sea Aleutian Island (BSAI) FMP crab fisheries, economic aspects of BSAI Crab fisheries. Norton Sound red king crab stock status review. Review of stock assessment models and stock status projections. Summer research issues, Bering Sea Fisheries Research Foundation survey issues. Crab overfishing amendment workgroup review and any New Business.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, 907–271–2809, at least 5 working days prior to the meeting date.

[FR Doc. E5–1843 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 041405A]

North Pacific Fishery Management Council; Notice of Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council (Council) Observer Advisory Committee will meet at the Alaska Fishery Science Center, Room 1055.

DATES: May 12–13, 2005 from 8:30 am– at the Alaska Fishery Science Center, 7600 Sand Point Way NE, Bldg 4, Room 1055, Seattle, WA 98115.

ADDRESSES: Alaska Fishery Science Center, 7600 Sand Point Way NE, Bldg 4, Room 1055, Seattle, WA 98115.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Nicole Kimball, Council staff, Phone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The Committee will review a preliminary draft of an analysis to restructure the observer deployment and funding mechanism of the North Pacific Groundfish Observer Program.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at 907–271–2809 at least 7 working days prior to the meeting date.

April 14, 2005.

Emily Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E5–1844 Filed 4–18–05; 8:45 am]

BILLING CODE 3510–22–S

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 its proposed renewal of its Innovative and Demonstration Application Instructions using the Corporation's electronic application system, eGrants. Completion of the Innovative and Demonstration Application Instructions is required to be considered for funding.

Copies of the information collection requests can be obtained by contacting the office listed in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by June 20, 2005.

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 Policy and Operations; Attention Ms. Shelly Ryan, Coordinator, Grant Reviews; 522 North Central Avenue, Room 205–A, Phoenix, AZ 85004.

(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: (602) 279–4030, Attention Ms. Shelly Ryan, Coordinator, Grant Reviews.

(4) Electronically through the Corporation's e-mail address system: *innovative@cns.gov.*

FOR FURTHER INFORMATION CONTACT: Shelly Ryan, (602) 379–4825, ext. 3 or by e-mail at *innovative@cns.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Description

The Innovative and Demonstration application instructions are used for special initiatives that are not supported by other CNCS OMB approved application instructions.

Background

The Innovative and Demonstration Application is completed by applicant organizations interested in supporting an Innovative and Demonstration program. The application instructions provide the information, instructions and forms that potential applicants need to complete and submit to the Corporation for funding. The application is completed electronically by using the Corporation's Web-based system, eGrants.

The Corporation seeks to renew and revise application instructions for Innovative and Demonstration Application Instructions using the eGrants system. When revised, the application will include additional instructions to clarify narrative and work plan sections; will contain an updated list of "Service Categories" used by applicants to identify the types of needs the national service participants will meet; and will contain current references used in the grants management system. The application will otherwise be used in the same manner as the existing application.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Innovative and Demonstration Application Instructions.

OMB Number: 3045–0083.

Agency Number: None.

Affected Public: Eligible applicants to the Corporation for funding for Innovative and Demonstrations.

Total Respondents: 300.

Frequency: On occasion.

Average Time Per Response: Twenty (20) hours.

Estimated Total Burden Hours: 6,000 hours.

Total Burden Cost (capital/startup): None.

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: April 6, 2005.

Marlene Zakai,

Director, Office of Grants Policy and Operations.

[FR Doc. 05–7752 Filed 4–18–05; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Court of Appeals for the Armed Forces Code Committee Meeting

AGENCY: United States Court of Appeals for the Armed Forces, DoD.

ACTION: Notice of public meeting; Armed Forces Code Committee meeting.

SUMMARY: This notice announces the forthcoming public meeting of the Code Committee established by Article 146(a), Uniform Code of Military Justice, 10 U.S.C. 946(a). The agenda for this meeting will include consideration of proposed changes to the Uniform Code of Military Justice and the Manual for Courts—Martial, United States, and other matters relating to the operation of the Uniform Code of Military Justice throughout the Armed Forces.

DATES: Tuesday, May 17, 2005 at 10 a.m.

ADDRESSES: Courthouse of the United States Court of Appeals for the Armed Forces, 450 E Street, NW., Washington, DC 20442–0001.

FOR FURTHER INFORMATION CONTACT: William A. DeCicco, Clerk of Court, United States Court of Appeals for the Armed Forces, 450 E Street, NW., Washington, DC 20442–0001, telephone (202) 761–1448.

Dated: April 8, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7807 Filed 4–18–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Open Meeting on the Department of Defense Directive 1344.7, "Personal Commercial Solicitation on DoD Installations"

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Notice; open meeting on the Department of Defense Directive 1344.7, "Personal Commercial Solicitation on DoD Installations".

SUMMARY: The Office of the Under Secretary of Defense for Personnel and Readiness is announcing the opportunity to provide comment on the Administrative Reissuance of Department of Defense Directive 1344.7, "Personal Commercial Solicitation on DoD Installations," dated February 13, 1986. The Department will consider the comments provided by those in attendance as it completes its review of the input received.

DATES: May 6, 2005, Friday, from 9:30 a.m. to 1:30 p.m.

ADDRESSES: The meeting will be held at the Central Library, 1015 N. Quincy Street, Arlington, VA 22201, Phone: 703–228–5990.

FOR FURTHER INFORMATION CONTACT: Colonel Michael A. Pachuta or Mr. James M. Ellis at (703) 602–4994 or (703) 602–5009 respectively, or main (703) 602–5001.

SUPPLEMENTARY INFORMATION: The Department of Defense has rewritten the existing policy governing "Personal Commercial Solicitation on DoD Installations," and is taking input on potential changes to the Administrative Reissuance of DoD Directive (DoDD) 1344.7. Inputs are welcome. If you recommend adding or deleting any provisions, please explain why succinctly. All oral comments on DoDD 1344.7, "Personal Commercial Solicitation on DoD Installations" will be limited to 5 minutes per individual/organization represented. Accompany any oral comments with a written transcript or summary.

All written comments should include full name, address and telephone number of the sender or a knowledgeable point of contact. If possible, please send an electronic version of the comments either on a 3½ inch DOS format floppy disk, or by email to the addresses listed below, in Adobe Acrobat Portable Document Format (PDF) or Microsoft Word. Because of staffing and resource limitations we cannot accept comments by facsimile, and all comments and content are to be limited to 8.5" wide by 11" high vertical page orientation. Additionally, if identical/duplicate comment submissions are submitted both electronically and in paper format, each submission should clearly indicate that it is a duplicate submission. In each comment, please specify the section of the new DoDD 1344.7 to which the comment applies. Written comments can be addressed to either Colonel Michael A. Pachuta (*Michael.Pachuta@osd.mil*) or Mr. James M. Ellis (*James.Ellis@osd.mil*), at DUSD (MC&FP), 241 S. 18th St, Crystal Square #4, Suite 302, Arlington, VA 22202.

Dated: April 14, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7937 Filed 4–15–05; 2:33 pm]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Task Force on Sexual Harassment and Violence at the Military Service Academies; Notice of Meeting

AGENCY: Department of Defense

ACTION: Notice; Defense Task Force on Sexual Harassment and Violence at the Military Service Academies—open meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 96–463, notice is hereby given that the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies will hold an open meeting at The Thayer Hotel, 674 Thayer Road, West Point, New York 10996, on May 2, 2005 from 1 p.m. to 4 p.m.

Purpose: The Task Force will meet on May 2, 2005, from 1 p.m. until 4 p.m., and this session will be open to the public, subject to the availability of space. In keeping with the spirit of Federal Advisory Committee Act, it is the desire of the Task Force to provide the public with an opportunity to ask questions of the Task Force or to make comment regarding the current work of the Task Force. The first hour of the meeting will be designated for any public comment. During the final two hours, the Task Force as a whole will discuss findings and recommendations regarding victims' rights and services, accountability, training, and community collaboration at the U.S. Military and

Naval Academies. Any interested citizens are encouraged to attend.

DATES: May 2, 2005/1 p.m.–4 p.m.

Location: The Thayer Hotel, 674 Thayer Road, West Point, New York 10996.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit comments must contact: Mr. William Harkey, Public Affairs Officer, Task Force on Sexual Harassment and Violence at the Military Service Academies, 2850 Eisenhower Ave., Suite 100, Alexandria, Virginia 22314, Telephone: (703) 325–6640, DSN# 221–6640, Fax: (703) 325–6710/6711, *william.harkey.CTR@wso.whs.mil.*

Interested persons may submit a written statement for consideration by the Task Force and make an oral presentation of such. Persons desiring to make an oral presentation or submit a written statement to the Task Force must notify the point of contact listed above no later than 5 p.m., April 27, 2005. Oral presentations by members of the public will be permitted only on May 2, 2005, from 1 p.m. until 2 p.m. before the full Task Force. Presentations will be limited to ten minutes each. Number of oral presentations to be made will depend on the number of requests received from members of the public and the time allotted. Each person desiring to make an oral presentation must provide the point of contact listed above with one (1) written copy of the presentation by 5 p.m., April 27, 2005 and bring 15 written copies of any material that is intended for distribution at the meeting. Persons submitting a written statement must submit 15 written copies of the statement to the Task Force staff by 5 p.m. on April 27, 2005.

General Information: Additional information concerning the Defense Task Force on Sexual Harassment and Violence at The Military Service Academies, its structure, function, and composition, may be found on the DTFSH and VTMA Web site (*http://www.dtic.mil/dtfs*).

Dated: April 14, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7808 Filed 4–18–05; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Task Force on Sexual Harassment and Violence at the Military Service Academies; Notice of Meeting

AGENCY: Department of Defense.

ACTION: Notice; Defense Task Force on Sexual Harassment and Violence at the Military Service Academies—open meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 96–463, notice is hereby given that the Defense Task Force on Sexual Harassment and Violence at the Military Academies will hold an open meeting at Loews Annapolis Hotel, 126 West Street, Annapolis, MD 21401, on May 3, 2005, from 8:30 a.m. to 11:30 a.m.

Purpose: The Task Force will meet on May 3, 2005, from 8:30 a.m. to 11:30 a.m., and this session will be open to the public, subject to the availability of space. In keeping with the spirit of Federal Advisory Committee Act, it is the desire of the Task Force to provide the public with an opportunity to ask questions of the Task Force or to make comment regarding the current work of the Task Force. The first hour of the meeting will be designated for any public comment. During the final two hours, the Task Force as a whole will discuss findings and recommendations regarding victims' rights and services, accountability, training, and community collaboration at the U.S. Military and Naval Academies. Any interested citizens are encouraged to attend.

DATES: May 3, 2005, 8:30 a.m.–11:30 a.m.

Location: Loews Annapolis Hotel, 126 West Street, Annapolis, Maryland 21401.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit comments must contact: Mr. William Harkey, Public Affairs Officer, Task Force on Sexual Harassment and Violence at the Military Service Academies, 2850 Eisenhower Ave, Suite 100, Alexandria, Virginia 22314, Telephone: (703) 325–6640, DSN# 221–6640, Fax: (703) 325–6710/6711, *william.harkey.CTR@wso.whs.mil.*

Interested persons may submit a written statement for consideration by the Task Force and make an oral presentation of such. Persons desiring to make an oral presentation or submit a written statement to the Task Force must notify the point of contact listed above no later than 5 p.m., April 27, 2005. Oral presentations by members of the public will be permitted only on May 3, 2005, from 8:30 a.m. until 9:30 a.m. before the full Task Force. Presentations will be limited to ten minutes each. Number of oral presentations to be made will depend on the number of requests received from members of the public and the time allotted. Each person desiring to make an oral presentation must provide the point of contact listed above with one (1) written copy of the presentation by 5 p.m., April 27, 2005 and bring 15 written copies of any material that is intended for distribution at the meeting. Persons submitting a written statement must submit 15 written copies of the statement to the Task Force staff by 5 p.m. on April 27, 2005.

General Information: Additional information concerning the Defense Task Force on Sexual Harassment and Violence at The Military Service Academies, its structure, function, and composition, may be found on the DTFSH and VTMA Web site (*http://www.dtic.mil/dtfs*).

Dated: April 14, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7809 Filed 4–18–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Board of Advisors (BOA) to the Superintendent, Naval Postgraduate School (NPS)

AGENCY: Department of the Navy, DOD.

ACTION: Notice of open meeting.

SUMMARY: The purpose of the meeting is to elicit the advice of the board on the Naval Service's Postgraduate Education Program and the collaborative exchange and partnership between NPS and the Air Force Institute of Technology (AFIT). The board examines the effectiveness with which the NPS is accomplishing its mission. To this end, the board will inquire into the curricula; instruction; physical equipment; administration; state of morale of the student body, faculty, and staff; fiscal affairs; and any other matters relating to the operation of the NPS as the board considers pertinent. This meeting will be open to the public.

DATES: The meeting will be held on Wednesday, April 20, 2005, from 8 a.m. to 4 p.m. and on Thursday, April 21, 2005, from 8 a.m. to 12 p.m. All written comments regarding the NPS BOA

should be received by April 8, 2005, and be directed to President, Naval Postgraduate School (Attn: Jaye Panza), 1 University Circle, Monterey, CA 93943–5000 or by fax (831) 656–3145.

ADDRESSES: The meeting will be held at the Naval Postgraduate School, Herrmann Hall, 1 University Circle, Monterey, CA.

FOR FURTHER INFORMATION CONTACT: Jaye Panza, Naval Postgraduate School, Monterey, CA 93943–5000, telephone number (831) 656–2514.

Dated: April 14, 2005.

I.C. Le Moyne, Jr.,

Lieutenant, Judge Advocate Generals Corps, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 05–7886 Filed 4–18–05; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education; Overview Information; Enhanced Assessment Instruments; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

Catalog of Federal Domestic Assistance (CFDA) Number: 84.368.

Dates: Applications Available: April 19, 2005.

Deadline for Transmittal of Applications: June 3, 2005.

Eligible Applicants: State educational agencies; Consortia of State educational agencies.

Estimated Available Funds: $11,680,000 in FY 2005 funds.

Estimated Range of Awards: $500,000 to $2,000,000.

Estimated Average Size of Awards: $1,460,000.

Estimated Number of Awards: 8.

Note: The Department is not bound by any estimates in this notice. In no case will an award be made for less than the amount specified in section 6113(b)(2)(A)(ii) of the Elementary and Secondary Education Act of 1965, as amended (ESEA) 20 U.S.C. 7301b(b)(2)(A)(ii).

Project period: Up to 20 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: To enhance the quality of assessment instruments and systems used by States for measuring the achievement of all students.

Priorities: These priorities are from Appendix E to the notice of final requirements for optional State consolidated applications submitted under section 9302 of the ESEA , published in the **Federal Register** on May 22, 2002 (67 FR 35967, 35979).

Competitive Preference Priorities: For FY 2005, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we will award up to an additional 35 points to an application, depending on the extent to which the application meets these priorities.

These priorities are: Test accommodations and alternate assessments (up to 15 points), collaborative efforts (up to 10 points), and dissemination beyond the original grantee or grant collaborative (up to 10 points).

Note: The full text of these priorities is included in the application package.

Program Authority: 20 U.S.C. 7842 and 7301a.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $11,680,000 in FY 2005 funds.

Estimated Range of Awards: $500,000 to $2,000,000.

Estimated Average Size of Awards: $1,460,000.

Estimated Number of Awards: 8.

Note: The Department is not bound by any estimates in this notice. In no case will an award be made for less than the amount specified in section 6113(2)(A)(ii) of the ESEA, 20 U.S.C. 7301b(b)(2).

Project period: Up to 20 months.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies; Consortia of State educational agencies.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

3. *Other:* An application from a consortium of State educational agencies must designate one State educational agency as the fiscal agent.

IV. Application and Submission Information

1. *Address to Request Application Package:* Zollie Stevenson, Jr., Student Achievement and School Accountability Program, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W200, Washington, DC 20202–6132. Telephone: 202–260–1824 or by e-mail: *Zollie.Stevenson@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Section 6112(a) of the ESEA (20 U.S.C. 7301a(a)) requires that all funded applications demonstrate that States (or consortia of States) will—

a. Collaborate with institutions of higher education, other research institutions, or other organizations to improve the quality, validity, and reliability of State academic assessments beyond the requirements for the assessments described in section 1111(b)(3) of the ESEA;

b. Measure student academic achievement using multiple measures of student academic achievement from multiple sources;

c. Chart student progress over time;

d. Evaluate student academic achievement through the development of comprehensive academic assessment instruments, such as performance and technology-based academic assessments.

Other requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 40 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only with 1″ margins at the top, bottom, and both sides.
- Double space (no more than 3 lines per vertical inch) all text and use a font no smaller than 10 point for all text in the application narrative, including titles, headings, footnotes, quotations, and captions as well as all text in charts, tables, figures, and graphs.
- Your cover sheet, budget section (chart and narrative), assurances and certifications, response regarding research activities involving human subjects, GEPA 427 response, one-page abstract, personnel résumés, and letters of support are not included in the page limit; however, discussion of how well the application meets the competitive preference priorities and how well the application addresses each of the selection criteria must be included within the page limit:

Our reviewers will not read any pages of your application that—

- Exceed the page limit if you apply these standards; or
- Exceed the equivalent of the page limit if you apply other standards.

3. *Submission Dates and Times: Applications Available:* April 19, 2005.

Deadline for Transmittal of Applications: June 3, 2005.

The dates and times for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this competition.

We do not consider an application that does not comply with the deadline requirements.

4. *Intergovernmental Review:* This competition is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Instructions and requirements for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this competition.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are in the application package and were published in Appendix E to the Notice of Final Requirements published in the **Federal Register** on May 22, 2002 (67 FR 35967, 35979).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notice (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Under the Government Performance and Results Act (GPRA), three measures have been developed for evaluating the overall effectiveness of the Enhanced Assessment Instruments program: The number of states that participated in pilot activities described in each proposal; the number of States that participated in Enhanced Assessment grant projects funded by the current or prior competitions; and the number of presentations at national conferences sponsored by professional education organizations and papers submitted for publication in refereed journals.

All grantees will be expected to submit an annual performance report documenting their success in addressing the performance measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Sue Rigney, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C139, Washington, DC 20202–6132. Telephone: (202) 260–0931, or by e-mail *Sue.Rigney@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: April 14, 2005.

Raymond Simon,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 05–7798 Filed 4–18–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995), intends to extend for three years, an information collection package with the Office of Management and Budget (OMB) concerning information "Technology Partnerships Ombudsmen Reporting Requirements." The ombudsman appointed at each DOE National Laboratory must submit reports to DOE on the number and nature of complaints and disputes raised by outside organizations regarding the policies and actions of each laboratory with respect to technology transfer partnerships, including Cooperative Research and Development Agreements, patents, and technology licensing. The reports must also include an assessment of the ombudsman's resolution to the disputes. Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, 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 through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

DATES: Comments regarding this proposed information collection must be received on or before June 20, 2005. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to: Sharon A. Evelin, IM–11, U.S. Department of Energy, 19901 Germantown Road, Germantown, Maryland 20874; or by fax at 301–903–9061 or by e-mail at *sharon.evelin@hq.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Sharon A. Evelin at the address listed in **ADDRESSES.**

SUPPLEMENTARY INFORMATION: This package contains: (1) *OMB No.:* 1910–5118; (2) *Package Title:* "Technology Partnerships Ombudsmen Reporting Requirements"; (3) *Type of Review:* Renewal; (4) *Purpose:* The information collected will be used to determine whether the Technology Partnerships Ombudsmen are properly hearing and helping to resolve complaints from outside organizations regarding laboratory policies and actions with respect to technology partnerships. (5) *Respondents:* 24 (6) *Estimated Number of Burden Hours:* 100.

Statutory Authority: Public Law 106–404, Technology Transfer Commercialization Act of 2000.

Issued in Washington, DC, on April 11, 2005.

Sharon Evelin,

Director, Records Management Division, Office of the Chief Information Officer.

[FR Doc. 05–7771 Filed 4–18–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Research and Development for Fuel Cell Technologies for Automotive and Stationary Applications

AGENCY: Golden Field Office, U.S. Department of Energy (DOE).

ACTION: Notice of pre-announcement meeting for Financial Assistance Funding Opportunity Announcement (FOA) Number DE–PS36–05GO95018.

SUMMARY: The Office of Hydrogen, Fuel Cells and Infrastructure Technologies of the DOE Office of Energy Efficiency and Renewable Energy is soliciting financial assistance applications for cost-shared financial assistance agreements with the DOE for research and development that will enhance fuel cell technology. DOE intends to provide financial support under provisions of the Energy Policy Act of 1992.

DATES: Pre-Announcement Meeting to be held 1 p.m. EDT, May 26, 2005, with the planned issuance of the FOA in August 2005.

ADDRESSES: The Pre-Announcement meeting will be held 1 p.m. EDT, May 26, 2005, at the Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, VA 22202.

SUPPLEMENTARY INFORMATION: In preparation for the meeting, DOE is issuing a draft FOA Description for public comments. Comments may include suggestions for research and development topic areas. The Draft FOA Description, instructions on submitting questions and comments, and additional information will be posted on the DOE Hydrogen, Fuel Cells and Infrastructure Technologies Program Web site at *http://www.eere.energy.gov/hydrogenandfuelcells* on or about April 15, 2005. Questions and comments should be submitted to DOE at *fuelcells@go.doe.gov* by May 15, 2005, so that DOE can answer as many questions as possible at the May 26th meeting. Proceedings from the meeting will be posted on the Web site at *http://www.eere.energy.gov/hydrogenandfuelcells*. DOE intends to release the FOA around August 2005, with awards to be made about a year later.

FOR FURTHER INFORMATION CONTACT: Reginald Tyler, Project Officer via e-mail at *fuelcells@go.doe.gov*. Further information on DOE's Hydrogen, Fuel Cells and Infrastructure Technologies Program can be viewed at *http://www.eere.energy.gov/hydrogenandfuelcells*.

Issued in Golden, Colorado, on April 4, 2005.

Matthew A. Barron,

Acting Director, Office of Acquisition and Financial Assistance.

[FR Doc. 05–7774 Filed 4–18–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–231–001]

CenterPoint Energy—Mississippi River Transmission Corporation; Notice of Tariff Filing

April 12, 2005.

Take notice that on April 6, 2005, CenterPoint Energy—Mississippi River Transmission Corporation (MRT) tendered for filing as part of its FERC Gas Tariff Third Revised Volume No. 1, Third Revised Sheet No. 226B, to remove the remaining portion of its tariff provisions implementing the *CIG/Granite State*[1] policy, to be effective April 17, 2005.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1820 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

[1] *Colorado Interstate Gas Co.*, 95 FERC ¶ 61,321 (2001) (*CIG*) and *Granite State Transmission Co.*, 96 FERC ¶ 61,273 (2001) (*Granite State*).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–172–001]

CenterPoint Energy—Mississippi River Transmission Corporation; Notice of Compliance Filing

April 13, 2005.

Take notice that on March 23, 2005, CenterPoint Energy—Mississippi River Transmission Corporation (MRT) tendered for filing additional information to comply with the Commission's Order Accepting and Suspending Tariff Sheets, Subject to Conditions and Further Commission Action, issued on March 23, 2005, in Docket No. RP05–172–000.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. eastern time on April 20, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1834 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–305–020]

CenterPoint Energy—Mississippi River Transmission Corporation; Notice of Negotiated Rate Filing

April 13, 2005.

Take notice that on April 8, 2005, CenterPoint Energy—Mississippi River Transmission Corporation (MRT) tendered for filing and approval a negotiated rate agreement between MRT and Laclede Energy Resources, Inc. for parking service under Rate Schedule PALS. MRT requests that the Commission accept and approve the transaction to be effective May 1, 2005.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1836 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP03–75–002]

Freeport LNG Development, L.P.; Notice of Petition To Amend

April 11, 2005.

Take notice that on April 1, 2005, Freeport LNG Development, L.P. (Freeport LNG), 1200 Smith Street, Suite 600, Houston, Texas 77002, filed in Docket No. CP03–75–002, a petition to amend the Commission order issued June 18, 2004, pursuant to section 3 of the Natural Gas Act. Freeport LNG states that it seeks to modify the diameter of the 9.6-mile send-out pipeline from 36-inches to 42 inches to accommodate future expansion of the Freeport LNG import terminal facilities.

This petition is on file with the Commission and open to public inspection. 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 for TTY, contact (202) 502–8659.

Any initial questions regarding this petition should be directed to counsel for Freeport LNG, Lisa M. Tonery, King and Spalding LLP, at (212) 556–2307 (phone), (212) 556–2222 (fax), or *ltonery@kslaw.com*.

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, 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 filings made with the Commission and must mail a copy 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.

Persons who wish to comment only on the environmental review of this project, or in support of or in opposition to this project, should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the applicant. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

Comment Date: 5 p.m. eastern time on May 2, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1829 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05–99–000]

Gulf South Pipeline Company, LP; Notice of Application

April 13, 2005.

Take notice that on March 30, 2005, Gulf South Pipeline Company, LP, 20 East Greenway, Houston, Texas 77046, filed in the above referenced docket, an application pursuant to Section 7(b) of the Natural Gas Act (NGA), requesting permission and approval to abandon, in place, the Lafayette Compressor Station in Lafayette Parish, Louisiana, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web 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.

Specifically, Gulf South explains that the facilities to be abandoned in place, include four 1,100 horsepower reciprocating compressors, the main compressor building, the suction and discharge piping and associated valves, the fin fan coolers and building, the jacket water cooling system (rainwater tanks and facilities), the generator building, the water treatment system and building, the gas cooling and dehydration systems and buildings, and other related plant piping and minor associated structures. Gulf South asserts that the abandonment is necessitated by a change in natural gas markets served by Gulf South in southeast Louisiana and that the proposed abandonment will have no effect on the capacity and services currently provided by Gulf South.

Any questions regarding this application should be directed to J. Kyle Stephens, Director of Certificates, Gulf South Pipeline Company, LP, 20 East Greenway Plaza, Houston, Texas 77046, phone (713) 544–7309.

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, 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 filings made with the Commission and must mail a copy 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 Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

Comment Date: May 4, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1830 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–266–000]

Northern Natural Gas Company; Notice of Tariff Filing

April 12, 2005.

Take notice that on April 4, 2005, Northern Natural Gas Company (Northern) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, with an effective date of May 5, 2005:

Eighth Revised Sheet No. 101
Third Revised Sheet No. 102
Fourth Revised Sheet No. 116
Fourth Revised Sheet No. 117
Second Revised Sheet No. 308

Northern states that the filing is being filed to incorporate a full requirements option into Rate Schedule TF and Rate Schedule TFX.

Northern states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or

protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1819 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2181–000]

Northern States Power Company; Notice of Authorization for Continued Project Operation

April 12, 2005.

On February 10, 2003, Northern States Power Company, licensee for the Menomonie Project No. 2181, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2181 is located on the Red Cedar River in Dunn County, Wisconsin.

The license for Project No. 2181 was issued for a period ending March 31, 2005. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2181 is issued to Northern States Power Company for a period effective April 1, 2005 through March 31, 2006, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before April 1, 2006, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Northern States Power Company is authorized to continue operation of the Menomonie Project No. 2181 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1823 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2697–000]

Northern States Power Company; Notice of Authorization for Continued Project Operation

April 11, 2005.

On February 10, 2003, Northern States Power Company, licensee for the Cedar Falls Project No. 2697, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2697 is located on the Red Cedar River in Dunn County, Wisconsin.

The license for Project No. 2697 was issued for a period ending March 31, 2005. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2697 is issued to Northern States Power Company for a period effective April 1, 2005 through March 31, 2006, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before April 1, 2006, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Northern States Power Company is authorized to continue operation of the Cedar Falls Project No. 2697 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1828 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–264–000]

Questar Southern Trails Pipeline Company; Notice of Tariff Filing

April 12, 2005.

Take notice that on April 1, 2005, Questar Southern Trails Pipeline Company (Southern Trails) tendered for filing as part of its FERC Gas Tariff Original Volume No. 1, the following tariff sheets, to be effective May 1, 2005:

Fourth Revised Sheet No. 1
Fourth Revised Sheet No. 30
Third Revised Sheet No. 112
Second Revised Sheet No. 113

Southern Trails states it is proposing to remove tariff provisions implementing the Commission's *CIG/Granite State* [1] policy concerning a shipper's retention of its discounted rates when a secondary point is used.

Southern Trails states that a copy of this filing has been served upon its customers and the Public Service Commissions of Utah, New Mexico, Arizona, and California.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

[1] *Colorado Interstate Gas Co.*, 95 FERC ¶ 61,321 (2001) (*CIG*) and *Granite State Transmission Co.*, 96 FERC ¶ 61,273 (2001) (*Granite State*).

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1822 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP02–405–001]

SG Resources Mississippi, L.L.C.; Notice of Filing

April 13, 2005.

Take notice that on April 6, 2005, SG Resources Mississippi, L.L.C. (SGRM), filed with the Commission a petition under Section 7 of the Natural Gas Act seeking reaffirmation of a Commission order granting under Section 7(c)(1)(B) of the Natural Gas Act a temporary exemption permitting construction, completion and operation of a water supply test/observation well required in connection with the development of the Southern Pines Energy Center, a new salt cavern natural gas storage project to be located in Greene County. *SG Resources Mississippi, L.L.C.* 100 FERC ¶ 61,203 (2002).

SGRM also asks that the Commission establish a new date by which the authorized well drilling and testing procedures must be completed of August 31, 2005.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC. 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1831 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2174–000]

Southern California Edison Company; Notice of Authorization for Continued Project Operation

April 11, 2005.

On March 27, 2003, Southern California Edison Company, licensee for the Portal Project No. 2174, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2174 is located on Camp 61 Creek and Rancheria Creek in Fresno County, California.

The license for Project No. 2174 was issued for a period ending March 31, 2005. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise

disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2174 is issued to Southern California Edison Company for a period effective April 1, 2005 through March 31, 2006, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before April 1, 2006, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Southern California Edison Company is authorized to continue operation of the Portal Project No. 2174 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1826 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–205–006]

Southern Natural Gas Company; Notice of Negotiated Rate Filing

April 13, 2005.

Take notice that on April 8, 2005, Southern Natural Gas Company (Southern) tendered for filing its Negotiated Rate Tariff Filing to adopt during an interim period the settlement rates proposed as part of its rate settlement in Docket No. RP04–523 for certain customers that have elected to be consenting parties to the rate settlement.

Southern requests that the Commission grant such approval of the tariff sheets effective March 1, 2005.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1835 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–253–000]

Vector Pipeline L.P.; Notice of Annual Fuel Use Report

April 12, 2005.

Take notice that on March 31, 2005, Vector Pipeline L.P., (Vector) tendered for filing its annual report of monthly fuel use ratios for the period January 1, 2004 through December 31, 2004. Vector states that this filing is made pursuant to section 11.4 of the General Terms and Conditions of the Vector Gas Tariff and section 154.502 of the Commission's regulations.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Intervention and Protest Date: 5 p.m. eastern time on April 19, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1821 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–107–003, et al.]

La Paloma Generating Company LLC, et al.; Electric Rate and Corporate Filings

April 12, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. La Paloma Generating Company, LLC

[Docket No. ER00–107–003]

Take notice that on March 31, 2005, La Paloma Generating Company, LLC submitted its triennial market power update and certain revisions to its market–based rate tariff.

Comment Date: 5 p.m. eastern time on April 21, 2005.

2. California Independent System Operator Corporation; Pacific Gas and Electric Company; San Diego Gas and Electric Company; Southern California Edison Company.

[Docket Nos. ER04–445–009, ER04–435–011, ER04–441–007 and ER04–443–007]

Take notice that on April 5, 2005, the California Independent System Operator Corporation (CAISO) filed a response to the Commission's February 25, 2005 letter requesting additional information with respect to the January 5, 2005 Large Generator Interconnection Procedures filing by CAISO and the joint January 5, 2005 Large Generator Interconnection Agreement filing by CAISO, Pacific Gas & Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company.

The CAISO states that a copy of the filing has been served on all parties listed on the official service lists in the above–captioned proceedings.

Comment Date: 5 p.m. eastern time on April 26, 2005.

3. Mid–Continent Area Power Pool

[Docket No. ER04–960–004]

Take notice that on April 5, 2005, the Mid–Continental Area Power Pool (MAPP), on behalf of its individual public utility members, submitted a compliance filing pursuant to the Commission's order issued March 16, 2005 in *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶61,290 (2005).

MAPP states that a copy of the filing has been posted on the MAPP Web site at *www.mapp.org.*

Comment Date: 5 p.m. eastern time on April 26, 2005.

4. North American Electric Reliability Council

[Docket No. ER05–580–002]

Take notice that on April 5, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a compliance filing to confirm that the current version of the North American Electric Reliability Council's Transmission Loading Relief procedures are incorporated in Attachement Q of the Midwest ISO's Open Access Transmission Energy Markets Tariff, pursuant to the Commission's order issued March 30, 2005 in *North American Electric Reliability Council,* 110 FERC ¶61,288 (2005).

Comment Date: 5 p.m. eastern time on April 26, 2005.

5. Pacific Gas and Electric Company

[Docket Nos. ER05–777–000 and ER05–777–001]

Take notice that on April 4, 2005, as amended April 7, 2005, Pacific Gas and Electric (PG&E) tendered for filing the 2003 true–up of rates pursuant to Contract No. 14–06–200–2948A, PG& E First Revised Rate Schedule FERC No. 79, between PG&E and the Western Area Power Administration (Western).

PG&E states that copies of the filing have been served on Western and the California Public Utilities Commission.

Comment Date: 5 p.m. eastern time on April 28, 2005.

6. USGen New England Inc.

[Docket No. ER05–780–000]

Take notice that on April 5, 2005, USGen New England, Inc. (USGenNE) submitted a Notice of Cancellation of Service Agreement No. 20 under FERC Electric Tariff, Original Vol. No. 1, between USGenNE and New England Power Company.

USGenNE states that the filing has been served on New England Power Company.

Comment Date: 5 p.m. eastern time on April 26, 2005.

7. Virginia Electric and Power Company

[Docket No. ER05–781–000]

Take notice that on April 5, 2005, Virginia Electric and Power Company tendered for filing a letter agreement between Dominion Virginia Power (Dominion) and Virginia Municipal Electric Association No. 1 (VMEA). Dominion requests an effective date of June 4, 2005.

Dominion states that copies of the filing were served on VMEA, the Virginia State Corporation Commission and the North Carolina Utilities Commission.

Comment Date: 5 p.m. eastern time on April 26, 2005.

8. Kentucky Utilities Company

[Docket No. ER05–782–000]

Take notice that on April 5, 2005, Kentucky Utilities Company (KU) tendered for filing an executed amendment to the interconnection agreement between KU and East Kentucky Power Cooperative, Inc. to provide for the construction of facilities to add an additional interconnection point on KU's transmission system. KU requests an effective date of April 5, 2005.

Comment Date: 5 p.m. eastern time on April 26, 2005.

9. Tucson Electric Power Company

[Docket No. ER05–783–000]

Take notice that on April 5, 2005, Tucson Electric Power Company (Tucson Electric) submitted for filing a Control Area Services Agreement between Tucson Electric and Morenci Water & Electric Company. Tucson Electric requests an effective date of August 18, 2004.

Comment Date: 5 p.m. eastern time on April 26, 2005.

10. El Paso Electric Company

[Docket No. ES05–25–000]

Take notice that on April 1, 2005, El Paso Electric Company (El Paso) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to issue long–term debt in the form of first mortgage bonds or unsecured bonds in an amount not to exceed $400 million.

El Paso also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: 5 p.m. eastern time on April 19, 2005.

11. Old Dominion Electric Cooperative

[Docket No. ES05–26–000]

Take notice that on April 7, 2005, Old Dominion Electric Cooperative (Old Dominion) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to guarantee obligations in an amount not to exceed $100 million at any one time.

Old Dominion also requests waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: 5 p.m. eastern time on May 3, 2005.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on–line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1845 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Intent To File Application for Subsequent License

April 11, 2005.

Take notice that the following notice of intent has been filed with the Commission and is available for public inspection:

a. *Type of filing:* Notice of Intent To File Application for a Subsequent License.

b. *Project No:* 733–000.

c. *Date filed:* April 4, 2005.

d. *Submitted by:* Eric R. Jacobson.

e. *Name of Project:* Ouray Project.

f. *Location:* The project is located on the Uncompahgre River in Ouray County, Colorado. The project occupies 4.38 acres of U.S. Forest Service lands.

g. *Filed Pursuant to:* 18 CFR 16.6.

h. *Effective date of current license:* January 1, 1980.

i. *Expiration date of current license:* April 12, 2010.

j. *Project Description:* The project consists of the following existing facilities: (1) A 1.06-acre reservoir; (2) a 70-foot-long masonry, gravity dam with a maximum height of 72 feet, a 51-foot-long non-overflow section and a 19-foot-wide spillway; (3) a 6,130-foot-long pipeline; (4) a powerhouse containing three generating units with a total authorized capacity of 632 kilowatts; and (5) appurtenant facilities.

k. Pursuant to 18 CFR 16.7, information on the project is available from Eric R. Jacobson, Ouray Hydro Plant, 303 Oak Street, Ouray, CO 81427; (970) 729–0034.

l. FERC Contact: Steve Hocking at 888 First Street NE., Washington, DC 20426; (202) 502–8753 or *steve.hocking@ferc.gov.*

m. The licensee states its unequivocal intent to submit an application for a subsequent license for Project No. 733. Pursuant to 18 CFR 16.8, 16.9, and 16.10, each application for a license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by April 12, 2008.

n. A copy of 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, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY (202) 502–8659. A copy is also available for inspection and reproduction at the address in item k above.

o. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support as shown in the paragraph above.

p. By this notice, the Commission is seeking corrections and updates to the attached mailing list for the Ouray Project. Updates should be filed with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1824 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

April 11, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of License.

b. *Project No:* 2004–176.

c. *Date filed:* March 23, 2005.

d. *Applicant:* City of Holyoke Gas & Electric Company.

e. *Name of Project:* Holyoke Hydroelectric Project.

f. *Location:* The project is located on the Connecticut River, in Hampden, Hampshire, and Franklin Counties, Massachusetts.

g. *Filed Pursuant to:* License Article 418; Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Paul Ducheney, 66 Suffolk St., Holyoke, MA 01040, (413) 536–9340.

i. *FERC Contact:* Any questions on this notice should be addressed to Hillary Berlin at (202) 502–8915, or e-mail address: *hillary.berlin@frec.gov.*

j. *Deadline for filing comments and or motions:* May 9, 2005.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2004–176) on any comments or motions filed. Comments, 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 e-filings.

k. *Description of Application:* The licensee filed an application to amend article 418 of the license and the Comprehensive Recreation and Land Management Plan. Specifically, the licensee proposes to provide a conservation restriction on 101.5 acres of lands in the Bachelor Brook/Stony Brook natural area. The licensee also proposes to include 62 acres of the parcel within the project boundary.

l. *Location of Application:* The filing is available for review at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, 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 (866) 208–3676 or TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions To Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, 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 at *http://www.ferc.gov* under the "e-Filing" link.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1825 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Applications for Non-Project Use of Project Lands and Soliciting Comments, Motions To Intervene, and Protests

April 11, 2005.

Take notice that the following applications have been filed with the Commission and are available for public inspection:

a. *Application Types:* Non-Project Use of Project Lands and Modification of Non-Project Use of Project Lands.

b. *Project Nos:* 2210–117 and 2210–118.

c. *Dates Filed:* March 22, 2005.

d. *Applicant:* Appalachian Power Company (APC).

e. *Name of Project:* Smith Mountain Pumped Storage Project.

f. *Location:* The project is located on the Roanoke River, in Bedford, Pittsylvania, Franklin, and Roanoke Counties, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a) 825(r) and 799 and 801.

h. *Applicant Contact:* Teresa P. Rogers, Hydro Generation Department, American Electric Power, P.O. Box 2021, Roanoke, VA 24022–2121, (540) 985–2441.

i. *FERC Contact:* Any questions on this notice should be addressed to Mrs. Heather Campbell at (202) 502–6182, or e-mail address: *heather.campbell@ferc.gov.*

j. *Deadline for filing comments and or motions:* May 9, 2005.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2210–117 for the Bay Roc Marina and P–2210–118 for the Lake Watch Property) on any comments or motions filed. Comments, 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 at *http://www.ferc.gov* under the e-Filing link. The Commission strongly encourages e-filings.

k. *Description of Requests:* APC is requesting approval for the following non-project uses of project lands:

P–2210–117: Bay Roc Marina L.L.C. proposes constructing a dock with a total of four slips for houseboats at the existing marina. The facilities would be located on the Roanoke River in the Hardy Bridge area at Bay Roc Marina located off Route 634.

P–2210–118: Lake Watch L.L.C is proposing to construct a total of three community docks with a total of 26 slips to serve single-family type dwellings. The facilities would be located along the Indian Creek portion of the Roanoke River on Smith Mountain Lake at an area known as Lake Watch, a proposed residential subdivision.

l. *Location of the Application:* This filing is available for review at the Commission in the Public Reference Room 888 First Street, NE., Room 2A, Washington, DC 20426 or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "e-library" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY 202–502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS

AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described applications. Copies of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1827 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9974–055]

Rough & Ready Water Power Company, LLC; Notice of Application for Temporary Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

April 13, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Request to amend exemption to replace existing single powerhouse unit with two refurbished units that equal the capacity of the existing unit.

b. *Project Number:* P–9974–055.

c. *Date Filed:* March 22, 2005.

d. *Applicant:* Rough & Ready Water Power Company, LLC.

e. *Name of Project:* Upper Watertown Hydroelectric Project (FERC No. 9974).

f. *Location:* The project is located on the Rock River in the City of Watertown, Jefferson County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a) 825(r) and 799 and 801.

h. *Applicant Contact:* Mr. Thomas J. Reiss, Jr., P.O. Box 553, Watertown, WI 53094, Phone (920) 261–7975.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Robert Fletcher at (202) 502–8901, or e-mail address: *robert.fletcher@ferc.gov.*

j. *Deadline for filing comments and/or motions:* May 16, 2005.

k. *Description of Request:* The exemptee is proposing that the existing single powerhouse unit be removed and replaced with two refurbished units. The current Flygt unit has a nameplate capacity of 265 kilowatts (kW), with a minimum hydraulic capacity of 90 cubic feet per second (cfs) and a maximum of 330 cfs. The new proposed units will be Leffel type B and Leffel type F. The Leffel type B will have a nameplate capacity of 80 kW, with a minimum hydraulic capacity of 35 cfs and a maximum of 100 cfs. The Leffel type F will have a nameplate capacity of 185 kW, with a minimum hydraulic capacity of 90 cfs and a maximum of 230 cfs. Combined, the two proposed units will have the same nameplate capacity (265 kW) and maximum hydraulic capacity (330 cfs) as the current unit. The exemptee states the proposed units will allow a greater operating range and will eliminate wide fluctuations in upstream water levels. The exemptee has consulted and received concurrence from the U.S. Fish and Wildlife Service and the Wisconsin Department of Natural Resources on the proposed change as indicated by letters dated March 11, 2005, and March 15, 2005, respectively.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also 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. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers (p–9974–055). All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, 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 at *http://www.ferc.gov* under the "e-Filing" link.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1833 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL04–3–000]

Natural Gas Interchangeability; Notice of Technical Conference

April 13, 2005.

On February 28, 2005, the Natural Gas Council (NGC) filed two reports in the captioned docket: *White Paper on Liquid Hydrocarbon Drop Out in Natural Gas Infrastructure and White Paper on Natural Gas Interchangeability and Non-Combustion End Use.* Representatives of the NGC summarized the reports at the Commission's March

2, 2005 open meeting. Subsequently, the Commission received a number of written comments on the reports. The Commission posted the reports on its website at *http://www.ferc.gov*, and the public comments are also available on the Commission's Web site under the eLibrary system.

The Commission will hold a technical conference on May 17, 2005, to consider further comments on the NGC reports and recommendations for Commission action on natural gas quality and liquefied natural gas interchangeability issues. The conference will be held at the offices of the Commission at 888 First Street, NE., in Washington, DC. beginning at 9:30 a.m. (e.s.t.) in Hearing Room 1. An overflow room will be available to accommodate expected meeting attendance. For further information about the conference, please contact Andrea Hilliard at (202) 502–8288 or e-mail *andrea.hilliard@ferc.gov*, Ed Murrell at (202) 502–8703 or e-mail ed.murrell@ferc.gov and Joseph Caramanica at (202) 502–8095 or e-mail *joseph.caramanica@ferc.gov*).

An agenda detailing the matters to be addressed and identifying speakers will be issued in the near future. In addition to direct presentations, the Commission will provide an open forum that will give all interested individuals an opportunity to respond to the presentations or present other views on the issues discussed. The Commission intends to use the reports, written comments and presentations at the technical conference to form its decisions as to how it should address issues of natural gas quality and natural gas interchangeability.

Capitol Connection will offer the opportunity for remote listening and viewing of the conference. It may be available for a fee, live or 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 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.".

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to *accessibility@ferc.gov* or call toll-free (866) 208–3372 (voice) or (202) 208–1659 (TTY), or send a FAX to (202) 208–2106 with the required accommodations.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1832 Filed 4–18–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EDOCKET: ORD–2005–0015; FRL–7901–1]

Board of Scientific Counselors, Executive Committee Meeting—Spring 2005

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of an Executive Committee meeting (via conference call) of the Board of Scientific Counselors (BOSC). The conference call will focus on reviewing a draft report of the BOSC Ecological Research Subcommittee.

DATES: The conference call will be held on Thursday, May 5, 2005 from 1 p.m. to 3 p.m., eastern time, and may adjourn early if all business is finished. Written comments, and requests for the draft agenda or for making oral presentations during the call will be accepted up to 1 business day before the conference call date.

ADDRESSES: Participation in the conference call will be by teleconference only—meeting rooms will not be used. Members of the public may obtain the call-in number and access code for the calls from Lorelei Kowalski, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Document Availability

Any member of the public interested in receiving a draft BOSC agenda or making an oral presentation during the meeting may contact Ms. Lorelei Kowalski, Designated Federal Officer, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. In general, each individual making an oral presentation will be limited to a total of three minutes. The draft agenda can be viewed through EDOCKET, as provided in Unit I.A. of the **SUPPLEMENTARY INFORMATION** section.

Submitting Comments

Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Ms. Lorelei Kowalski, Designated Federal Officer, via telephone/voice mail at (202) 564–3408, via e-mail at *kowalski.lorelei@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8104–R, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

The purpose of this conference call is to review, discuss, and potentially approve a draft report prepared by the BOSC Ecological Research Subcommittee. Proposed agenda items for the conference call include, but are not limited to: discussion of the Subcommittee's draft responses to the charge questions, and general report content. The meeting is open to the public.

Information on Services for the Handicapped: Individuals requiring special accommodations at this meeting should contact Lorelei Kowalski, Designated Federal Officer, at (202) 564–3408, at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation.

A. How Can I Get Copies of Related Information ?

1. Docket. EPA has established an official public docket for this action under Docket ID No. ORD–2005–0015. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Documents in the official public docket are listed in the index in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy of the draft agenda may be viewed at the Board of Scientific Counselors, Executive Committee Meeting—Spring 2005 Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone

number for the ORD Docket is (202) 566–1752.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket 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 EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period.

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

i. EDOCKET. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EDOCKET at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, *http://www.epa.gov*, select "Information Sources," "Dockets," and "EDOCKET." Once in the system, select "search," and then key in Docket ID No. ORD–2005–0015. 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.

ii. E-mail. Comments may be sent by electronic mail (e-mail) to *ORD.Docket@epa.gov*, Attention Docket ID No. ORD–2005–0015. In contrast to EPA's electronic public docket, EPA's e-mail system is not an anonymous access system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. By Mail. Send your comments to: U.S. Environmental Protection Agency, ORD Docket, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. ORD–2005–0015.

3. By Hand Delivery or Courier. Deliver your comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. ORD–2005–0015 (note: this is not a mailing address). Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.A.1.

Dated: April 12, 2005.

Jeffery T. Morris,

Associate Director, Office of Science Policy.

[FR Doc. 05–7804 Filed 4–18–05; 8:45 am]

BILLING CODE 6560–50–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 May 13, 2005.

A. Federal Reserve Bank of New York (Jay Bernstein, Bank Supervision Officer) 33 Liberty Street, New York, New York 10045-0001:

1. Edgar M. Bronfman Trusts A, B, C, D, E, F, G, and Treetops Acquisition

Group LP, Treetops Acquisition Group II LP, Treetops Acquisition Group Ltd., Treetops Acquisition Group II Ltd., CAM Discount Ltd., all of New York, New York, to become bank holding companies by acquiring up to fifty–one percent of the voting shares of Israel Discount Bank, Ltd., Tel Aviv, Israel, and thereby indirectly acquire Discount Bancorp, New York, New York, and Israel Discount Bank of New York, New York, New York.

B. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Copiah Bancshares, Inc., Hazlehurst, Mississippi; to become a bank holding company by acquiring 100 percent of the voting shares of Copiah Bank, National Association, Hazlehurst, Mississippi.

C. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Peotone Bancorp, Inc., Peotone, Illinois; to acquire up to 20.06 percent of the voting shares of SouthwestUSA Corporation, Las Vegas, Nevada, and thereby indirectly acquire SouthwestUSA Bank, Las Vegas, Nevada.

D. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. The Farmers State Bank of Fort Morgan, Colorado Employee Stock Ownership Plan, Fort Morgan, Colorado; to acquire up to 38 percent of the voting shares of FSB Bancorporation of Fort Morgan, Colorado, Fort Morgan, Colorado, and thereby indirectly acquire voting shares of Farmers State Bank of Fort Morgan, Fort Morgan, Colorado.

Board of Governors of the Federal Reserve System, April 13, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–7749 Filed 4–18–05; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[FAI N02]

Federal Acquisition Conference and Exposition, June 2005

AGENCY: Office of the Chief Acquisition Officer, GSA

ACTION: Notice of meeting

SUMMARY: The Federal Acquisition Conference and Exposition (FACE) 2005 is a forum for Federal acquisition professionals and policy makers to share their insights and experiences. FACE also provides a full range of training on the latest acquisition issues and an opportunity to review exhibitors' products and services.

The Chief Acquisition Officers Council, Federal Acquisition Institute, U.S. General Services Administration, and Department of Defense are sponsoring the FACE 2005. This Governmentwide conference has become a major event for the acquisition community. The Federal Acquisition Institute is serving as the conference planner. The conference will be held June 7–8, 2005 at the Washington Convention Center in Washington, DC.

The theme of this year's conference, "Mission Possible through Acquisition," recognizes contracting as a key component in supporting how Federal agencies acquire the goods and services that enable them to perform their missions.

Benefits of Attending—

- Earn 10.5 Continuous Learning Points;
- Learn about important issues and emerging trends in acquisition;
- Hear from senior managers, agency experts, and industry partners;
- Visit the exhibit hall to review products and services; and
- Network with your colleagues in the Federal acquisition community throughout the conference and at the reception Tuesday evening.

WHO SHOULD ATTEND? Contracting officers, contract specialists, contracting officer's technical representatives/ contracting officer's representatives, program managers, and private industry contractors.

REGISTRATION: Registration rates are $400 for government attendees and $700 for industry attendees. These registration rates and online registration expire on May 31, 2005. After May 31, attendees may register onsite. Onsite rates are $500 for government attendees and $750 for industry attendees. Register online: *www.fai.gov/face.*

FOR FURTHER INFORMATION CONTACT: Ms. Heather Cameron, by phone at (703) 247–5727 or toll free at (866) 604–5376 or by e-mail at *FACE@sra.com*

Dated: April 13, 2005.

Pat Brooks,

Director, Office of National and Regional Acquisition Development.

[FR Doc. 05–7731 Filed 4–18–05; 8:45 am]

BILLING CODE 6820–61–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Voluntary Establishment of Paternity.

OMB No.: 0970–0175.

Description: Section 466(a)(5)(C) of the Social Security Act requires States to pass laws ensuring a simple civil process for voluntarily acknowledging paternity under which the State must provide that the mother and putative father must be given notice, orally and in writing, of the benefits and legal responsibilities and consequences of acknowledging paternity. The information is to be used by hospitals, birth record agencies and other entities participating in the voluntary paternity establishment program.

Respondents: State and Tribal IV–D agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
None	862,043	Variable	.166	143,099
Estimated Total Annual Burden Hours				143,099

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the

information collection. E-mail address: *grjohnson@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrich@omb.eop.gov.*

Dated: April 13, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–7757 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–07–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Child Care Report for High Performance Bonus.

OMB No.: 0970–0255.

Description: The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, established the Temporary Assistance for Needy Families (TANF) program under title IV–A of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.* Section 403(a)(4) of the Act requires the Secretary to award bonuses to "high performing States." (Indian tribes are not eligible for these bonuses.) The term "high performing State" is defined in section 403(a)(4) of the Act to mean a State that is most successful in achieving the purposes of the TANF program as specified in section 401(a) of the Act.

The final rule covering the TANF high performance bonuses to States in FY 2002 and beyond was published August 30, 2000 (65 FR 52814) followed by an interim final rule published May 10, 2001 (66 FR 23854). The final and interim final rules set forth how the Child Care Bureau (CCB) will compute scores and rank States on the three components, *i.e.*, Accessibility, Affordability, and Quality, that comprise the child care measure.

In FY 2002, CCB measured State performance on a composite ranking of two components, *i.e.*, Accessibility and Affordability (based on FY 2001 performance data). No additional reporting burden was required since the data/information for the Accessibility and Affordability components are reported under the Child Care Development Fund program (ACF Reports 800 and 801). However, there was a reporting burden (related to the Quality component) for the information States submitted if they wished to compete on the child care measure beginning in FY 2003 and again in FY 2004 (based on FY 2002 and FY 2003 performance data, respectively). The same requirements must be met for States wishing to compete on the child care measure for FY 2005 (based on FY 2004 performance data). The information includes:

(1) All age-specified rates for children 0–13 years of age reported by the child day care centers and family day care homes responding to the State's market rate survey; and

(2) The provider's county or, if the State uses multi-county regions to measure market rates or set maximum payment rates, the administrative region.

Respondents: States, the District of Columbia, and Territories including Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Marianna Islands.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF–900	56	0.5	40	1,120
Estimated Total Annual Burden Hours				1,120

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503. Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrich@omb.eop.gov.*

Dated: April 13, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–7758 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Community-Based Child Prevention Program (CBCAP).

OMB No.: 0970–0155.

Description: The Program Instruction, prepared in response to the enactment of the Community-Based Grants for the Prevention of Child Abuse and Neglect (administratively known as the Community-Based Child Abuse Prevention Program (CBCAP)), as set forth in Title II of Pub. L. 108–36, Child Abuse Prevention and Treatment Act Amendments of 2003, and which is in the process of reauthorization, provides direction to the States and Territories to accomplish the purposes of (1) supporting community-based efforts to develop, operate, expand, and, where appropriate, to network initiatives aimed at the prevention of child abuse and neglect, and to support networks of coordinated resources and activities to better strengthen and support families to reduce the likelihood of child abuse and neglect; and (2) fostering an understanding, appreciation and knowledge of diverse populations in order to be effective in preventing and

treating child abuse and neglect. This Program Instruction contains information collection requirements that are found in Pub. L. 108–36 at sections 201, 202, 203, 205, 206, 207, and pursuant to receiving a grant award. The information submitted will be used by the agency to ensure compliance with the statute, complete the calculation of the grant award entitlement, and provide training and technical assistance to the grantee.

Respondents: State governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours.
Application	52	1	40	2,080
Annual Report	52	1	24	1,248

Estimated Total Annual Burden Hours: 3,328.

Additional Information: Copies of the proposed collection may be obtained by writing to: The Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail: *grjohnson@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrich@omb.eop.gov.*

Dated: April 13, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–7759 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Child Care and Development Fund Plan for States/Territories for FY 2006–2007.

OMB No.: 0970–0114.

Description: The Child Care and Development Fund (CCDF) Plan (the Plan) for States and Territories is required from each CCDF Lead Agency in accordance with section 658E of the Child Care and Development Block Grant Act of 1990, as amended (Pub. L. 101–508, Pub. L. 104–193, and 42 U.S.C. 9858). The implementing regulations for the statutorily required Plan are set forth at 45 CFR 98.10 through 98.18. The Plan, submitted on the ACF–118, is required biennially, and remains in effect for two years. The Plan provides ACF and the public with a description of, and assurance about, the State's or the Territory's child care program. The ACF–118 is currently approved through May 31, 2006, making it available to States and Territories needing to submit Plan Amendments through the end of the FY 2005 Plan Period. However, in July 2005, States and Territories will be required to submit their FY 2006–2007 Plans. Consistent with the statute and regulations, ACF requests extension of the ACF–118 with minor corrections and modifications. The Tribal Plan (ACF–118A) is not affected by this notice.

Respondents: State and Territorial CCDF Lead Agencies.

ANNAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF–118	56	.5	162.57	4,552
Estimated Total Annual Burden Hours				4,552

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *grjohnson@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine T. Astrich@omb.eop.gov.*

Dated: April 13, 2005.

Robert Sargis,

Report Clearance Officer.

[FR Doc. 05–7760 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Title IV Foster Care Eligibility Re-Determinations and Re-Determinations of Candidacy for Foster Care.

OMB No.: New collection.

Description: The information collection is needed to ensure States are properly claiming title IV–E foster care maintenance payments and administrative costs for the appropriate children. A State must re-determine eligibility for title IV–E foster care and for title IV–E foster care candidacy to ensure that the State can justify requests for reimbursement incurred on behalf of these children. The Department is proposing that State agencies re-determine eligibility for title IV–E foster care every 12 months and every 6 months for candidates for title IV–E foster care. This is consistent with current policy. The information will be recorded in the child's case file as a programmatic record of foster care maintenance payments and/or administrative expenditures. This ensures that only children who are eligible for title IV–E foster care receive payments. The Children's Bureau does not require that a State report the information. The Children's Bureau does not mandate the method or variety of collection techniques States may use to re-determine a child's eligibility for title IV–E foster care or for title IV–E candidacy.

Respondents: State agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response (hours)	Total burden hours
Title IV–E foster care eligibility re-determination	264,670	1	0.5	132,335
Title IV–E foster care candidacy re-determination	144,600	2	0.5	144,600
Estimated Total Burden Hours				276.935

In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests 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 shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: April 13, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–7761 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Administration on Children, Youth and Families, Head Start Bureau; Head Start Hispanic Service; Institution Partnerships

Announcement Type: Initial.

Funding Opportunity Number: HHS–2005–ACF–ACYF–YP–0011.

CFDA Number: 93.600.

Due Date for Letter of Intent or Preapplications: Letters of intent are due May 19, 2005.

Due Date for Applications: Application is due June 20, 2005.

Executive Summary: The Head Start Bureau is announcing the availability of funds and request for applications for professional development and training grants for institutions of higher education with experience and capability in educating and preparing professionals to work effectively with Hispanic young children and families, in partnership with Head Start, Migrant Head Start and Early Head Start programs. The Head Start—Higher Education Hispanic Service Institution Partnership (HS–HEHSIPs) program is funded to improve the quality and long-term effectiveness of program services to Hispanic children and their families by developing academic and other training models and forming partnerships between institutions of higher education and Head Start, Migrant Head Start, and Early Head Start programs.

Through this announcement, the Administration on Children, Youth and Families (ACYF) is making available up to $1,500,000 annually for each of five years to support Head Start—Higher Education Hispanic Service Institution Partnerships (HS–HEHSIPs). These partnerships are designed to improve the quality and long-term effectiveness of Head Start, Migrant Head Start and Early Head Start grantees by developing academic and other training models to increase the number of Head Start teachers with degrees in early childhood education.

I. Funding Opportunity Description

The overall goal of Head Start is to ensure that children of low-income families acquire the skills and knowledge necessary to allow them to enter school ready for success. Programs funded under the Head Start Act provide comprehensive services to these children and their families. Head Start enhances children's physical, cognitive, social, and emotional development. It supports parents in their efforts to fulfill their parental roles as their child's primary educator, helps support them while they work towards employment and self-sufficiency, and provides for

their involvement in administering the Head Start program.

In an attempt to ensure that highly qualified and well trained staff provides high quality services to enrolled children and their families, Head Start has supported many demonstration projects. For example, Head Start supported the creation of the Child Development Associate (CDA) credential designed for early childhood development teaching staff, implemented the Head Start Teaching Centers, and developed other innovative projects. The Head Start Bureau also implemented partnerships with Historically Black Colleges and Universities (HBCUs) and Tribally-Controlled Land Grant Colleges and Universities (TCUs) in addition to other innovative training and staff development projects.

The 1998 reauthorization of the Head Start Act contains provisions to improve Head Start program quality and accountability. These include new education performance standards and measures, the expansion of program monitoring to incorporate evidence of progress on outcomes-based measures, funding to upgrade program quality and staff compensation, and higher education standards for Head Start teachers. In January 2001, the President signed into law the No Child Left Behind Act to make the education of every child in America one of the country's top priorities. The Act seeks to ensure that public schools teach children what they need to know to be successful in life and that they also set high education standards in the classroom. In his 2002 State of the Union address, the President indicated the need to prepare our children to read and succeed in school, including the improvement of Head Start and early childhood development programs. In response to these goals, the White House has developed an early childhood initiative, which is built on, among other things, raising the bar for Head Start education methods to create a better learning environment and improved outcomes for children. In his announcement of the Good Start, Grow Smart Early Childhood Initiative in April 2002, the President identified children's early literacy as a key focus for Head Start program improvement. In this initiative, the President presented three areas of focus for Head Start: (1) Strengthening Head Start programs; (2) partnering with states to improve early childhood education; and (3) providing information to teachers, caregivers, and parents.

The Head Start Act, as amended 42 U.S.C. § 9831 *et seq.*, is the authorizing legislation for the HS–HEHSIPS program. The key purpose in funding the program is to increase the number of Head Start classroom teaching staff with BA degrees in early childhood education. To assure that selected colleges and universities will be able to fulfill this task it is important that HS–HEHSIPs applying for funds under this announcement clearly demonstrate that they have established relationships with the Head Start programs in their community and that these Head Start programs have indicated that they are willing to work collaboratively with the institution.

Priority Area

Head Start Hispanic Service Institution Partnerships

1. *Description:* The Head Start Bureau is announcing the availability of funds and request for applications for professional development and training grants for institutions of higher education with experience and capability in educating and preparing professionals to work effectively with Hispanic young children and families, in partnership with Head Start, Migrant Head Start and Early Head Start programs. The Head Start—Higher Education Hispanic Service Institution Partnership (HS–HEHSIPs) program is funded to improve the quality and long-term effectiveness of program services to Hispanic children and their families by developing academic and other training models and forming partnerships between institutions of higher education and Head Start, Migrant Head Start, and Early Head Start programs.

Through this announcement, the Administration on Children, Youth and Families (ACYF) is making available up to $1,500,000 annually for each of five years to support Head Start—Higher Education Hispanic Service Institution Partnerships (HS–HEHSIPs). These partnerships are designed to improve the quality and long-term effectiveness of Head Start, Migrant Head Start and Early Head Start grantees by developing academic and other training models to increase the number of Head Start teachers with degrees in early childhood education.

II. Award Information

Funding Instrument Type: Grant.

Anticipated Total Priority Area Funding: $1,500,000 per budget period.

Anticipated Number of Awards: 6 to 10.

Ceiling on Amount of Individual Awards per Budget Period: $150,000 per budget period.

Floor on Amount of Individual Awards Per Budget Period: None.

Average Projected Award Amount: $150,000 per budget period.

Length of Project Periods: 60-month project with five 12-month budget periods.

Project Periods for Awards: Up to 60 months with 12-month budget periods.

Awards will be made on a competitive basis and will be for a one-year budget period. The total project period will not exceed 60 months. Applications for continuation grants funded under these awards beyond the first 12-month budget period (but within the project period) will be considered on a noncompetitive basis subject to the availability of funds, satisfactory progress of the grantee, and a determination that continued funding is in the best interest of the Government.

III. Eligibility Information

1. Eligible Applicants: State controlled institutions of higher education. Private institutions of higher education.

Additional Information on Eligibility: This announcement is limited to institutions of higher education with experience and capability in educating and preparing professionals to work effectively with Hispanic young children and families. All institutions planning to compete under this announcement, including faith-based institutions of higher education, must meet the same eligibility requirements.

Institutions of higher education that are not accredited for the degree program they propose are not eligible to apply under this announcement. The applicant must submit documentation of accreditation for the degree program included as part of the method of meeting the objective of this announcement (*i.e.*, increasing the number of teaching staff in the classroom with BA degrees).

HEHSIPs must provide a Head Start program participation agreement as specified in Section V of this announcement.

HEHSIPs that are currently funded under the Head Start Partnership with HEHSIPs and whose funding will end after October 1, 2005 are not eligible to apply under this announcement.

2. *Cost Sharing/Matching:* None.

3. *Other:* No grants award will be made under this announcement on the basis of an incomplete application.

All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal

Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.grants.gov/*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com/*.

Non-profit organizations applying for funding are required to submit proof of their non-profit status. Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earning accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.
- Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.
- When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private. non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *s.gov/programs/ofs/forms.htm*.

Disqualification Factors. Applications that exceed the ceiling amount will be considered non-responsive and will not be eligible for funding under this announcement.

Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-responsive and will not be considered for funding under this announcement.

IV. Application and Submission Information

1. *Address To Request Application Package:* ACYF Operations Center, c/o The Dixon Group, Inc., Higher Education Hispanic Service Institutions Partnerships (HS–HEHSIPs), 118 Q Street, NE., Washington, DC 20002, Phone: (866) 796–1591, e-mail: *HS@dixongroup.com*.

2. *Content and Form of Application Submission: Submission of Letters of Intent.* Prior to submittal of the application, applicants must submit a post card or call the ACYF Operations Center c/o The Dixon Group with the following information: the name, address, telephone and fax numbers, and e-mail address of the college/university intending to apply to receive Head Start Higher Education Hispanic Service Institutions Partnerships funds. Please see Section IV.1. for ACYF Operations Center address and telephone contact information. Letter of Intent information will be used to determine the number of reviewers necessary to complete the panel review process. Failure to submit a Letter of Intent will not impact eligibility to submit an application and will not disqualify an application from competitive review based on non-responsiveness.

Proof of Accreditation Status. Applicants must submit proof of accreditation by an accreditation agency recognized by the Secretary of the Department of Education.

Head Start Program Participation Agreement. Applicants must submit a letter of agreement with their applications from a Head Start Program Director verifying that the applicant has an established relationship with the program and that the Head Start program is willing to work with the applicant institution of higher education.

Application Requirements. The project description of the application should be double-spaced and single-sided on 8½" x 11½" plain white paper, with 1" margins on all sides. Use only a standard size font no smaller than 12 pitch throughout the application. Packages should be assembled so the SF–424 and SF–424A are the first pages of the application package, immediately followed by the project abstract then the table of contents. All narrative sections of the application (including appendices, resumes, charts, references/footnotes, tables, maps and exhibits) must be sequentially numbered, beginning on the first page after the table of contents. The length of the application, including the project description, appendices and resumes must not exceed 75 pages. Anything over 75 pages will be removed and not considered by the reviewers. The abstract should not be counted in the 75 pages and not exceed one page.

Applicants are requested NOT to send pamphlets, brochures, or other printed material along with their applications. These materials, if submitted, will not be included in the review process. In addition, applicants must NOT submit any additional letters of endorsement beyond any that are stated as required in this announcement.

Project Narrative. Specific factual information and statements of measurable goals in quantitative terms must be included in the project description. Extensive exhibits are not required. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant-funded activity should be placed in an appendix. Please see Section V for further information regarding the Project Description.

Table of Contents. All pages must be numbered and a table of contents should be included for easy reference.

Standard Forms and Certifications. Information on required Standard Forms and Certifications follows this section.

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via email or facsimile transmission. Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit

electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.

- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF–424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.grants.gov/*.
- You must search for the downloadable application package by the CFDA number.

An original and two copies of the complete application are required. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *www.acf.hhs.gov/programs/ofs/forms.htm*.

Standard Forms and Certifications: The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand they will be held accountable for the smoking prohibition included within Pub. L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO-KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with forms. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *www.acf.hhs.gov/programs/ofs/forms.htm*.

Please see Section V.1. Criteria, for instructions on preparing the full project description.

3. *Submission Dates and Times: Due Dates:* Letters of intent are due May 19, 2005. Applications are due June 20, 2005.

Explanation of Due Dates: The closing time and date for receipt of applications is referenced above. Applications received after 4:30 p.m. eastern time on the closing date will be classified as late.

Deadline: Applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date referenced in Section IV.6. Applicants are responsible for ensuring applications are mailed or submitted electronically well in advance of the application due date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in Section IV.6., between Monday and Friday (excluding Federal holidays).

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. However, applicants will receive an electronic acknowledgement for applications that are submitted via Grants.gov.

ACF cannot accommodate transmission of applications by facsimile. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

Late Applications: Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Any application received after 4:30 p.m. eastern time on the deadline date will not be considered for competition.

Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

Extension of deadlines: ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

Checklist: You may use the checklist below as a guide when preparing your application package.

What to submit	Required content	Required form or format	When to submit
Letter of Intent	See Section III	Described in Section III	30 days prior to application due date.
Table of Contents	See Section IV	Described in Section IV	By application due date.
Project Abstract	See Sections IV and V	Described in Sections IV and V	By application due date.
Project Narrative	See Sections IV and V	Described in Sections IV and V	By application due date.
SF 424	See Section IV	May be found at: *www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
SF 424A	See Section IV	May be found at: *www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
Assurances and Certifications	See Section IV	May be found at: *www.acf.hhs.gov/programs/ofs/forms.htm.*	By time of award.
Support Letters	See Section V	Described in Section V	By application due date.
Proof of Accreditation	See Sections III and IV	Described in Sections III and IV	By application due date.
Head Start Program(s) Participation Agreement.	See Sections III and IV	Described in Sections III and IV	By application due date.

Additional Forms: Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

What to submit	Required content	Location	When to submit
Survey for Private, Non-Profit Applicants.	See form	May be found on *www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.

4. *Intergovernmental Review: State Single Point of Contact (SPOC).* This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 4th floor, Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

5. *Funding Restrictions:* Grant awards will not allow reimbursement of pre-award costs.

An application that exceeds the upper value of the dollar range specified will be considered non-responsive.

HEHSIPs that are currently funded under the Head Start Partnership with HEHSIPs and whose funding will end after October 31, 2004 are not eligible to apply under this announcement.

6. *Other Submission Requirements: Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date.

Applications should be mailed to: c/o The Dixon Group, Inc., Higher Education Hispanic Service Institutions Partnerships, 118 Q Street, NE., Washington, DC 20002, Attention: ACYF Operations Center.

Hand Delivery: An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: c/o The Dixon Group, Inc., Higher Education Hispanic Service Institutions Partnerships, 118 Q Street, NE., Washington, DC 20002, Attention: ACYF Operations Center.

Electronic Submission: http://www.grants.gov/. Please see section IV.2 Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

V. Application Review Information

The Paperwork Reduction Act of 1995 (Pub. L. 104–13)

Public reporting burden for this collection of information is estimated to average 35 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 4/30/2007.

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.

1. Criteria

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived. Specifically, describe how the college or university's conduct of a program to provide educational opportunities to staff of Head Start grantees, including faith-based and community organizations, will further the goals of the Head Start program.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates. If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Evaluation

Provide a narrative addressing how the conduct of the project and the results of the project will be evaluated. In addressing the evaluation of results, state how you will determine the extent to which the project has achieved its stated objectives and the extent to which the accomplishment of objectives can be attributed to the project. Discuss the criteria to be used to evaluate results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the project results and benefits are being achieved. With respect to the conduct of the project, define the procedures to be employed to determine whether the project is being

conducted in a manner consistent with the work plan presented and discuss the impact of the project's various activities on the project's effectiveness.

Geographic Location

Describe the precise location of the project and boundaries of the area to be served by the proposed project. Maps or other graphic aids may be attached.

Additional Information

Following are requests for additional information that need to be included in the application:

Staff and Position Data

Provide a biographical sketch and job description for each key person appointed. Job descriptions for each vacant key position should be included as well. As new key staff is appointed, biographical sketches will also be required.

Plan for Project Continuance Beyond Grant Support

Provide a plan for securing resources and continuing project activities after Federal assistance has ended.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate, (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status, (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Letters of Support

Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. "Federal resources" refers only to the ACF grant for which you are applying. "Non-Federal resources" are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: First column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

Description: Costs of employee salaries and wages.

Justification: Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

Description: Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

Justification: Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

Description: Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

Justification: For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

Description: "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. **(NOTE:** Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

Justification: For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

Description: Costs of all tangible personal property other than that included under the Equipment category.

Justification: Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

Description: Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

Justification: Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

Note: Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

Justification: Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

Description: Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

Justification: An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Program Income

Description: The estimated amount of income, if any, expected to be generated from this project.

Justification: Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application which contain this information.

Non-Federal Resources

Description: Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

Justification: The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

Evaluation Criteria: The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*e.g.* from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Results or Benefits Expected (20 Points)

The results and benefits to be derived. The anticipated contribution to policy, practice, theory and research. Specific benefits for both the applicant and the Head Start/Migrant Head Start/Early Head Start community.

Based on the stated program objectives, the results and benefits to be derived. The specific results or benefits that could be expected for the Head Start/Migrant Head Start/Early Head Start grantees and the institution.

The qualitative and quantitative data the program will collect to measure progress towards the stated results or benefits. How the program will determine the extent to which it has achieved its stated objectives.

The extent to which the applicant provides an accurate projection of the estimated number of Head Start/Migrant Head Start/Early Head Start teachers that will earn degrees over the duration of the project based on an analysis of the current levels of credits/courses earned by participants and a proposed sequence of courses to be offered through this project.

The extent to which the applicant proposes new teaching methods for Head Start/Migrant Head Start/Early Head Start teachers and staff for teaching early literacy in the classrooms and enhancing parental skills to encourage children to read and succeed in school. The extent to which the applicant proposes to design and submit a replicable model incorporating strength based perspective and reflective practices as well as their relationship to Head Start competency goals, indicators, priorities and the program performance standards.

Objectives and Need for Assistance (20 Points)

Relevant physical, economic, social, financial, institutional or other problems requiring intervention. The need for this project in the proposed community(ies). The principal and subordinate objectives of the project. The supporting documentation provided or other testimonies from concerned interests other than the applicant.

The objectives for the program. How these objectives are based on an assessment of partner and community needs and how they relate to Head Start goals. The extent to which the applicant proposes a detailed process that will be used to assess the need for the proposed program including the total number of staff needing training, including preschool and infant/toddler teachers.

Specifically identified population to be served. The extent to which the applicant describes proposed Head Start, Migrant Head Start, and Early Head Start grantees as participating partners. The extent to which the applicant provides the numbers and

types of staff to be enrolled in the project, the proposed courses in relationship to courses completed by partner staff before entering the project, and degrees to be awarded.

The consultative process related to the development of the proposed initiative. The extent to which the applicant describes detailed efforts to frame the proposed initiative within broader state or community efforts to enhance professional and career development for staff in all forms of early childhood and child care programs. The extent to which the applicant provides letters of support that document consultation and support from the proposed grantee or delegate agency partners, the Head Start State Collaboration Office, and any existing state level early childhood career development initiative.

Approach (20 Points)

The extent to which the application describes a detailed plan of action pertaining to the scope of the project including details on how the proposed work will be accomplished, such as detailed timelines and lists of each organization as well as consultant and key individuals who will work on the project. The extent to which the applicant describes a brief yet clear description of the nature of the effort and contribution each organization, consultant, or key individual will make to the project. The extent to which the applicant demonstrates adequate time key staff will devote to the project and that this staff is qualified and knowledgeable of Head Start and Early Head Start. The extent to which the applicant describes an approach and methodology for implementing the project, including a clear description that delineates the relationship of each task to the accomplishment of the proposed objectives. The extent to which the applicant provides evidence that the planned approach reflects sufficient input from and partnership with Head Start, Migrant and Seasonal Head Start and Early Head Start grantees.

The extent to which the applicant demonstrates effective planning for activities developed during the start-up period in preparation of implementation of the program including assurance that no more than 6 months will be devoted to planning activities.

The extent to which the applicant demonstrates effective methods for recruiting Head Start center-based teaching staff and an effective selection process for participation in the program.

The extent to which the applicant demonstrates how training and coursework will be contextually and culturally relevant to the Head Start, Migrant Head Start, and Early Head Start environment and how it will contribute to enhancing the effectiveness of teachers, program quality, and outcomes for Head Start children and families.

The extent to which the application describes efforts the applicant and Head Start partners will make to ensure that training and coursework are accessible to teaching staff and how the applicant will support their successful completion of courses and degrees. The extent to which the applicant provides discussion of relevant issues such as timing, scheduling, and location of classes, support to enhance the literacy and study skills of participants, and approaches to integrate training in the working environment of the participants in the program. The extent to which the applicant describes costs (if any) associated with courses and degree requirements for participants.

The extent to which the applicant describes credit courses offered particularly in the area of Early Childhood Development/Education.

The extent to which the applicant describes how CDA training and certification of Head Start, Migrant and Seasonal Head Start and Early Head Start staff, as appropriate, as well as previous coursework and credits will be linked to academic credits and course sequences leading to BA degrees. The extent to which the applicant includes estimates indicating how many Head Start, Migrant and Seasonal Head Start and Early Head Start teaching staff members will be included in this effort.

Plan for Project Continuance Beyond Grant Support (15 Points)

The extent to which the applicant describes appropriate activities that will continue after the completion of this project that will ensure that the applicant will continue to participate in providing educational opportunities for Head Start and Early Head Start classroom staff.

Non-Federal Resources (5 Points)

The extent to which the applicant describes strong efforts to complement the Federal funds requested in this proposal with other sources to maximize the benefits to Head Start, Migrant and Seasonal Head Start and Early Head Start grantees including efforts or plans to assist participants in accessing sources of financial assistance or to make use of other funding for training and career development of early childhood program staff.

Staff and Position Data (5 Points)

The extent to which the applicant demonstrates that key staff are qualified and knowledgeable of Head Start, Migrant Head Start, and Early Head Start. The extent to which the applicant demonstrates the capacity of its organization, key leaders, managers, and project personnel to provide: High quality, relevant, and responsive training to Head Start staff; competent project staff to plan and deliver appropriate course material to Head Start trainees that is culturally relevant; implementation of the training grant in an effective and timely manner; and successful partnerships that involve sharing resources, staffing, and facilities.

Budget and Budget Justification (5 Points)

How the proposed project costs are reasonable and appropriate in view of the activities to be carried out and the anticipated outcomes. The extent to which the applicant identifies and explains the relationship of the budgetary items listed under "General Budget Information," in this section, to the objective of this announcement. The extent to which the applicant describes a thorough line item budget for the costs associated with key project staff attending two ACF-sponsored conferences in Washington, DC

Organizational Profiles (5 Points)

The extent to which the applicant presents an organizational structure that will support the project objectives. The extent to which the applicant demonstrates how joint planning and assessment with the Head Start, Migrant Head Start, and Early Head Start grantees will be effectively implemented with timelines and clear lines of responsibility. The extent to which the applicant explains how staff positions will be assigned and describes their major functions and responsibilities.

Geographic Location (5 Points)

The extent to which the application describes the precise location of the project and area to be served, including the location of the Head Start, Migrant Head Start, and Early Head Start grantees the applicant partners with.

2. Review and Selection Process: No grant award will be made under this announcement on the basis of an incomplete application.

Responsive applications received by the due date will be reviewed and scored competitively. Experts in the field, generally persons from outside the Federal government, will use the evaluation criteria listed in Section V of

this announcement as well as the eligibility criteria specified in Section III to review and score the applications. The results of this review will be a primary factor in making funding decisions. Application review panels will assign a score to each application and identify its strengths and weaknesses. The Head Start Bureau will conduct an administrative review of the applications and results of the competitive review panels and make recommendations for funding to the Commissioner, ACYF. Subject to the recommendation of the Head Start Bureau Associate Commissioner, the Commissioner, ACYF, will make the final selection of the applications to be funded. An application may be funded in whole or in part depending on: (1) The ranked order of applicants resulting from the competitive review; (2) staff review and consultations; (3) the combination of projects that best meets the objectives of the Head Start Bureau; (4) the funds available; (5) the statutory requirement that reserves funds for Indian Tribes, and Alaska Native Regional Corporations, and Native Hawaiian entities; and (6) other relevant considerations. The Commissioner may also elect not to fund any applicants with known management, fiscal, reporting, program, or other problems, which make it unlikely that they would be able to provide effective services. Approved but Unfunded Applications: Should more applications be approved for funding than ACYF can fund with available HSI monies, the Grants Officer shall fund applications in their order of approval until the available funds are expended.

When this occurs, ACYF has the option of carrying-over the approved applications to the subsequent fiscal year for funding consideration in that HSI grant competition. These applications need not be reviewed nor scored again as long as the HSI program's evaluation criteria do not change from one fiscal year to the next. However, the approved but not funded applications must be placed in the proper rank order with the new fiscal year HSI applications.

Since ACF will be using non-Federal reviewers in the process, applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security Numbers, if otherwise required for individuals. The copies may include summary salary information.

Approved but Unfunded Applications

In cases where more applications are approved for funding than ACF can fund with the money available, the Grants Officer shall fund applications in their order of approval until funds run out. In this case, ACF has the option of carrying over the approved applications up to a year for funding consideration in a later competition of the same program. These applications need not be reviewed and scored again if the program's evaluation criteria have not changed. However, they must then be placed in rank order along with other applications in later competition.

3. *Anticipated Announcement and Award Dates:* The anticipated start date for the new awards is September 30, 2005. Projects may run through September 29, 2010 for a period of up to 60 months.

VI. Award Administration Information

1. *Award Notices:* The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided, and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

The anticipated start date for the new awards is September 30, 2005. Projects may run through September 29, 2010.

Organizations whose applications will not be funded will be notified in writing.

2. *Administrative and National Policy Requirements:* Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) and 45 CFR part 92 (governmental).

Direct Federal grants, subaward funds, or contracts under this ACF Program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this Program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

3. *Reporting:* Program Progress Reports: Semi-Annually. Financial Reports: Semi-Annually.

Grantees will be required to submit program progress and financial reports (SF 269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period. The standard form (SF–269) can be found at the following URL: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Final reports are due 90 days after the end of the grant period. A suggested format for the program report will be sent to all grantees after the awards are made.

VII. Agency Contacts

Program Office Contact: Rosalind Dailey, U.S. Department of Health and Human Services, Administration for Children and Families, ACYF—Head Start Bureau, 330 C Street SW., Switzer 2211, Washington, DC 20447, Phone: (202) 205–8653, e-mail: *rdailey@acf.hhs.gov.*

Grants Management Office Contact: Delores Dickenson, U.S. Department of Health and Human Services, Administration for Children and Families, ACYF—Head Start Bureau, 330 C Street SW., Switzer Room 2220, Washington, DC 20447, Phone: (202) 260–7622, e-mail: *dedickenson@acf.hhs.gov.*

VIII. Other Information

Applicants will not be sent acknowledgements of received applications.

Notice: Beginning with FY 2006, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005, applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *www.Grants.gov.* Applicants will also be able to find the complete text of all ACF grant announcements on the ACF Web site located at: *http://www.acf.hhs.gov/grants/index.html.*

Dated: April 12, 2005.

Joan E. Ohl,

Commissioner, Administration on Children, Youth and Families.

[FR Doc. 05–7794 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Administration on Children, Youth and Families, Head Start Bureau; Head Start Historically Black College and University Partnerships

Announcement Type: Initial.

Funding Opportunity Number: HHS–2005–ACF–ACYF–YH–0004.

CFDA Number: 93.600.

Due Date For Letter of Intent or Preapplications: Letter of Intent is due May 19, 2005.

Due Date for Applications: Application is due June 20, 2005.

Executive Summary: The Head Start Bureau is announcing the availability of funds and request for applications for professional development and training grants for Historically Black Colleges and Universities (HBCUs) in partnership with Head Start and Early Head Start programs to improve staff training and to thereby enhance services to Head Start and Early Head Start children and families.

Through this announcement, the Administration on Children, Youth and Families (ACYF) is making available up to $1,500,000 annually for each of five years to support Head Start Historically Black Colleges and Universities (HBCUs) Partnerships. These partnerships are designed to improve the quality and long-term effectiveness of Head Start and Early Head Start grantees by developing academic training models to increase the number of Head Start/Early Head Start teachers with BA degrees in early childhood education.

I. Funding Opportunity Description

The overall goal of Head Start is to ensure that children of low-income families acquire the skills and knowledge necessary to allow them to enter school ready for success Programs funded under the Head Start Act provide comprehensive services to these children and their families. Head Start enhances children's physical, cognitive, social, and emotional development. It supports parents in their efforts to fulfill their parental roles as their child's primary educator, helps support them while they work towards employment and self-sufficiency, and provides for their involvement in administering the Head Start program.

In an attempt to ensure that highly qualified and well trained staff provides high quality services to enrolled children and their families, Head Start has supported many demonstration projects. For example, Head Start supported the creation of the Child Development Associate (CDA) credential designed for early childhood development teaching staff, implemented the Head Start Teaching Centers, and developed other related innovative projects. The Head Start Bureau also implemented partnerships with Tribally Controlled Land Grant Colleges and Universities (TCUs) and Higher Education Hispanic Service Partnerships (HS–HEHSPs) in addition to key innovative training and staff development projects.

The 1998 reauthorization of the Head Start Act contains provisions to improve Head Start program quality and accountability. These require the establishment of new education performance standards and measures, the expansion of program monitoring to incorporate evidence of progress on outcomes-based measures, funding to upgrade program quality and staff compensation, and higher education standards for Head Start teachers. In January 2001, the President signed into law the "No Child Left Behind Act" to make the education of every child in America one of the country's top priorities. The Act seeks to ensure that public schools teach children what they need to know to be successful in life and that they also set high education standards in the classroom. In his 2002 State of the Union address, the President indicated the need to prepare our children to read and succeed in school, including the improvement of Head Start and early childhood development programs. In response to these goals, the White House has developed an early childhood initiative, which is built on raising the bar for Head Start education methods to create a better learning environment and improved outcomes for children. In his announcement of the Good Start, Grow Smart Early Childhood Initiative in April 2002, the President identified children's early literacy as a key focus for Head Start program improvement. In this initiative, the President presented three areas of focus for Head Start: (1) Strengthening Head Start programs; (2) partnering with states to improve early childhood education, and (3) providing information to teachers, caregivers, and parents.

The Head Start Act, as amended 42 U.S.C. 9831 *et seq.*, is the authorizing legislation for the HBCU program. The key purpose in funding the HBCU program is to increase the number of Head Start classroom teaching staff with BA degrees in early childhood education. To assure that selected colleges and universities will be able to fulfill this task it is important that HBCUs applying for funds under this announcement clearly demonstrate that they have established relationships with the Head Start and/or Early Head Start programs in their community and that these programs have indicated that they are willing to work collaboratively with the institution.

Priority Area

Head Start Historically Black Colleges and Universities

1. *Description:* The Head Start Bureau is announcing the availability of funds and request for applications for professional development and training grants for Historically Black Colleges and Universities (HBCUs) in partnership with Head Start and Early Head Start programs to improve staff training and to thereby enhance services to Head Start and Early Head Start children and families.

Through this announcement, the Administration on Children, Youth and Families (ACYF) is making available up to $1,500,000 annually for each of five years to support Head Start Historically Black Colleges and Universities (HBCUs) Partnerships. These partnerships are designed to improve the quality and long-term effectiveness of Head Start and Early Head Start grantees by developing academic training models to increase the number of Head Start/Early Head Start teachers with BA degrees in early childhood education.

The Head Start Act, as amended 42 U.S.C. § 9831 *et seq.*, is the authorizing legislation for the HBCU program. The key purpose in funding the HBCU program is to increase the number of Head Start classroom teaching staff with BA degrees in early childhood education. To assure that selected colleges and universities will be able to fulfill this task it is important that HBCUs applying for funds under this announcement clearly demonstrate that they have established relationships with the Head Start and/or Early Head Start programs in their community and that these programs have indicated that they are willing to work collaboratively with the institution.

II. Award Information

Funding Instrument Type: Grant.

Anticipated Total Priority Area Funding: $1,500,000 per budget period.

Anticipated Number of Awards: 6 to 10.

Ceiling on Amount of Individual Awards Per Budget Period: $150,000 per budget period.

Floor on Amount of Individual Awards Per Budget Period: None.

Average Projected Award Amount: $150,000 per budget period.

Length of Project Periods: 60 month project with five 12-month budget periods.

Project Periods for Awards: Up to 60 months with 12 month budget periods. Awards will be made on a competitive basis and will be for a one-year budget period. The total project period will not exceed 60 months. Applications for continuation grants funded under these awards beyond the first 12 month budget period (but within the project period) will be considered on a noncompetitive basis subject to the availability of funds, satisfactory progress of the grantee, and a determination that continued funding is in the best interest of the Government.

III. Eligibility Information

1. *Eligible Applicants:* State controlled institutions of higher education. Private institutions of higher education.

Additional Information on Eligibility: This announcement is limited to Historically Black Colleges and Universities (HBCUs) defined as "Part B Institutions" under section 322(2) of the Higher Education Act of 1965, codified at 20 U.S.C. 1061(2). HBCUs are institutions established prior to 1964 whose principal mission was, and is, the education of Black Americans, and must satisfy section 322 of the Higher Education Act of 1965, as amended. Only those institutions that meet the definition of "Part B institution" in section 322 of the Higher Education Act of 1965, as amended, 20 U.S.C. 1061(2), shall be eligible for assistance under this announcement. Faith-based institutions planning to compete under this announcement must also meet the same eligibility criteria as other applicants.

Applicants must submit proof of accreditation for their institution and degree program by an accreditation agency recognized by the Secretary of the Department of Education. Institutions of Higher Education that are not accredited for the degree program they propose are not eligible to apply under this announcement. The applicant must submit documentation of accreditation for the degree program included as part of the method of meeting the objective of this announcement (*i.e.*, increasing the number of teaching staff in the classroom with BA degrees).

HBCUs that are currently funded under the Head Start Partnership with HBCUs and whose funding will end after October 1, 2005 are not eligible to apply under this announcement.

Please see section IV for required documentation supporting eligibility or funding restrictions if any are applicable.

2. *Cost Sharing/Matching:* None.

3. *Other:* No grants award will be made under this announcement on the basis of an incomplete application.

All Applicants must have a Dun & Bradstreet Number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.grants.gov/*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com/*.

Non-profit organizations applying for funding are required to submit proof of their non-profit status.

Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.
- Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

Disqualification Factors. Applications that exceed the ceiling amount will be considered non-responsive and will not be eligible for funding under this announcement.

Any application received after 4:30 p.m., eastern time, on the deadline date will not be considered for competition.

IV. Application and Submission Information

1. *Address to Request Application Package:* ACYF Operations Center, c/o The Dixon Group, Inc., Historically Black Colleges and Universities (HBCUs), 118 Q Street, NE., Washington, DC 20002, Phone: 866–796–1591, E-mail: *HS@dixongroup.com*.

2. *Content and Form of Application Submission:* The project description of the application should be double-spaced and single-sided on 8 ½″ × 11″ plain white paper, with 1″ margins on all sides. Use only a standard size font no smaller than 12 pitch throughout the application. Packages should be assembled so the SF–424 and SF–424A are the first pages of the application package, immediately followed by the project abstract then the table of contents. All narrative sections of the application (including appendices, resumes, charts, references/footnotes, tables, maps and exhibits) must be sequentially numbered, beginning on the first page after the table of contents. *The length of the application, including the projection description, appendices and resumes must not exceed 75 pages.* Anything over 75 pages will be removed and not considered by the reviewers. The abstract should not be counted in the 75 pages and should not exceed one page.

Applicants are requested to refrain from sending pamphlets, brochures, or other printed material along with their applications. These materials, if submitted, will not be included in the review process. In addition, applicants must Not submit any additional letters of endorsement beyond any that are stated as *required* in this announcement.

Specific factual information and statements of measurable goals in quantitative terms must be included in the project description. Extensive exhibits are not required. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant-funded activity should be placed in an appendix. Please see section V for further information regarding the Project Description.

Submission of Intent

Prior to submittal of the application, applicants should submit a Letter of Intent post card or call the ACYF Operations Center c/o The Dixon Group. The Letter of Intent post card must include the following information: the name, address, telephone and fax numbers, and e-mail address of the college/university intending to apply to receive Head Start Historically Black Colleges and Universities Partnerships funds. Please see section IV.1. for ACYF Operations Center c/o The Dixon Group address and telephone contact information.

Letter of Intent information will be used to determine the number of reviewers necessary to complete the panel review process. Failure to submit a Letter of Intent will not impact eligibility to submit an application and will not disqualify an application from competitive review based on non-responsiveness.

Table of Contents

All pages must be numbered and a table of contents should be included for easy reference.

Head Start Program Participation Agreement

Applicants must submit a letter of agreement with their applications from a Head Start Program Director verifying that the applicant has an established relationship with the program and that the Head Start program is willing to work with the HBCU.

Proof of Accreditation Status

Applicants must submit proof of accreditation for their institution and degree program by an accreditation agency recognized by the Secretary of the Department of Education.

Proof of HBCU Status

Applicants must submit documentation of their status as a HBCU as defined at "Part B Institutions" under section 322(2) of the Higher Education Act of 1965, codified at 20 U.S.C. 1061(2).

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *www.Grants.gov/Apply site*. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission.

Please note the following if you plan to submit your application electronically via Grants.gov :

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.grants.gov*.
- You must search for the downloadable application package by the CFDA number.

An original and two copies of the complete application are required. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *www.acf.hhs.gov/programs/ofs/forms.htm*.

Standard Forms and Certifications: The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand they will be held accountable for the smoking prohibition included within Pub. L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO–KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with forms. By signing and submitting the application, applicants are providing the

certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *www.acf.hhs.gov/programs/ofs/forms.htm.*

Please see section V.1. Criteria, for instructions on preparing the full project description.

3. *Submission Dates and Times: Due Dates:* Letters of intent are due May 19, 2005.

Applications are due June 20, 2005.

Explanation of Due Dates: The closing time and date for receipt of applications is referenced above. Applications received after 4:30 p.m., eastern time, on the closing date will be classified as late.

Deadline: Applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date referenced in section IV.6. Applicants are responsible for ensuring applications are mailed or submitted electronically well in advance of the application due date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in section IV.6., between Monday and Friday (excluding Federal holidays).

ACF cannot accommodate transmission of applications by facsimile. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. However, applicants will receive an electronic acknowledgement for applications that are submitted via Grants.gov.

Late Applications: Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Any application received after 4:30 p.m., eastern time, on the deadline date will not be considered for competition.

Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

Extension of deadlines: ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, *etc.*) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

Checklist: You may use the checklist below as a guide when preparing your application package.

What to submit	Required content	Required form or format	When to submit
Letter of Intent	See section IV	IV	30 days prior to application due date.
Table of Contents	See section IV	IV	By application due date.
Project Abstract	See section IV and V	IV and V	By application due date.
Project Narrative	See section IV and V	IV and V	By application due date.
SF–424	See section III	May be found on *www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
SF–424A	See section III	May be found on *www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
Assurances and Certifications	See section III	May be found on *www.acf.hhs.gov/programs/ofs/forms.htm.*	By date of award.
Support Letters	See section V	V	By application due date.
Proof of HBCU Status	See section III	III	By application due date.
Head Start Program(s) Participation Agreement.	See section III and V	III and V	By application due date.
Proof of Accreditation	See section III	III	By application due date.

Additional Forms: Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *www.acf.hhs.gov/programs/ofs/forms.htm.*

What to Submit	Required content	Location	When to submit
Survey for Private, Non-Profit Grant Applicants.	See form	May be found on *www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.

4. *Intergovernmental Review: State Single Point of Contact (SPOC).* This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa,

Guam, Northern Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade SW., 4th floor, Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, *etc.* does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by federally recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

5. *Funding Restrictions:* Grant awards will not allow reimbursement of pre-award costs.

An application that exceeds the upper value of the dollar range specified will be considered non-responsive.

HBCUs that are currently funded under the Head Start Partnership with HBCUs and whose funding will end after October 1, 2005, are not eligible to apply under this announcement.

6. *Other Submission Requirements: Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m., eastern time, on or before the closing date. Applications should be mailed to: c/o The Dixon Group, Inc., Historically Black Colleges and Universities (HBCUs), 118 Q Street, NE., Washington, DC 20002, ACYF Operations Center.

Hand Delivery: An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m., eastern time, on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: c/o The Dixon Group, Inc., Historically Black Colleges and Universities (HBCUs), 118 Q Street, NE., Washington, DC 20002, Attention: ACYF Operations Center.

Electronic Submission: http://www.grants.gov/ Please see section IV. 2 Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

V. Application Review Information

The Paperwork Reduction Act of 1995 (Pub. L. 104–13)

Public reporting burden for this collection of information is estimated to average 35 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 4/30/2007.

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 following are instructions and guidelines on how to prepare the "project summary/abstract" and "Full Project Description" sections of the application. Under the evaluation criteria section, note that each criterion is preceded by the generic evaluation requirement under the ACF Uniform Project Description (UPD).

1. Criteria

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/

beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

Specifically describe how the college or university's conduct of a program to provide educational opportunities for teaching staff in Head Start classrooms, including faith-based and community organizations, will further the goals of the Head Start program.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Evaluation

Provide a narrative addressing how the conduct of the project and the results of the project will be evaluated. In addressing the evaluation of results, state how you will determine the extent to which the project has achieved its stated objectives and the extent to which the accomplishment of objectives can be attributed to the project. Discuss the criteria to be used to evaluate results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the project results and benefits are being achieved. With respect to the conduct of the project, define the procedures to be employed to determine whether the project is being conducted in a manner consistent with the work plan presented and discuss the impact of the project's various activities on the project's effectiveness.

Geographic Location

Describe the precise location of the project and boundaries of the area to be served by the proposed project. Maps or other graphic aids may be attached.

Additional Information

Following are requests for additional information that need to be included in the application:

Staff and Position Data

Provide a biographical sketch and job description for each key person appointed. Job descriptions for each vacant key position should be included as well. As new key staff is appointed, biographical sketches will also be required.

Plan for Project Continuance Beyond Grant Support

Provide a plan for securing resources and continuing project activities after Federal assistance has ended.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate, (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status, (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Dissemination Plan

Provide a plan for distributing reports and other project outputs to colleagues and the public. Applicants must provide a description of the kind, volume and timing of distribution.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. "Federal resources" refers only to the ACF grant for which you are applying. "Non Federal resources" are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

Description: Costs of employee salaries and wages.

Justification: Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time

equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

Description: Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

Justification: Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

Description: Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

Justification: For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

Description: "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (*Note:* Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

Justification: For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

Description: Costs of all tangible personal property other than that included under the Equipment category.

Justification: Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

Description: Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

Justification: Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, *etc.*

Note: Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

Justification: Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

Description: Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

Justification: An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Nonfederal Resources

Description: Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

Justification: The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

Evaluation Criteria: The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*e.g.*, from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Results or Benefits Expected 20 points

The results and benefits to be derived. The anticipated contribution to policy, practice, theory and research. Specific benefits for both the applicant and the Head Start/Early Head Start community.

Based on the stated program objectives, the results and benefits to be derived. The specific results or benefits that could be expected for the Head Start/Early Head Start grantees and the institution.

The qualitative and quantitative data the program will collect to measure progress towards the stated results or benefits. How the program will determine the extent to which it has achieved its stated objectives.

The extent to which the applicant provides an accurate projection of the estimated number of Head Start/Early Head Start teachers that will earn degrees over the duration of the project based on an analysis of the current levels of credits/courses earned by participants and a proposed sequence of courses to be offered through this project.

The extent to which the applicant proposes new teaching methods for Head Start/Early Head Start teachers and staff for teaching early literacy in the classrooms and enhancing parental skills to encourage children to read and succeed in school. The extent to which the applicant proposes to design and submit a replicable model incorporating strength based perspective and reflective practices as well as their relationship to Head Start competency goals, indicators, priorities and the program performance standards.

Objectives and Need for Assistance 20 points

Relevant physical, economic, social, financial, institutional or other problems requiring intervention. The need for this project in the proposed community(ies). The principal and subordinate objectives of the project. The supporting documentation provided or other testimonies from concerned interests other than the applicant.

The objectives for the program. How these objectives are based on an assessment of partner and community needs and how they relate to Head Start goals. The extent to which the applicant proposes a detailed process that will be used to assess the need for the proposed program including the total number of staff needing training, including preschool and infant/toddler teachers.

Specifically identified population to be served. The extent to which the applicant describes proposed Head Start and Early Head Start grantees as participating partners. The extent to which the applicant provides the numbers and types of staff to be enrolled in the project, the proposed courses in relationship to courses completed by partner staff before entering the project, and degrees to be awarded.

The consultative process related to the development of the proposed initiative. The extent to which the applicant describes detailed efforts to frame the proposed initiative within broader State or community efforts to enhance professional and career development for staff in all forms of early childhood and child care programs. The extent to which the applicant provides letters of support that document consultation and support from the proposed grantee or delegate agency partners, the Head Start State Collaboration Office, and any existing state level early childhood career development initiative.

Approach 20 points

The extent to which the application describes a detailed plan of action pertaining to the scope of the project including details on how the proposed work will be accomplished, such as detailed timelines and lists of each organization as well as consultant and key individuals who will work on the project. The extent to which the applicant describes a brief yet clear description of the nature of the effort and contribution each organization, consultant, or key individual will make to the project. The extent to which the applicant demonstrates adequate time key staff will devote to the project and that this staff is qualified and knowledgeable of Head Start and Early Head Start. The extent to which the applicant describes an approach and methodology for implementing the project, including a clear description that delineates the relationship of each task to the accomplishment of the proposed objectives. The extent to which the applicant provides evidence that the planned approach reflects sufficient input from and partnership with Head Start and Early Head Start grantees.

The extent to which the applicant demonstrates effective planning for activities developed during the start-up period in preparation of implementation of the program including assurance that no more than 6 months will be devoted to planning activities.

The extent to which the applicant demonstrates effective methods for recruiting Head Start center-based teaching staff and an effective selection process for participation in the program.

The extent to which the applicant demonstrates how coursework will be contextually and culturally relevant to the Head Start and Early Head Start environment and how it will contribute to enhancing the effectiveness of teachers, program quality, and outcomes for Head Start children and families.

The extent to which the application describes efforts the applicant and Head Start partners will make to ensure that coursework is accessible to teaching staff and how the applicant will support their successful completion of courses and degrees. The extent to which the applicant provides discussion of relevant issues such as timing, scheduling, and location of classes, support to enhance the literacy and study skills of participants, and approaches to integrate coursework into the working environment of the Head Start program. The extent to which the applicant describes costs (if any) associated with courses and degree requirements for Head Start staff.

The extent to which the applicant describes credit courses offered particularly in the area of Early Childhood Development/Education.

The extent to which the applicant describes how CDA training and certification of Head Start and Early Head Start staff, as appropriate, as well as previous coursework and credits will be linked to academic credits and course sequences under this project leading to BA degrees in early childhood education. The extent to which the applicant includes estimates indicating how many Head Start and Early Head Start staff members will be included in this effort.

Plan for Project Continuance Beyond Grant Support 15 points

The extent to which the applicant describes appropriate activities that will continue after the completion of this project that will ensure that the applicant will continue to participate in providing educational opportunities for Head Start and Early Head Start classroom staff.

Nonfederal Resources 5 points

The extent to which the applicant describes strong efforts to complement the Federal funds requested in this proposal with other sources to maximize the benefits to Head Start and Early Head Start grantees including efforts or plans to assist Head Start/Early Head Start staff in accessing sources of financial assistance or to make use of other funding for training and career development of early childhood program staff.

Staff and Position Data 5 points

The extent to which the applicant demonstrates that key staff are qualified and knowledgeable of Head Start and Early Head Start. The extent to which the applicant demonstrates the capacity

of its organization, key leaders, managers, and project personnel to provide: high quality, relevant, and responsive training to Head Start staff; competent project staff to plan and deliver appropriate course material to Head Start trainees that is culturally relevant; implementation of the training grant in an effective and timely manner; and successful partnerships that involve sharing resources, staffing, and facilities.

Budget and Budget Justification 5 points

How the proposed project costs are reasonable and appropriate in view of the activities to be carried out and the anticipated outcomes. The extent to which the applicant identifies and explains the relationship of the budgetary items listed under "General Budget Information," in this section, to the objective of this announcement. The extent to which the applicant describes a thorough line item budget for the costs associated with key project staff attending two ACF-sponsored meetings in Washington, DC.

Organizational Profiles 5 points

The extent to which the applicant presents an organizational structure that will support the project objectives. The extent to which the applicant demonstrates how joint planning and assessment with the Head Start and Early Head Start grantees will be effectively implemented with timelines and clear lines of responsibility. The extent to which the applicant explains how staff positions will be assigned and describes their major functions and responsibilities.

Geographic Location 5 points

The extent to which the application describes the precise location of the project and area to be served, including the location of the Head Start and Early Head Start grantees the applicant partners with.

2. *Review and Selection Process:* No grant award will be made under this announcement on the basis of an incomplete application. Applications received by the due date will be reviewed and scored competitively. Experts in the field, generally persons from outside the Federal government, will use the evaluation criteria listed in Section V of this announcement as well as the eligibility criteria specified in Section III to review and score the applications. Application review panels will assign a score to each application and identify its strengths and weaknesses. The Head Start Bureau will conduct an administrative review of the applications and results of the competitive review panels and make recommendations for funding to the Commissioner, ACYF. Subject to the recommendation of the Head Start Bureau Associate Commissioner, the Commissioner, ACYF, will make the final selection of the applications to be funded. An application may be funded in whole or in part depending on: (1) The ranked order of applicants resulting from the competitive review; (2) staff review and consultations; (3) the combination of projects that best meets the objectives of the Head Start Bureau; (4) the funds available; (5) the statutory requirement that reserves funds for Indian Tribes, and Alaska Native Regional Corporations, and Native Hawaiian entities; and (6) other relevant considerations. The Commissioner may also elect not to fund any applicants with known management, fiscal, reporting, program, or other problems, which make it unlikely that they would be able to provide effective services.

Non-Federal Reviewers

Since ACF will be using non-Federal reviewers in the process, applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security Numbers, if otherwise required for individuals. The copies may include summary salary information.

Approved but Unfunded Applications

In cases where more applications are approved for funding than ACF can fund with the money available, the Grants Officer shall fund applications in their order of approval until funds run out. In this case, ACF has the option of carrying over the approved applications up to a year for funding consideration in a later competition of the same program. These applications need not be reviewed and scored again if the program's evaluation criteria have not changed. However, they must then be placed in rank order along with other applications in later competition.

3. *Anticipated Announcement and Award Dates:* The anticipated start date for the new awards is September 30, 2005. Projects may run through September 29, 2010 for a period of up to 60 months.

VI. Award Administration Information

1. *Award Notices:* The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided, and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

Organizations whose applications will not be funded will be notified in writing.

2. *Administrative and National Policy Requirements:* Grantees are subject to the requirements in 45 CFR part 74 (non-governmental) and 45 CFR part 92 (governmental).

Direct Federal grants, subaward funds, or contracts under this ACF Program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this Program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

3. *Reporting Requirements:* Program Progress Reports: Semi-Annually. Financial Reports: Semi-Annually.

Grantees will be required to submit program progress and financial reports (SF–269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period. The SF–269 may be found at the following URL: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

VII. Agency Contacts

Program Office Contact: Rosalind Dailey, U.S. Department of Health and Human Services—ACF, ACYF—Head Start Bureau, 330 C Street SW., Switzer Room 2211, Washington, DC 20447, Phone: 202–205–8653, E-mail: *rdailey@acf.hhs.gov.*

Grants Management Office Contact: Tim Chappelle, Administration for Children and Families, Office of Grants Management, 330 C Street SW., Switzer Room 2220, Washington, DC 20447, Phone: 202–401–4855, E-mail: *tichappelle@acf.hhs.gov.*

VIII. Other Information

Additional information about this program and its purpose can be located on the following Web sites: *http://www.headstartinfo.org* and *http://www.hsnrc.org.*

Applicants will not be sent acknowledgements of received applications.

Notice: Beginning with FY 2006, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005, applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov*. Applicants will also be able to find the complete text of all ACF grant announcements on the ACF Web site located at: *http://www.acf.hhs.gov/grants/index.html*.

Dated: April 12, 2005.

Joan E. Ohl,

Commissioner, Administration on Children, Youth and Families.

[FR Doc. 05–7795 Filed 4–18–05; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3209–EM]

Maine; Emergency and Related Determinations

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

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Maine (FEMA–3209–EM), dated April 1, 2005, and related determinations.

DATES: *Effective Date:* April 1, 2005.

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, in a letter dated April 1, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the impact in certain areas of the State of Maine, resulting from the record and/or near record snow on March 9, 2005, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Maine.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide emergency protective measures under the Public Assistance program to save lives, protect public health and safety, and property. Other forms of assistance under Title V of the Stafford Act may be added at a later date, as you deem appropriate. You are further authorized to provide this emergency assistance in the affected areas for a period of 72 hours. You may extend the period of assistance, as warranted. This assistance excludes regular time costs for sub-grantees' regular employees. Assistance under this emergency is authorized at 75 percent Federal funding for eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Maine to have been affected adversely by this declared emergency:

Androscoggin, Aroostook, Cumberland, Oxford, Penobscot, Piscataquis, Somerset, and York Counties for emergency protective measures (Category B) under the Public Assistance program for a period of 72 hours.

(Catalog of Federal Domestic Assistance No. 97.036, Disaster Assistance.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–7753 Filed 4–18–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Reopening of Public Comment Period for the Agency Draft Recovery Plan for the Endangered *Catesbaea melanocarpa*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of reopening of public comment period.

SUMMARY: We, the Fish and Wildlife Service, announce that we are reopening the comment period for the Technical/Agency Draft Recovery Plan for *Catesbaea melanocarpa* (no common name) to solicit comment on revised "Recovery Goal" and "Recovery Criteria" sections. The revised recovery goal of the draft recovery plan is to protect and stabilize existing populations and associated habitat of *Catesbaea melanocarpa* and ultimately remove the species from the List of Endangered and Threatened Wildlife and Plants. The revised recovery criteria establish criteria for both downlisting and delisting. We solicit review and written comments from the public on these sections of the recovery plan.

DATES: In order to be considered, we must receive comments on the technical agency draft recovery plan on or before May 19, 2005.

ADDRESSES: If you wish to review this draft recovery plan, you may obtain a copy by contacting the Boquerón Field Office, U.S. Fish and Wildlife Service, P.O. Box 491, Boquerón, Puerto Rico 00622 (telephone 787/851–7297), or by visiting our recovery plan Web site at *http://endangered.fws.gov/recovery/index.html#plans*. If you wish to comment, you may submit your comments by either of three methods:

1. You may submit written comments and materials to the Field Supervisor, at the above address.

2. You may hand-deliver written comments to our Boquerón Field Office, at the above address, or fax your comments to (787) 851–7440.

3. You may send comments by electronic mail to Marelisa Rivera from the Boquerón Field Office at *marelisa_rivera@fws.gov*.

Comments and materials received are available for public inspection on request, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Marelisa Rivera (see **ADDRESSES** section) (Telephone 787–851–7297, ext. 231).

SUPPLEMENTARY INFORMATION:

Background

Catesbaea melanocarpa is an extremely rare small spiny shrub that is known from Puerto Rico (PR), St. Croix in the U.S. Virgin Islands, Barbuda, Antigua, and Guadalupe. It occurs in the subtropical dry forest life zone, and it is currently known in the United States from only one individual in Peñones de Melones in Cabo Rojo, Puerto Rico, and approximately 100 individuals at one location in St. Croix. The species is threatened by the limited number of individuals and distribution, habitat destruction or modification for residential and tourist development, fire, and catastrophic natural events such as hurricanes. We listed Catesbaea

melanocarpa as endangered on March 17, 1999 (64 FR 13116).

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the endangered species program. To help guide the recovery effort, we prepare recovery plans for most listed species. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting, and estimate time and cost for implementing recovery measures.

Previous Federal Action

On September 27, 2004, we published in the **Federal Register** a notice of availability of the Technical/Agency Draft Recovery Plan for *Catesbaea melanocarpa* for review and comment (69 FR 57712). The public review and comment period ended on November 26, 2004. We subsequently have revised the "Recovery Goal" and "Recovery Criteria" sections to address the delisting of the species. Accordingly, we are reopening the comment period to solicit comments on these revised sections.

Recovery Goal

The Technical/Agency Draft Recovery Plan for *Catesbaea melanocarpa* included an interim goal of protecting and enhancing existing populations to the point that downlisting to threatened was warranted. The reason we included only an interim goal was that the limited information available on the current number of individuals throughout the species range and the limited knowledge on biology, habitat requirements, and genetic information precluded us from coming up with well-informed criteria to support a long-term goal. We have revised the recovery goal of the draft recovery plan to protect and stabilize existing populations and associated habitat, and ultimately remove the species from the List of Endangered and Threatened Wildlife and Plants. Although the amount of information available for this species has not changed, we believe that we can still identify the ultimate goal as the delisting of the species due to recovery, while acknowledging that we will need additional information to support and refine objective and measurable criteria for delisting.

Recovery Criteria

The Technical/Agency Draft Recovery Plan for *Catesbaea melanocarpa* identified four interim priority tasks that would lead us to obtain information essential for the development of more objective, measurable criteria that would need to be met before considering the downlisting of the species. We have revaluated the downlisting criteria and determined that objective and measurable criteria could be developed at this time and have revised the draft plan accordingly. Further, we have added delisting criteria to reflect the revised recovery goal. The revised and added criteria are as follows.

Downlisting of the species from endangered to threatened status will be considered when: (1) The habitat known to support the two extant populations (St. Croix and Peñones de Melones) is enhanced and protected through landowner conservation agreements or easements; (2) extant populations are enhanced through the planting of additional propagated individuals to augment the number of adult individuals to at least 250; (3) at least one population within each of the following previously occupied habitat is found and/or established: Guánica Commonwealth Forest (PR), Susúa Commonwealth Forest (PR), Barbuda, Antigua, and Guadalupe; and (4) research is conducted on key biological and genetic issues, including effective propagation techniques, and number of individuals within a population and number of populations needed for the establishment of self-sustaining populations and a viable overall population.

Catesbaea melanocarpa will be considered for delisting when: (1) A number of viable populations (to be determined following the appropriate studies) are protected by long term conservation strategies; and (2) viable populations (the number of which should be determined following the appropriate studies) are established in unoccupied but suitable habitat at Sandy Point National Wildlife Refuge (USVI), Cabo Rojo National Wildlife Refuge (PR), La Tinaja in Sierra Bermeja (Laguna Cartagena National Wildlife Refuge, PR), and any other identified suitable conservation area within the dry forest zone.

Because we lack critical biological and genetic information, we can not determine specific numbers for the delisting criteria at this time. However, we have identified a recovery task that is necessary for providing such information and will refine the recovery criteria when this information is available:

8. Refine recovery criteria. As additional information on the biology, ecology, propagation, and management of Catesbaea melanocarpa is accumulated, it will be necessary to better define recovery criteria.

81. Determine number of individuals and self-sustaining populations necessary to ensure species survival and recovery. Environmental and reproductive studies, together with the relative success of population protection measures, will allow for more precise and realistic recovery criteria to be established.

82. Determine what additional actions, if any, are necessary to achieve recovery criteria. Any action(s) not included in this recovery plan that are recognized during the recovery process as being necessary or important for the conservation and/or recovery of this species should be incorporated into the plan.

This task was included in the first draft of the recovery plan as Task 7 and sub-tasks 71 and 72.

Public Comments Solicited

We solicit written comments on the "Recovery Goal" and "Recovery Criteria" sections of the recovery plan as discussed above. We will consider all comments regarding recovery goal and criteria received by the date specified in the **DATES** section (above) prior to final approval of the recovery plan.

Our practice is to make all comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold their home addresses, which we will honor to the extent allowable by law. There may also be circumstances in which we would withhold a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. 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.

Author

The primary author of this notice is Marelisa Rivera (see **ADDRESS** section).

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: March 18, 2005.

Cynthia K. Dohner,

Acting Regional Director, Southeast Region.

[FR Doc. 05–7787 Filed 4–18–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Quarterly Status Report of Water Service, Repayment, and Other Water-Related Contract Negotiations

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of contractual actions that have been proposed to the Bureau of Reclamation (Reclamation) and are new, modified, discontinued, or completed since the last publication of this notice on March 10, 2005. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities consistent with section 9(f) of the Reclamation Project Act of 1939. Additional announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Sandra L. Simons, Manager, Contract Services Office, Bureau of Reclamation, PO Box 25007, Denver, Colorado 80225–0007; telephone 303–445–2902.

SUPPLEMENTARY INFORMATION: Consistent with section 9(f) of the Reclamation Project Act of 1939 and the rules and regulations published in 52 FR 11954, April 13, 1987 (43 CFR 426.22), Reclamation will publish notice of proposed or amendatory contract actions for any contract for the delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for the sale of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act. Pursuant to the "Final Revised Public Participation Procedures" for water resource-related contract negotiations, published in 47 FR 7763, February 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.

2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.

3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act, as amended.

4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.

5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to (i) the significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. At a minimum, the regional director shall furnish revised contracts to all parties who requested the contract in response to the initial public notice.

The March 10, 2005, notice should be used as a reference point to identify changes. The numbering system in this notice corresponds with the numbering system in the March 10, 2005, notice.

Definitions of Abbreviations Used in This Document

BCP—Boulder Canyon Project
Reclamation—Bureau of Reclamation
CAP—Central Arizona Project
CVP—Central Valley Project
CRSP—Colorado River Storage Project
FR—**Federal Register**
IDD—Irrigation and Drainage District
ID—Irrigation District
M&I—Municipal and Industrial
NMISC—New Mexico Interstate Stream Commission
O&M—Operation and Maintenance
P-SMBP—Pick-Sloan Missouri Basin Program
PPR—Present Perfected Right
SOD—Safety of Dams
WD—Water District

Pacific Northwest Region: Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, Idaho 83706–1234, telephone 208–378–5344.

The Pacific Northwest Region has no updates to report for this quarter. Please refer to the March 10, 2005, publication of this notice for current contract actions.

Mid-Pacific Region: Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825–1898, telephone 916–978–5250.

New contract actions:

37. Broadview WD, CVP, California: Proposed assignment of 27,000 acre-feet of Broadview WD's entire CVP supply to Westlands WD for irrigation and M&I use.

38. Mendota Wildlife Area, CVP, California: Reimbursement agreement between the California Department of Fish and Game and Reclamation for conveyance service costs to deliver Level 2 water to the Mendota Wildlife Area during infrequent periods when the Mendota Pool is down due to unexpected but needed maintenance. This action is taken pursuant to Pub. L. 102–575, Title 34, Section 3406(d)(1), to meet full Level 2 water needs of the Mendota Wildlife Area.

Discontinued contract item:

29. Pajaro Valley Water Management Agency, CVP, California: Proposed assignment of 27,000 acre-feet of

Broadview WD's entire CVP supply to Pajaro Valley Water Management Agency for M&I use.

Completed contract action:

2. Contractors from the American River Division, Cross Valley Canal, Delta Division, Friant Division, Sacramento River Division, San Felipe Division, Shasta Division, Trinity River Division, and West San Joaquin Division; CVP; California: Renewal of up to 114 long-term water service contracts; water quantities for these contracts total in excess of 3.4M acre-feet. These contract actions will be accomplished through long-term renewal contracts pursuant to Pub. L. 102–575. Prior to completion of negotiation of long-term renewal contracts, existing interim renewal water service contracts may be renewed through successive interim renewal of contracts. Execution of long-term renewal contracts began in late February 2005. Execution of these contracts will continue through July 2005.

Lower Colorado Region: Bureau of Reclamation, PO Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006–1470, telephone 702–293–8536.

New contract actions:

40. Cibola Valley IDD, BCP, Arizona: Assign 396 acre-feet per year of the district's entitlement to fourth-, fifth-, and sixth-priority water to The Conservation Fund.

41. Golden Shores Water Conservation District, BCP, Arizona: Amend the district's contract to include the water allocation for Topock Village Estates within the district's boundaries.

42. Ronald E. and Shannon L. Williamson, BCP, California: Assign contract No. 6–07–30–W0342 to Kendell Perrett from Ronald E. and Shannon L. Williamson.

Modified contract action:

33. Wellton-Mohawk IDD, BCP, Arizona: Amend contract No. 1–07–30–W0021 to revise the authority to deliver domestic use water from 5,000 to 12,000 acre-feet per calendar year, which is within the district's current overall Colorado River water entitlement.

Completed contract actions:

9. San Tan ID, CAP, Arizona: Amend distribution system repayment contract No. 6–07–30–W0120 to increase the repayment obligation by approximately $168,000. Amendatory contract executed on February 16, 2005.

31. Cibola Valley IDD, BCP, Arizona: Contingent upon completion of sale documents, proposed assignment and transfer of a portion of the district's right to divert up to 24,120 acre-feet of Colorado River water per year to the Mohave County Water Authority, the Hopi Tribe, and Reclamation. Contract was executed on December 14, 2004.

42. Ronald E. and Shannon L. Williamson, BCP, California: Assign contract No. 6–07–30–W0342 to Kendell Perrett from Ronald E. and Shannon L. Williamson. Amendatory contract executed on February 16, 2005.

Upper Colorado Region: Bureau of Reclamation, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1102, telephone 801–524–3864.

New contract actions:

1.(c) Dry West Nursery, Aspinall Storage Unit, CRSP: Dry West Nursery has requested a 40-year water service contract for 3 acre-feet of water out of Blue Mesa Reservoir. Dry West Nursery has submitted their augmentation plan to Water District 4, Case No. 04CW174.

1.(d) United Companies, Aspinall Storage Unit, CRSP: United Companies has requested 22.0 acre-feet of M&I water out of Blue Mesa Reservoir for four gravel pits.

1.(e) Downy Excavating, Inc., Aspinall Storage Unit, CRSP: Downy Excavating, Inc., has requested a 40-year water service contract for 2 acre-feet of water out of Blue Mesa Reservoir. Downy Excavation has submitted their augmentation plan to Water District 4, Case No. 97CW49.

1.(f) Bowie Resources, LLC, Aspinall Storage Unit, CRSP: Bowie Resources, LLC has requested a 40-year water service contract for 105 acre-feet of water out of Blue Mesa Reservoir. Bowie Resources has submitted their augmentation plan to Water District 4, Case No. 02CW77.

29. Carbon Water Conservancy District, Scofield Project, Utah: Contract providing for the district to repay to the United States 15 percent of the cost of SOD modifications to the spillway at Scofield Dam.

30. Weber River Water Users Association, Weber River Project, Utah: Contract providing for the association to repay to the United States 15 percent of the cost of SOD modifications at Echo Dam.

31. Central Utah Project, Utah. Petition for project water among the United States, the Central Utah Water Conservancy District, and the Duchesne County Water Conservancy District for use of 3,000 acre-feet of irrigation water from the Bonneville Unit of the Central Utah Project.

Modified contract action:

10. Pine River ID, Pine River Project, Colorado: Contract to allow the district to convert project irrigation water to municipal, domestic, and industrial uses.

Great Plains Region: Bureau of Reclamation, PO Box 36900, Federal Building, 316 North 26th Street, Billings, Montana 59107–6900, telephone 406–247–7752.

New contract actions:

45. Belle Fourche ID, Belle Fourche Project, P–SMBP, South Dakota: Temporary contract for a supplemental water supply from Keyhole Reservoir.

46. Buford-Trenton ID, P–SMBP, North Dakota: Amend existing power contract to provide for increase in project use pumping power rate of delivery and enter new repayment and power contract for additional project use pumping power for project purposes in irrigating bench lands existing within the district.

47. East Bench ID, East Bench Unit, P–SMBP, Montana: The district requested a deferment of its 2005 distribution works repayment obligation. A request is being prepared to amend Contract No. 14–06–600–3593 to defer payments in accordance with the Act of September 21, 1959.

48. ExxonMobil Corporation, Ruedi Reservoir, Fryingpan-Arkansas Project, Colorado: Consideration of ExxonMobil Corporation's request to amend its Ruedi Round I contract to include additional uses for the water.

49. Frenchman Valley ID; Frenchman Unit, Frenchman-Cambridge Division, P–SMBP; Culbertson, Nebraska: The district requested a deferment of its 2005 repayment and reserve fund obligations in accordance with the Act of September 21, 1959.

50. Kansas-Bostwick ID No. 2; Courtland Unit, Bostwick Division, P–SMBP; Courtland, Kansas: The district requested a deferment of its 2005 repayment and water service obligations in accordance with the Act of September 21, 1959.

Discontinued contract action:

37. City of Huron, P–SMBP, South Dakota: Renewal of long-term operation, maintenance, and replacement agreement for O&M of the James Diversion Dam, South Dakota, with the City of Huron, South Dakota, or negotiation of water service and O&M with other interested, but as of yet, unidentified entity.

Completed contract actions:

13. Sisk Ranch, Inc., Lower Marias Unit, P–SMBP, Montana: Initiating a long-term contract for up to 552 acre-feet of storage water from Tiber Reservoir to irrigate 276 acres. Temporary contracts have been issued to allow continued delivery of water. A new 40-year water service contract was executed on December 13, 2004.

14. I.J. Peterson Ranch, Inc., Lower Marias Unit, P–SMBP, Montana:

Initiating a long-term contract for up to 478 acre-feet of storage water from Tiber Reservoir to irrigate 239 acres. Temporary contracts have been issued to allow continued delivery of water. A new 40-year water service contract was executed on December 13, 2004.

22. Helena Valley Unit, P–SMBP, Montana: Negotiating with Helena Valley ID for renewal of Part A of the A/B contract which expired December 31, 2004. A new 40-year repayment contract was executed on December 28, 2004.

23. Crow Creek Unit, P–SMBP, Montana: Negotiating with Toston ID for renewal of Part A of the A/B contract which expired December 31, 2004. A new 40-year repayment contract was executed on December 30, 2004.

27. Tiber Enterprises, Inc., Lower Marias Unit, P–SMBP, Montana: Initiating a long-term contract for up to 1,388 acre-feet of storage water from Tiber Reservoir to irrigate 694 acres. Temporary contracts have been issued to allow continued delivery of water. A new 40-year water service contract was executed on December 13, 2004.

28. Helena Valley Unit, P–SMBP, Montana: Initiating negotiations for contract renewal for an annual supply of water for domestic and M&I use to the City of Helena, Montana. A new 40-year water service contract was executed on December 29, 2004.

Dated: March 18, 2005.

Roseann Gonzales,

Director, Office of Program and Policy Services.

[FR Doc. 05–7789 Filed 4–18–05; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1076 (Final)]

Live Swine From Canada

Determination

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission (Commission) determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Canada of live swine, provided for in subheadings 0103.91.00 and 0103.92.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Background

The Commission instituted this investigation effective March 5, 2004, following receipt of a petition filed with the Commission and Commerce by the National Pork Producers Council, Washington, DC, and numerous state associations and individual producers. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of live swine from Canada were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of November 17, 2004 (69 FR 67364). The hearing was held in Washington, DC, on March 8, 2005, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on April 25, 2005. The views of the Commission are contained in USITC Publication 3766 (April 2005), entitled Live Swine from Canada: Investigation No. 731–TA–1076 (Final).

Issued: April 13, 2005.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–7796 Filed 4–18–05; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Joint Research and Development Program for the Advancement of In Situ Bioremediation Technologies

Notice is hereby given that, on March 11, 2005, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Joint Research and Development Program for the Advancement of In Situ Bioremediation Technologies (the "Program") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of parties to the Program are: E.I. du Pont de Nemours and company, Wilmington, DE; General Electric Company, Schenectady, NY; GeoSyntec Consultants Inc., Boca Raton, FL; ICI Chemicals and Polymers, Runcorn, United Kingdom; Shell Research Ltd., London, United Kingdom; Terra Systems, Inc., Wilmington, DE; Golder Associates, Atlanta, GA; Environmental Simulations International Ltd., Shrewsbury, United Kingdom; Acetate Products Limited, Derby, United Kingdom; W.S. Atkins Consultants Ltd., Epsom, United Kingdom; and Scientifics Ltd., Derby, United Kingdom. These parties collectively are the Bioremediation Consortium. Additional parties to the Program are: University of Edinburgh, Edinburgh, Scotland, United Kingdom; University of Sheffield, Sheffield, United Kingdom; and The Natural Environmental Research Council, Nottingham, United Kingdom. The general areas of the Program's planned activities are as follows: The Bioremediation Consortium's goals include sharing existing research regarding the techniques of bioremediation for the remediation of chlorinated solvent contaminants in soil or ground water; working collectively to demonstrate the treatment systems in the field of hazardous waste sites; and ultimately advancing the technologies to the point of public and regulatory acceptability. Additional goals of the Program include having one or more members of the Bioremediation Consortium enter into a Cooperative Research and Development Agreement with the U.S. Environmental Protection Agency, and having the Bioremeditation Consortium enter into a LINK Collaboration Agreement with the additional parties to the Program and the British Geological Survey.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 05–7747 Filed 4–18–05; 8:45 am]

BILLING CODE 4410–1–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Southwest Research Institute: Clean Diesel IV

Notice is hereby given that, on March 31, 2005, pursuant to Section 6(a) of the national Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Southwest Research Institute: Clean Diesel IV ("Clean Diesel IV") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Federal Mogul Inc., Southfield, MI and Woodward Governor Company, Fort Collins, CO have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Clean Diesel IV intends to file additional written notification disclosing all changes in membership.

On April 6, 2004, Clean Diesel IV filed its original notification pursuant to Section 6(a) of the Act. The department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on May 10, 2004 (69 FR 25923).

The last notification was filed with the Department on November 16, 2004. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 5, 2005 (70 FR 921).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 05–7748 Filed 4–18–05; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

129th Plenary Meeting; Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 129th open meeting of the full Advisory Council on Employee Welfare and Pension Benefit Plans will be held on May 12, 2005.

The session will take place in Room S–2508, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. The purpose of the open meeting, which will run from 2 p.m. to approximately 4:30 p.m., is to swear in the new members, introduce the Council Chair and Vice Chair, receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration, and determine the topics to be addressed by the Council in 2005.

Organizations or members of the public wishing to submit a written statement may do so by submitting 20 copies on or before May 5, 2005 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue, NW., Washington DC 20210. Statements received on or before May 5, 2005 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Larry Good by May 5 at the address indicated.

Signed at Washington, DC, this 13th day of April, 2005.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 05–7769 Filed 4–18–05; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a "Certification of Non-Relocation and Market and Capacity Information Report" (Form 4279–2), for the following:

Applicant/Location: Eagle Ridge Hospitality, LLC Coleraine, Minnesota.

Principal Product: The loan, guarantee, or grant applicant proposes to build a Holiday Inn hotel, water theme park, and restaurant. The NAICS industry codes for this enterprise are 721110 Hotels and Motels, 722110 Full Service Restaurant, 722320 Caterers, and 713110 Amusement and Theme Park.

DATES: All interested parties may submit comments in writing no later than May 3, 2005. Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR part 75, authorizes the United States Department of Agriculture (USDA) to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated to or likely to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration (ETA) within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed in Washington, DC, this 13th day of April, 2005.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E5–1841 Filed 4–18–05; 8:45 am]

BILLING CODE 4510–30–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Geoscience, Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Geosciences (1755).

Dates & Times: 8:30–5:30 p.m. Wednesday, May 11, 2005. 8:30 a.m.–4 p.m. Thursday, May 12, 2005.

Place: National Science Foundation, 4201 Wilson Boulevard, Rm 375, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Dr. Thomas Spence, Directorate for Geosciences, National Science Foundation, Suite 705, 4201 Wilson Boulevard, Arlington, Virginia 22230, phone 703–292–8500.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To provide advice, recommendations, and oversight concerning support for research, education, and human resources development in the geosciences.

Agenda:

Day 1: Directorate and Division Activity Reports; Division Subcommittee Meetings.

Day 2: Future Directorate Initiatives.

Dated: April 14, 2005.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 05–7797 Filed 4–18–05; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Polar Programs; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Polar Programs (1130).

Date and Time: May 9, 2005, 8 a.m. to 5 p.m.; May 10, 2005, 8 a.m. to 3 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford I, Room 1235.

Type of Meeting: Open.

Contact Person: Altie Metcalf, Office of Polar Programs (OPP), National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292–8030.

Minutes: May be obtained from the contact person list above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs, and activities of the polar research community; to provide advice to the Director of OPP on issues related to long range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

Agenda: Staff presentations on program updates, discussions on International Polar Year; U.S. Antarctic Program resupply, advance planning, budgets, and commitments; and polar education and outreach.

Dated: April 13, 2005.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 05–7745 Filed 4–18–05; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499; License Nos. NPF–76 and NPF–80]

In the Matter of Centerpoint Energy, Inc., Texas Genco, LLC (South Texas Project Units 1 and 2); Order Approving Application Regarding Proposed Acquisition

I.

STP Nuclear Operating Company (STPNOC) and owners Texas Genco, LP (Texas Genco), the City Public Service Board of San Antonio (CPS), AEP Texas Central Company (TCC), and the City of Austin, Texas (COA) are holders of Facility Operating License Nos. NPF–76 and NPF–80, which authorize the possession, use, and operation of the South Texas Project, Units 1 and 2 (the facility or STP). STPNOC is licensed by the U.S. Nuclear Regulatory Commission (NRC or Commission) to operate STP. The facility is located at the licensees' site in Matagorda County, Texas.

II.

By application dated October 12, 2004, as supplemented by letters dated December 13 and 22, 2004, and February 23 and March 1, 2005 (collectively referred to herein as the application), STPNOC, acting on behalf of Texas Genco, CenterPoint Energy, Inc. (CenterPoint Energy), and GC Power Acquisition LLC (renamed Texas Genco LLC) (together, the Applicants), requested that the NRC, pursuant to 10 CFR 50.80, consent to the indirect license transfers that would be effected by the indirect transfer of control of Texas Genco's ownership interest in the facility. This action is being sought as a result of the transfer of Texas Genco's indirect parent company, Texas Genco Holdings, Inc. (TGN), from Centerpoint Energy to Texas Genco LLC. No changes to the facility licenses are proposed in the application.

In a separate request, Texas Genco is seeking approval of direct license transfers that would occur in connection with increasing its ownership interest in STP from its current 30.8 percent to either 44 percent or 56 percent, through an acquisition of all or part of TCC's 25.2 percent interest in STP. A separate Order is being issued to address that request.

In connection with the indirect transfer of control of Texas Genco's ownership interest in the facility, indirect control over Texas Genco's related interest in STPNOC, a not-for-profit Texas corporation that is the licensed operator of STP, will also be transferred. To the extent that the indirect transfer of control of Texas Genco's interest in STPNOC would constitute an indirect transfer of control of the licenses as held by STPNOC, consent under 10 CFR 50.80 is also being sought.

Approval of the indirect transfer of the facility operating licenses was requested by STPNOC pursuant to 10 CFR 50.80. Notice of the request for approval and an opportunity for a hearing was published in the **Federal Register** on November 17, 2004 (69 FR 67368). No comments or hearing requests were received.

Under 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information in the application by STPNOC and other information before the Commission, the NRC staff has determined that the proposed indirect transfer of control of Texas Genco's parent company will not affect the qualifications of Texas Genco as holder of the STP licenses, whether Texas Genco holds a 30.8 percent, 44 percent, or 56 percent interest in STP, and that the indirect transfer of control of the licenses as held by Texas Genco under each of the three scenarios discussed, to the extent effected by the transfer of control of Texas Genco, is otherwise consistent with the applicable provisions of laws, regulations, and orders issued by the NRC pursuant thereto, subject to the conditions discussed herein. The NRC staff also concludes that, to the extent Texas Genco holds a 30.8 percent, 44 percent, or 56 percent interest in STPNOC by reason of Texas Genco's acquisition of a part or all of TCC's 25.2 percent interest in the facility and STPNOC, and control of Texas Genco is then indirectly transferred to Texas Genco LLC, any resulting indirect transfer of control of STPNOC will not affect STPNOC's qualifications to hold the facility licenses to the extent now held by

STPNOC, and that the indirect transfer of the licenses as held by STPNOC, to the extent effected by the proposed indirect transfer of control of Texas Genco to Texas Genco LLC, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission, subject to the conditions set forth below.

The findings set forth above are supported by a safety evaluation dated

III.

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended (the Act), 42 U.S.C. 2201(b), 2201(I), 2201(o), and 2234; and 10 CFR 50.80, *it is hereby ordered* that the application regarding the indirect license transfers related to the proposed acquisition is approved, subject to the following conditions:

1. Texas Genco shall take no action to cause Texas Genco LLC, or its successors and assigns, to void, cancel, or modify its $120 million contingency commitment to Texas Genco, as represented in the application, or cause it to fail to perform or impair its performance under the commitment, or remove or interfere with Texas Genco's ability to draw upon the commitment, without the prior written consent of the Director of the Office of Nuclear Reactor Regulation. An executed copy of the Support Agreement shall be submitted to the NRC no later than 30 days after completion of the indirect license transfers. Also, Texas Genco shall inform the NRC in writing any time that it draws upon the $120 million commitment.

2. Should the proposed acquisition of control of Texas Genco by Texas Genco LLC not be completed within one year from date of issuance, this Order shall become null and void, provided, however, upon written application and good cause shown, such date may in writing be extended.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated October 12, 2004, and supplemental letters dated December 13 and 22, 2004, and February 23 and March 1, 2005, and the safety evaluation dated April 4, 2005, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland and accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 4th day of April, 2005.

For the Nuclear Regulatory Commission.

J. E. Dyer,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 05–7773 Filed 4–18–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499]

In the Matter of Texas Genco, LP; City Public Service Board of San Antonio; AEP Texas Central Company; STP Nuclear Operating Company (South Texas Project, Units 1 and 2); Order Approving Transfer of Licenses and Conforming Amendments

I.

STP Nuclear Operating Company (STPNOC), and owners Texas Genco, LP (Texas Genco), the City Public Service Board of San Antonio (CPS), AEP Texas Central Company (TCC), and the City of Austin, Texas (COA) are holders of Facility Operating License Nos. NPF–76 and NPF–80, which authorize the possession, use, and operation of the South Texas Project, Units 1 and 2 (the facility or STP). STPNOC is licensed by the U.S. Nuclear Regulatory Commission (NRC or Commission) to operate STP. The facility is located at the licensees' site in Matagorda County, Texas.

II.

By letter dated October 21, 2004, STPNOC submitted an application requesting approval of direct license transfers that would be necessary in connection with the proposed transfer of TCC's 25.2 percent undivided ownership interest in the facility to STP current co-owners Texas Genco and CPS. The transfer of TCC's interest may occur under one of several alternative scenarios described in the application. Supplemental information was provided by letters dated December 13 and 22, 2004, and February 23 and March 1, 2005. Hereinafter, the October 21, 2004, application and supplemental information will be referred to collectively as the "application." STPNOC also requested approval of conforming license amendments that would remove TCC from the facility operating licenses. After completion of the proposed transfers under any proposed scenario, Texas Genco, CPS, and COA would be the sole owners of the facility; the role of STPNOC would be unchanged. The application also requested NRC approval, as necessary, of any indirect transfer of the licenses as held by STPNOC that would be effected by the transfer of TCC's ownership interest in STP under any proposed scenario.

Approval of the transfer of the facility operating licenses and conforming license amendments was requested by STPNOC pursuant to 50.80 and 50.90 of Title 10 of the Code of Federal Regulations (10 CFR). Notice of the request for approval and an opportunity for a hearing was published in the **Federal Register** on December 20, 2004 (69 FR 76019). No comments or hearing requests were received.

Under 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information in the application and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that Texas Genco and CPS are qualified to hold the ownership interest in the facility previously held by TCC under the alternative scenarios described in the application, and that the transfer of TCC's 25.2 percent undivided ownership interest in the facility to Texas Genco and/or CPS under the alternative scenarios described in the application is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission, subject to the conditions set forth below. The NRC staff has further found that the application for the proposed license amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I. The facility will operate in conformity with the application, the provisions of the Act and the rules and regulations of the Commission; there is reasonable assurance that the activities authorized by the proposed license amendments can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations; the issuance of the proposed license amendments will not be inimical to the common defense and

security or to the health and safety of the public; and the issuance of the proposed amendments will be in accordance with 10 CFR part 51 of the Commission's regulations and all applicable requirements have been satisfied. The NRC staff has also found that to the extent that the transfer of TCC's interest as described herein will effect an indirect transfer of the licenses as held by STPNOC, such transfer of TCC's interest will not affect the qualifications of STPNOC as a holder of the licenses, and such indirect transfer of the licenses as held by STPNOC is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The findings set forth above are supported by NRC safety evaluation dated _____.

III.

Accordingly, pursuant to Sections 161b, 161o, and 184 of the Act, 42 U.S.C. 2201(b), 2201(o), and 2234; and 10 CFR 50.80, *it is hereby ordered* that the direct transfer of the licenses as described herein is approved, subject to the following conditions:

1. On the closing date of the transfer of any part of TCC's interest in STP to Texas Genco, TCC shall transfer to Texas Genco TCC's decommissioning funds accumulated as of such date, as follows: (1) If TCC transfers a 13.2 percent interest in STP to Texas Genco, TCC shall transfer 52.38 percent (13.2/25.2) of its accumulated decommissioning funds to Texas Genco; (2) if TCC transfers its entire 25.2 percent interest in STP to Texas Genco, TCC shall transfer all of its accumulated decommissioning funds to Texas Genco. In either case, Texas Genco shall ensure the deposit of such funds received from TCC into an external decommissioning trust consistent with the application.

2. On the closing date of the transfer of any part of TCC's interest in STP to CPS, TCC shall transfer to CPS TCC's decommissioning funds accumulated as of such date, as follows: (1) if TCC transfers a 12.0 percent interest in STP to CPS, TCC shall transfer 47.62 percent (12.0/25.2) of its accumulated decommissioning funds to CPS; (2) if TCC transfers its entire 25.2 percent interest in STP to CPS, TCC shall transfer all of its accumulated decommissioning funds to CPS. In either case, CPS shall ensure the deposit of such funds received from TCC into an external decommissioning trust consistent with the application.

It is further ordered that, consistent with 10 CFR 2.1315(b), license amendments that make changes, as indicated in Enclosures 2 and 3 to the cover letter forwarding this Order, to conform the licenses to reflect the subject direct license transfers are approved. The amendments shall be issued and made effective at the time the proposed direct license transfers are completed.

It is further ordered that to the extent any indirect transfer of the licenses as held by STPNOC would be effected by reason of the transfer of TCC's interest in STP, such indirect transfer of the licenses is approved.

It is further ordered that STPNOC shall inform the Director of the Office of Nuclear Reactor Regulation in writing of the date of closing of the transfer of TCC's interest in STP no later than 5 business days prior to closing. Should the transfer of the licenses not be completed by April 1, 2006, this Order shall become null and void, provided, however, that upon written application and for good cause shown, such date may be extended by order.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated October 21, 2004, as supplemented by letters dated December 13 and 22, 2004, and February 23 and March 1, 2005, and the non-proprietary safety evaluation dated April 4, 2005, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 4th day of April 2005.

For the Nuclear Regulatory Commission.

J. E. Dyer,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. E5–1840 Filed 4–18–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–407]

University of Utah; University of Utah TRIGA Nuclear Reactor Facility; Exemption

1.0 Background

University of Utah (the licensee), is the holder of Facility Operating License No. R–126, which authorizes operation of the University of Utah Nuclear Reactor Facility, an open pool TRIGA fueled research reactor facility, licensed to operate at power levels up to 100 kilowatts, located in Salt Lake City, Utah. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The current operating license expires at midnight on April 17, 2005.

By letter dated April 13, 2005, the licensee requested an exemption from the regulation, 10 CFR 2.109(a). Specifically, the requested exemption allows the University of Utah to have submitted a license renewal application for the research reactor less than 30 days prior to the expiration of the operating license, while maintaining the protection of the timely renewal doctrine contained in 10 CFR 2.109(a). By letter dated March 25, 2005, the licensee applied for renewal of the research reactor license. In the April 13, 2005 letter, the licensee stated it was unable to submit a renewal application 30 days prior to license expiration because: (1) Compliance with 10 CFR 2.109 created an undue hardship not intended by this regulation due to the limited staff (currently only two licensed senior reactor operators) and a change in the Reactor Administrator (administrative change) within the previous calendar year, and (2) misinterpretation of the requirements of 10 CFR 2.109(a). The licensee also in the April 13, 2005 letter, indicated that the exemption from the 30 day rule will not present: (1) an undue risk to the public health and safety and is consistent with the common defense and security, and that the reactor and material would be protected under the current license provisions; (2) the licensee made a good faith effort to comply with the regulation; and (3) there is no good alternatives for divesting the licensee of material held under the license. The licensee indicated that, in light of these and other factors, it could not prepare and file a sufficient license renewal application 30 days prior to the license expiration specified in Title 10 of the Code of Federal Regulations (10 CFR) Part 2, Section 109(a), "Effect of timely renewal application."

2.0 Request/Action

Section 109(a) of 10 CFR Part 2 states: "Except for the renewal of an operating license for a nuclear power plant under 10 CFR 50.21(b) or 50.22, if, at least 30 days prior to the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new

license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined."

The licensee's application requested an exemption from the timing requirements of 10 CFR 2.109(a), for submittal of the research reactor license renewal application. The exemption would allow the submittal of the renewal application with less than 30 days prior to expiration of the operating license while maintaining the protection of the timely renewal provision in 10 CFR 2.109(a).

3.0 Discussion

Pursuant to the requirements of 10 CFR 50.12, the Commission may grant an exemption from the requirements of Part 50 when the exemption is (1) authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security, and (2) special circumstances are present as defined in 10 CFR 50.12(a)(2). The operation of the University of Utah research reactor since initial licensing in 1975 and license renewal in 1985 has been acceptable to ensure protection of the public health and safety and consistent with the common defense and security. Further, the requested exemption meets two special circumstances: 10 CFR 50.12(a)(2)(ii), "[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule;" and 10 CFR 50.12(a)(2)(iii), "[c]ompliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated."

The purpose of 10 CFR 2.109(a), as it is applied to NRC licensees, is to implement the "timely renewal" doctrine of section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. 558(c), which states:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The underlying purpose of this "timely renewal" provision in the APA is to protect a licensee who is engaged in an ongoing licensed activity and who has complied with agency rules in applying for a renewed or new license from facing license expiration as the result of delays in the administrative process.

Submittal of the license renewal application approximately 24 days, instead of 30 days, prior to expiration of the operating license provides reasonable time prior to expiration to allow the staff to ensure that the application is essentially complete and sufficient and the licensee intends to continue to operate the facility. The NRC's current schedule for review of research reactor license renewal applications is to complete its review and make a decision on issuing the renewed license within 48 months of receipt. Meeting this schedule is based on a complete and sufficient application, and on the review being completed in accordance with the NRC's established license renewal review schedule. Also, completing the research reactor license renewal review process on schedule is, of course, dependent on licensee cooperation in meeting established schedules for submittal of any additional information required by the NRC, and the resolution of all issues demonstrating that issuance of a renewed license is warranted.

The second special circumstance involves undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated. The research reactor is operated solely for educational and research purposes. The reactor is a part of the Nuclear Engineering Program, but it also supports the curriculum of the other engineering disciplines in the University of Utah College of Engineering. The loss of this resource for an extended period of time during a license renewal process is an undue hardship.

In summary, the licensee has demonstrated that application of the subject regulation is not necessary to achieve the underlying purpose of the rule and is an undue hardship, thus meeting the criterion specified in 10 CFR 50.12(a)(2)(ii) and (iii). Accordingly, the NRC staff agrees that special circumstances are present to justify the requested exemption.

Therefore, the exemption is contingent upon the following condition being met: To ensure timely completion of the review process, the licensee must provide any requested information as necessary to support the completion of the NRC staff's safety and environmental reviews in accordance with the review schedule issued by the NRC.

Pending final action on the license renewal application, the NRC will continue to conduct all regulatory activities associated with licensing, inspection, and oversight, and will take whatever action may be necessary to ensure adequate protection of the public health and safety. The existence of this exemption does not affect NRC's authority, applicable to all licenses, to modify, suspend, or revoke a license for cause, such as a serious safety concern.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not endanger life or property or common defense and security, and is, otherwise, in the public interest. In addition, special circumstances exist to justify the proposed exemption. Therefore, the Commission hereby grants the licensee an exemption from the requirement of 10 CFR 2.109(a) for the University of Utah research reactor. Specifically, this exemption will allow the University of Utah to have submitted a license renewal application for the research reactor less than 30 days prior to the expiration of the operating license, while maintaining the protection of the timely renewal doctrine contained in 10 CFR 2.109(a), subject to the condition imposed by this exemption.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment. This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 15th day of April, 2005.

For the Nuclear Regulatory Commission.

David B. Matthews,

Director, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 05–7844 Filed 4–18–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–407]

University of Utah; University of Utah TRIGA Nuclear Reactor Facility; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from certain requirements of Title 10 of the Code of Federal Regulations (10 CFR), subsection 2.109(a), for Facility Operating License No. R–126, which authorizes operation of the University of

Utah TRIGA Nuclear Reactor Facility, a 100 kW (thermal) research reactor facility, located in Salt Lake County, Utah. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

Subsection 109(a) of 10 CFR Part 2 states, "Except for the renewal of an operating license for a nuclear power plant under 10 CFR 50.21(b) or 50.22, if, at least 30 days prior to the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined."

The University of Utah has requested an exemption from the timing requirements of 10 CFR 2.109(a), for submittal of the University of Utah TRIGA Nuclear Reactor Facility license renewal application. The exemption would allow the submittal of the renewal application with less than 30 days remaining prior to expiration of the operating license while maintaining the protection of the timely renewal provision in 10 CFR 2.109(a).

The proposed action is in accordance with the licensee's application for exemption dated April 13, 2005.

The Need for the Proposed Action

Because the licensee has submitted their application for license renewal less than 30 days before the expiration date of the existing license (midnight April 17, 2005), the proposed action is needed to allow continued operation of the facility while the NRC staff makes a final determination regarding license renewal.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes that pursuant to 10 CFR 50.12(a), the proposed exemption is authorized by law, will not endanger life or property or common defense and security, and is, otherwise, in the public interest. In addition, special circumstances exist to justify the proposed exemption. The details of the staff's evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation.

Because the proposed action would allow continued operation of the reactor facility under the current license conditions and technical specifications and will not authorize any changes to the facility or its operation, the proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent release offsite. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC staff concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Denial of the application for exemption would result in a period of time where the licensee would not operate the reactor while the NRC staff reviewed the licensee's application for license renewal. There would be a small decrease in environmental impact during the period of time the reactor would be shut down and the benefits of education and research would be lost. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This proposed action does not involve the use of any resources not previously considered in environmental impact appraisal for initial facility license authorization dated September 30, 1975, and the environmental assessment for operating license renewal dated March 27, 1985.

Agencies and Persons Consulted

In accordance with its policy, on April 13, 2005, the NRC staff consulted with the Utah State official, Mr. Dane Finerfrock, Director, Division of Radiation Control, Department of Environmental Quality, regarding the environmental impact of the proposed action. The State official had no comments regarding the environmental aspects of the exemption.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated April 13, 2005. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 14th day of April, 2005.

For the Nuclear Regulatory Commission.

Patrick M. Madden,

Section Chief, Research and Test Reactors Section, New, Research and Test Reactors Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 05–7845 Filed 4–18–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Week of April 18, 2005.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of April 18, 2005

Thursday, April 21, 2005

2:55 p.m.

Affirmation Session (Public Meeting) (Tentative).

a. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2),

Commission *sua sponte* review of portions of the Licensing Board's March 10, 2005 final decision on security contention (Tentative).

*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: Dave Gamberoni, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/what-we-do/policy-making/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.*, braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–415–2100, or by e-mail at *aks@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

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: April 14, 2005.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 05–7847 Filed 4–15–05; 9:47 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 18f–1 and SEC File No. 270–187; OMB Control No. 3235–0211; Form N–18F–1; SEC File No. 270–187; OMB Control No. 3235–0211.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 18f–1 [17 CFR 270.18f–1] enables a registered open-end management investment company ("fund") that may redeem its securities in-kind, by making a one-time election, to commit to make cash redemptions pursuant to certain requirements without violating section 18(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–18(f)). A fund relying on the rule must file Form N–18F–1 (17 CFR 274.51) to notify the Commission of this election. The Commission staff estimates that approximately 38 funds file Form N–18F–1 annually, and that each response takes approximately one hour. Based on these estimates, the total annual burden hours associated with the rule is estimated to be 38 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. 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.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: April 11, 2005.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1816 Filed 4–18–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51526; File No. SR–NASD–2005–045]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Delivery of Customer Agreements Containing Predispute Arbitration Clauses

April 12, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 4, 2005, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD Rule 3110(f) to: (1) Amend NASD Rule 3110(f)(2)(B) to conform to the SEC's recordkeeping rules, in particular, Exchange Act Rule 17a–3(a)(17)(i)(B)(*1*),[3] by extending the time period for delivery of a copy of a customer account agreement containing a predispute arbitration clause from the time of signing to within 30 days of signing; (2) extend the compliance date of the recent amendments to NASD Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.17a–3(a)(17)(i)(B)(*1*). This rule requires a broker-dealer, among other things, to keep a record indicating that the broker-dealer has furnished to each customer within 30 days of opening the account a copy of the account record, or alternate document, containing the customer's name, address, telephone number, date of birth, employment status, annual income, net worth, the account's investment objectives, and other information.

3110(f)(1)[4] to June 1, 2005; and (3) make technical corrections to the numbering in NASD Rule 3110(f)(4), as recently amended, to conform to existing NASD rule format. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

3110. Books and Records

(a) through (e) No change.

(f) (1) No change.

(2) (A) No Change.

(B) [At the time] *Within thirty days* of signing, a copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.

(3) (A) A member shall provide a customer with a copy of any predispute arbitration clause or customer agreement executed between the customer and the member, or inform the customer that the member does not have a copy thereof, within ten business days of receipt of the customer's request. *If a customer requests such a copy before the member has provided the customer with a copy pursuant to subparagraph (2)(B) of this Rule, the member must provide a copy to the customer by the earlier date required by this subparagraph (3)(A) or by subparagraph (2)(B).*

(B) No change.

(4) No predispute arbitration agreement shall include any condition that:

(A) [(i)] limits or contradicts the rules of any self-regulatory organization;

(B) [(ii)] limits the ability of a party to file any claim in arbitration;

(C) [(iii)] limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement;

(D) [(iv)] limits the ability of arbitrators to make any award.

(5) through (7) No Change.

(g) through (h) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(a) Delivery of Customer Agreements

The purpose of the proposed rule change regarding the delivery of customer agreements is to conform the time period for the delivery of copies of any customer agreement containing a predispute arbitration clause to customers in NASD Rule 3110(f) with the SEC recordkeeping rules, in particular, Exchange Act Rule 17a–3(a)(17)(i)(B)(*1*).

On November 22, 2004, the Commission approved changes (the "Rule 3110 changes") to NASD Rule 3110(f), which governs the use of predispute arbitration agreements with customers. The primary purposes of the Rule 3110 changes were to require enhanced disclosure to customers about the arbitration process and to clarify the prohibition against inserting provisions in predispute arbitration agreements that limit rights or remedies that parties have (for example, the ability of a party to file any claim in arbitration). The Rule 3110 changes also require that firms provide a copy of any customer agreement containing a predispute arbitration clause to the customer, who must acknowledge receipt thereof on the agreement or on a separate document, at the time of signing.[5] The proposed rule change would amend the time requirement for delivery of a copy of the customer agreement from the time of signing to within 30 days of signing.[6] This change would conform the delivery requirement in NASD Rule 3110(f)(2)(B) to that in the SEC's recordkeeping rules.[7]

(b) Extension of Compliance Date

The Rule 3110 changes are scheduled to become effective on May 1, 2005.[8] To give firms more time to amend their customer agreements to comply with the changes to NASD Rule 3110(f)(1), the proposed rule change will extend the compliance date by which firms must begin using the disclosure required by the changes to NASD Rule 3110(f)(1) from May 1, 2005 until June 1, 2005.[9] This will give firms six months (rather than five) to implement the changes required by the Rule 3110 changes with respect to NASD Rule 3110 (f)(1).[10] However, the other requirements of the Rule 3110 changes (*i.e.*, subparagraphs (f)(2) through (f)(7)) as well as the amendments set forth in this proposed rule change will apply to all predispute

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[4] *See* Exchange Act Rel. No. 50713 (Nov. 22, 2004), 69 FR 70293 (Dec. 3, 2004) (Order Granting Approval to Proposed Rule Change as Amended and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 by the National Association of Securities Dealers, Inc., Regarding NASD Rule 3110(f) Governing Predispute Arbitration Agreements With Customers) (SR–NASD–98–74).

[5] Prior to the Rule 3110 changes, firms were required to provide copies of predispute arbitration agreements to customers; however, the rule did not specify when they must do so.

[6] The changes made to NASD Rule 3110(f)(3)(A) by the Rule 3110 changes require firms to provide customers who request a copy of any predispute arbitration clause or client agreement with a copy within ten business days of the request. Thus, if the rule changes proposed in this release are adopted, customers wishing to have a copy of the customer agreement sooner than the specified 30 days can request one. For example, if a customer requests a copy of the agreement on the date of signing, the firm must provide the copy to the customer within ten business days of receiving that request. In addition, firms may not extend the 30-day time period for compliance with the delivery requirement in NASD Rule 3110(f)(2)(B), even though the Rule 3110 changes allow a firm ten business days in which to provide a copy of the agreement to a customer upon request. For example, if a customer requested a copy of the customer agreement 25 days after signing, the firm still would be required to provide the customer with the copy within 30 days of the signing date (rather than within ten business days of the date the firm received the request). Proposed language has been added to NASD Rule 3110(f)(3)(A) to address this situation.

[7] *See* Exchange Act Rule 17a–3(a)(17)(i)(B)(*1*); Exchange Act Rel. No. 44992 (Oct. 26, 2001), 66 FR 55817 (Nov. 2, 2001). The Rule 3110 changes were first filed in 1998, prior to the adoption of the Rule 17a–3(a)(17)(i)(B)(*1*). *See* 69 FR at 70293.

[8] The Notice announcing the Commission's approval of the Rule 3110 changes noted that "the proposed rule change would take effect 90 days after NASD publishes a *Notice to Members* within 60 days of publication of the Commission's approval * * *." 63 FR at 70295. *Notice to Members* 05–09, which announced the approval, was published on January 31, 2005.

[9] The effective date of the Rule 3110 changes was originally linked to the effective date of amendments to NASD Rule 10304, governing time limits on filing claims in arbitration, which will also take effect on May 1, 2005. *See* Exchange Act Rel. No. 50714 (Nov. 22, 2004), 69 FR 69971 (Dec. 1, 2004) (Order Granting Approval to Proposed Rule Change, and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 1 and 2 Thereto Relating to Time Limits for Submission of Claims in Arbitration) (SR–NASD–2003–101). The two rule filings are related because both include provisions restricting the ability of member firms to bifurcate customer claims between court and arbitration, and because the enhanced disclosure in NASD Rule 3110(f)(1) states that some firms have time limits for the filing of claims in arbitration. Extension of the compliance date for NASD Rule 3110(f)(1) would not extend the effective date of the bifurcation provision in NASD Rule 3110(f)(5), which would remain the same (May 1, 2005) as the amendments to NASD Rule 10304, or the applicability of any provision in NASD Rule 10304.

[10] Firms would be permitted to use customer agreements containing the new disclosure language required by the Rule 3110 changes before June 1, 2005.

arbitration agreements signed on or after May 1, 2005.

(c) Technical Amendments

The purpose of the proposed rule change renumbering the four subparagraphs in NASD Rule 3110(f)(4) is to conform the numbering in those subparagraphs to existing NASD rule format.

(d) Effective Dates and Compliance Dates

The proposed rule change will become effective upon approval by the Commission, and the compliance date of the proposed rule change will be May 1, 2005, except that firms will not be required to use the disclosure required by the changes to NASD Rule 3110(f)(1) until June 1, 2005. NASD will announce the proposed rule change in a *Notice to Members* to be published no later than 30 days following Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act, which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will continue to ensure that customers receive certain information regarding arbitration and predispute arbitration agreements in a timely fashion; however, the proposed rule change will conform the delivery requirements of NASD Rule 3110(f) with the requirements in the SEC's recordkeeping rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–045 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549—0609.

All submissions should refer to File Number SR–NASD–2005–045. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR–NASD–2005–045 and should be submitted on or before May 10, 2005.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has reviewed carefully the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association and, in particular, the requirements of section 15A(b)(6) of the Act and the rules and regulations thereunder. Section 15A(b)(6) requires, among other things, that the rules of a national securities association be designed in part 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, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change requiring members to provide customers with executed customer agreements in a time period consistent with the Commission's recordkeeping rules, in particular, Exchange Act Rule 17a–3(a)(17)(i)(B)(*1*), fosters cooperation and coordination with persons engaged in regulating transactions in securities. The Commission finds that the proposed rule change balances the need for protecting investors with the need for minimizing the administrative burden on members and is consistent with the requirements of the Act. The Commission notes that NASD Rule 3110(f)(3)(A) protects investors by requiring members to provide customers with a copy of the executed customer agreement within 30 days of execution, whether or not the customer requests a copy. If a customer requests a copy before the end of the 30-day period, the member must provide such copy within ten business days or before the end of the 30-day period, whichever date is earlier. The Commission notes that under the proposed rule change, members also are required to provide customers with additional copies of the executed agreement within ten business days if a customer requests it.

The Commission believes that the proposed rule change to extend the compliance date for NASD Rule 3110(f)(1) from May 1, 2005, to June 1, 2005 is designed to foster cooperation and coordination with persons engaged in regulating transactions in securities and is consistent with the Act. The Commission notes that the compliance date for NASD Rule 3110(f)(2) through (f)(7) remains May 1, 2005.

NASD has requested that the Commission find good cause pursuant to section 19(b)(2) of the Act for approving the proposed rule change prior to the 30th day after publication in the **Federal Register.** The Commission believes that granting accelerated approval for the proposed rule change will permit NASD to provide its members with notice of the revised customer agreement delivery requirement and staggered compliance dates in timely manner. The Commission therefore finds good cause for approving the proposed rule change prior to the 30th day after the date of

publication of notice of filing thereof in that accelerated approval will benefit NASD members and the investing public.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR–NASD–2005–045) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1818 Filed 4–18–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51539; File No. SR–NYSE–2004–59]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. To Adopt a New Rule (NYSE Rule 401A) Requiring Members and Member Organizations To Respond to Customer Complaints, and Adding Failure To Acknowledge Customer Complaints to the Minor Fine Provisions of NYSE Rule 476A

April 13, 2005.

I. Introduction

On October 21, 2004, the New York Stock Exchange, Inc. ("NYSE" or "the 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 adopt a new rule, denoted NYSE Rule 401A, to require its members and member organizations ("members") to respond to customer complaints, and to add failure to acknowledge customer complaints to the minor fine provisions of NYSE Rule 476A. The proposed rule change was published for comment in the **Federal Register** on March 7, 2005.[3] The Commission received no comments in response to the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

NYSE Rule 351(d) requires NYSE members to "report to the Exchange statistical information regarding customer complaints relating to such matters as may be specified by the Exchange." Pursuant to this Rule, the NYSE currently requires reporting of statistical information relating to complaints by customers involving, *inter alia*, sales practices, unauthorized trading and misappropriation of funds.[4] The reporting obligation applies to "[a]ll complaints, regardless of how delivered (oral, written, e-mail or fax) * * *."[5]

The NYSE now proposes to adopt a new Rule, designated 401A, to require its members to acknowledge and respond to customer complaints. Specifically, Rule 401A(a) would require NYSE members to acknowledge receipt of every customer complaint that is subject to the reporting requirements of Rule 351(d) within 15 business days of receipt, and to respond to the issues raised in such complaint within a reasonable period of time. Rule 401A(b) would mandate specific methods of delivery for acknowledgements and responses. Written acknowledgements and responses mailed to the complaining customer's last known address would suffice in all cases. However, where a complaint was electronically transmitted, members would be permitted to acknowledge and respond to it by electronic transmission to the e-mail address from which the complaint was sent. The Exchange would also permit verbal acknowledgements and responses to verbal complaints, provided that they are recorded in a log of such actions. Paragraph (c) of the proposed rule would require members to keep written records of all such acknowledgements, responses, and logs in accordance with NYSE Rule 440 ("Books and Records").

Finally, the Exchange proposes to add failures to acknowledge customer complaints within 15 days of receipt to the list of violations in NYSE Rule 476A ("Imposition of Fines for Minor Violations of Rules"). Rule 476A provides that the Exchange may impose fines, not to exceed $5,000, on any member for a minor violation of the Exchange rules specified therein.

III. Discussion and Findings

The Commission finds the proposed rule change is consistent with the Act, and in particular with section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[6] The Commission further finds that the proposal is consistent with section 6(b)(6) of the Act,[7] which requires that members be appropriately disciplined for violations of Exchange rules. Finally, the Commission finds the proposal is consistent with Rule 19d–1(c)(2) under the Act,[8] which governs minor rule violation plans.

As the Exchange stated in its proposal, no current NYSE rule requires members to acknowledge or respond to complaints from customers.[9] The proposal will require NYSE members to acknowledge and respond to any and all customer complaints that must be reported to the Exchange under NYSE Rule 351(d). Indeed, under proposed Rule 401A, ignoring or neglecting a customer complaint would constitute a violation of NYSE rules. The Commission believes that the new Rule is consistent with the protection of investors and the public interest because, by requiring members to review and respond to customer complaints, and by requiring records to be kept with respect to such actions, the Rule should encourage NYSE members to attend to complaints that may alert them to potential abuses and to take corrective action, where appropriate.

The Commission also believes that the new required procedures should foster an awareness within NYSE member firms of the volume and specific types of complaints they receive, thereby promoting appropriate preventive or supervisory action by the member's compliance personnel. Specifically, requiring firms to review and respond to customer complaints should enhance a member's ability to supervise its personnel by drawing attention to any that may require additional training or monitoring. Exposure to an aggregation of complaints should also alert NYSE members to systemic problems with registered representatives, products, and services and should allow the member to identify areas where it, or its personnel, could improve compliance. Further, the Commission believes that the proposed new Rule should serve to protect investors because it will require NYSE members to notify them when

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 51276 (Feb. 28, 2005), 70 FR 11040 (Mar. 7, 2005) ("Notice").

[4] NYSE Information Memo Number 03–39 (Sep. 19, 2003).

[5] NYSE Information Memo Number 03–38 (Sep. 19, 2003).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(6).

[8] 17 CFR 240.19d–1(c)(2).

[9] Notice *at* 11041.

their complaints are received, and to notify them of any action (or refusal to act) with respect to their complaints. In cases where an investor and member are unable to resolve a dispute, records of complaints and responses will document the sequence of correspondence and/or actions for use in any potential formal resolution proceedings.

The Commission believes that the Exchange's proposed requirements relating to the timing and method of delivery of acknowledgements and responses are also reasonably designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, consistent with section 6(b)(5) of the Act.[10] The Commission notes that written, mailed acknowledgements and responses will always be sufficient, but that e-mail or verbal correspondence will be permitted where the complaint is transmitted by such means. These requirements should minimize any confusion regarding how a complaint is to be processed, and limit administrative burdens on NYSE members. Likewise, the Commission believes that requiring acknowledgements to be delivered within 15 business days of receipt of a complaint, and responses to be delivered "within a reasonable period of time" should promote prompt and effective resolution of customer complaints, while allowing NYSE members the flexibility to tailor specific responses.

Proposed Rule 401A(c) would require retention of records of acknowledgements and responses in accordance with NYSE Rule 440. The Commission believes that this record-keeping requirement should assist the Exchange in monitoring and enforcing compliance with proposed Rule 401A, as well as Rule 351(d), by allowing it to compare the number of a member's reported complaints to the number of acknowledgements and responses Finally, the acknowledgements, responses, and logs required by new Rule 401A(c) may contain useful information for the member's compliance personnel insofar as it may relate to other obligations of the member, such as the preparation of its annual report on supervision and compliance efforts during the preceding year. *See e.g.*, NYSE Rule 342 ("Offices—Approval, Supervision and Control").

[10] 15 U.S.C. 78f(b)(5).

The proposed rule change is also consistent with section 6(b)(6)[11] of the Act, which requires the rules of the Exchange to provide for its members and persons associated with its members to be appropriately disciplined for violations of those rules through fitting sanctions, including the imposition of fines, and with Rule 19d–1(c)(2) under the Act[12] which governs minor rule violation plans. Rule 476A allows the NYSE to impose sanctions for rule violations that do not rise to the level of requiring formal disciplinary proceedings. Because of the possible range of severity of a member's failure to satisfy the acknowledgement provisions of the proposed new rule, Rule 476A would be amended in order to allow the NYSE to sanction less serious failures with minor fines. The Commission notes that this proposal will render violations of the acknowledgement provisions of new Rule 401A eligible for treatment as minor violations, but will not require it in all cases. Thus, the Exchange will remain able to determine, on a case-by-case basis, whether a particular violation requires formal disciplinary action. Therefore, the Commission believes that this change will not compromise the Exchange's ability to bring formal disciplinary actions for more serious violations of Rule 401A, but will augment its ability to enforce its rules in cases where full disciplinary proceedings are not warranted.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[13] and Rule 19d–1(c)(2) under the Act,[14] that the proposed rule change (SR–NYSE–2004–59) be, and hereby is, approved.[15]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1817 Filed 4–18–05; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78f(b)(6).

[12] 17 CFR 240.19d–1(c)(2).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 240.19d–1(c)(2).

[15] 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).

[16] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 5053]

Bureau of Diplomatic Security, Office of Foreign Missions, Diplomatic Motor Vehicles; 30-Day Notice of Proposed Information Collection: Form DS–1972, U.S. Department of State Driver License and Tax Exemption Card Application, OMB Collection Number 1405–0105

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

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.

- *Title of Information Collection:* U.S. Department of State Driver License and Tax Exemption Card Application.
- *OMB Control Number:* 1405–0105.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Bureau of Diplomatic Security, Office of Foreign Missions (DS/OFM).
- *Form Number:* DS–1972.
- *Respondents:* Foreign missions that have personnel assigned to the United Sates: diplomatic, consular, administrative and technical, specified official representatives of foreign governments to international organizations, and their dependents.
- *Estimated Number of Respondents:* 350 foreign missions.
- *Estimated Number of Responses:* 14,000.
- *Average Hours Per Response:* 0.5 hours (30 minutes).
- *Total Estimated Burden:* 7,000 hours.
- *Frequency:* On occasion. (As often as is necessary for foreign missions to obtain/renew driver licenses and/or tax exemption cards for foreign mission personnel.)
- *Obligation to Respond:* Required to obtain or retain a benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from April 19, 2005.

ADDRESSES: Direct comments and questions to Katherine Astrich, the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB), who may be reached at 202–395–4718. You may submit comments by any of the following methods:

- E-mail: *Katherine_T._Astrich @omb.eop.gov*. You must include the DS

form number, information collection title, and OMB control number in the subject line of your message.

- Mail (paper, disk, or CD–ROM submissions): Office of Foreign Missions, U.S. Department of State, 2201 C Street, NW., Washington, DC 20520.
- Fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from: Jacqueline Robinson, Diplomatic Motor Vehicle Director, Office of Foreign Missions, 3507 International Place, NW., State Annex 33, Washington DC 20522–3302, who may be reached on (202) 895–3528 or *RobinsonJD@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our 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 the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The U.S. Department of State Driver License and Tax Exemption Card Application form (DS 1972) is the means by which foreign missions in the United States request the issuance of a driver license and/or a sales tax exemption card for foreign mission personnel and their dependents. The exemption from sales taxes and the operation of a motor vehicle in the United States by foreign mission personnel are benefits under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, which must be obtained by foreign missions through the U.S. Department of State, Office of Foreign Missions (DS/OFM). The DS–1972 application form provides OFM with the necessary information required to administer the two benefits effectively and efficiently. Sales tax exemption is enjoyed under the provisions of international law but is granted on the basis of reciprocity. The administration of driver licenses at the national level helps the Federal Government identify operators who repeatedly receive citations. This also helps the Federal Government determine the necessary course of action that may be required against an individual's driving privilege. Accordingly, the Federal Government is able to provide consistency to the diplomatic community on a national level through a uniform program.

Methodology: Currently, this form is submitted by foreign missions in paper format, and the information is then entered into an electronic database, maintained and utilized by the Office of Foreign Missions.

Dated: April 1, 2005.

John R. Arndt,

Acting Deputy Assistant Secretary, Bureau of Diplomatic Security, Office of Foreign Missions, Department of State.

[FR Doc. 05–7800 Filed 4–18–05; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice 5054]

Determination Pursuant to Section 1(b) of Executive Order 13224 Relating to Lashkar-e-Tayyiba (LT, LeT), aka Lashkar-e-Toiba, aka Lashkar-i-Taiba, aka al Mansoorian, aka al Mansooreen, aka Army of the Pure, aka Army of the Righteous, aka Army of the Pure and Righteous

Acting under the authority of section 1(b) of Executive Order 13224 of September 23, 2001, as amended, and in consultation with the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security, I hereby determine that Lashkar-e-Tayyiba uses or has used the following aliases in addition to those listed above: Paasban-e-Kashmir, Paasban-i-Ahle-Hadith, Pasban-e-Kashmir, Pasban-e-Ahle-Hadith, and Paasban-e-Ahle-Hadis

I hereby amend the designation of Lashkar-e-Tayyiba (and its aliases) to add the following names as aliases together with any transliterations of these names:

aka Paasban-e-Kashmir
aka Paasban-i-Ahle-Hadith
aka Pasban-e-Kashmir
aka Pasban-e-Ahle-Hadith
aka Paasban-e-Ahle-Hadis

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," no prior notice need be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: April 13, 2005.

Condoleezza Rice,

Secretary of State, Department of State.

[FR Doc. 05–7799 Filed 4–18–05; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 5022]

Secretary of State's Advisory Committee on Private International Law: Notice of Meeting

Summary: There will be a public meeting of the Study Group on Enforcement of Judgments of the Secretary of State's Advisory Committee on Private International Law, from 9 a.m. to 3 p.m. on Monday May 9 at the new headquarters of the U.S. Patent & Trademark Office: Randolph Building Conference Center (401 Dulany Street, Alexandria, VA 22313–1450.

Full Text: The Department of State is convening a meeting of the Secretary of State's Advisory Committee on Private International Law, Study Group on Enforcement of Judgments, in order to seek consultations on the proposed draft Hague Convention on Exclusive Choice of Court Agreements. The draft convention will be considered at the 20th Diplomatic Session of the Hague Conference on Private International Law, June 14–30, 2005, and is expected to be adopted and opened for signature at that time.

The meeting of the Advisory Committee will consider the full range of issues raised by the draft convention, in order to assist the U.S. delegation prepare for the Diplomatic Conference. In addition to members of the U.S. delegation, the meeting will include experts from industry, trade associations, consumer groups, bar associations, non-governmental associations, and other interested parties. The current draft of the proposed convention, including an explanatory report, may be found on the Web site of the Hague Conference (*http://www.hcch.net*).

The meeting will be held from 9 a.m. to 3 p.m. on Monday, May 9, at the Randolph Building Conference Center of the U.S. Patent and Trademark Office, 401 Dulany Street, Alexandria, VA 22313–1450. The meeting is open to the public up to the capacity of the meeting room. Interested persons are invited to attend and to express their views. Persons who wish to have their views considered are encouraged, but not required, to submit written comments in advance of the meeting. Written comments should be submitted by e-mail to Jeffrey Kovar at

kovarjd@state.gov. All comments will be made available to the public by request to Mr. Kovar via e-mail or by telephone (202–776–8420).

Persons wishing to attend must notify Ms. Cherise Reid by e-mail (*reidcd@state.gov*). fax (202–776–8482), or by telephone (202–776–8420).

Dated: April 15, 2005.

Jeffrey D. Kovar,

Assistant Legal Adviser for Private International Law, Department of State.

[FR Doc. 05–7801 Filed 4–18–05; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

April 12, 2005.

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 May 19, 2005 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0988.

Form Number: IRS Form 8609 and Schedule A (Form 8609).

Type of Review: Extension.

Title: Form 8609: Low-Income Housing Credit Allocation Certification; and Schedule A (Form 8609): Annual Statement.

Description: Owners of residential low-income rental buildings may claim a low-income housing credit for each qualified building over a 10-year credit period. Form 8609 is used to bet a credit allocation from the housing-credit agency. The form, along with Schedule A, is used by the owner to certify necessary information required by the law.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Respondents/ Recordkeepers: 120,000.

Estimated Burden Hours Respondent/ Recordkeeper:

	Form 8609	Schedule A (for 8609)
Recordkeeping	7 hr., 53 min.	5 hr., 44 min.
Learning about the law or the form	4 hr., 10 min.	1 hr., 23 min.
Preparing and sending the form to the IRS	4 hr., 28 min.	1 hr., 32 min,

Frequency of Response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 3,058,200 hours.

OMB Number: 1545–1570.

Regulation Project Number: REG–120168–97 Final.

Type of Review: Extension.

Title: Preparer Due Diligence Requirements for Determining Earned Income Credit Eligibility.

Description: Income tax return preparers who satisfy the due diligence requirements in this regulation will avoid the imposition of the penalty under section 6695(g) of the Internal Revenue Code for return or claims for refund due after December 31, 1997. The due diligence requirements include soliciting the information necessary to determine a taxpayer's eligibility for, and amount of, the Earned Income Tax Credit, and the retention of this information.

Respondents: Business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 100,000.

Estimated Burden Hours Respondent/ Recordkeeper: 5 hours, 4 minutes.

Frequency of response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 507,136 hours.

OMB Number: 1545–1672.

Regulation Project Number: REG–142299–01 and REG–209135–88 Final.

Type of Review: Extension.

Title: Certain Transfers of Property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs).

Description: The regulation applies with respect to the net built-in gain of C corporation property that becomes property of a Regulated Investment Company (RIC) or Real Estate Investment Trust (REIT) by the qualification of a C corporation as a RIC or REIT or by the transfer of property of a C corporation to a RIC or REIT in certain tax-free transactions. Depending on the date of the transfer of property or qualification as a RIC or REIT, the regulation provides that either (1) the C corporation will recognize gain as if it had sold the property at fair market value, unless the RIC or REIT elects section 1374 treatment or (2) the RIC or REIT will be subject to section 1374 treatment with respect to the net recognized built-in gain, unless the C corporation elects deemed sale treatment. The regulation provides that a section 1374 election is made by filing a statement, signed by an official authorized to sign the income tax return of the RIC or REIT and attached to the RIC's or REIT's Federal income tax return for the taxable year in which the property of the C corporation becomes the property of the RIC or REIT. The regulation provides that a deemed sale election is made by filing a statement, signed by an official authorized to sign the income tax return of the C corporation and attached to the C corporation's Federal income tax return for the taxable year in which the deemed sale occurs.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 140.

Estimated Burden Hours Respondent: 30 minutes.

Frequency of Response: Other (once).

Estimated Total Reporting Burden: 70 hours.

OMB Number: 1545–1913.

Form Number: IRS Form 8892.

Type of Review: Extension.

Title: Payment of Gift/GST Tax and/or Application for Extension of Time To File Form 709.

Description: Form 8892 was created to serve a dual purpose. First the form enables taxpayers to request an extension of time to file 709, when they are not filing an individual income tax extension. Second, it serves as a payment voucher for taxpayers, who are filing an individual income tax extension (by Form 4868) and will have a gift tax balance due on Form 709.

Respondents: Individuals or households.

Estimated Number of Respondents/ Recordkeepers: 10,000.

Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping	13 min.
Learning about the law or the form	13 min.
Copying, assembling, and sending the form to the IRS	16 min.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 7,400 hours.
OMB Number: 1545–1914.
Form Number: IRS Form 8896.
Type of Review: Extension.
Title: Low Sulfur Diesel Fuel Production Credit.
Description: Internal Revenue Code (IRC) section 45H allows small business refiners a 5 cents/gallon credit for the production of low sulfur diesel fuel.
Respondents: Business or other for-profit.
Estimated Number of Respondents/ Recordkeeping: 100.
Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping	6 hr., 13 min.
Learning about the law or the form.	45 min.
Preparing, and sending the form to the IRS.	2 hr., 5 min.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 908 hours.
Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 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. 05–7780 Filed 4–18–05; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

April 11, 2005.

The Department of the 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 May 19, 2005 to be assured of consideration.

Bureau of the Public Debt (PD)

OMB Number: 1535–0059.
Form Number: PD F 1832 and PD F 1832–1.
Type of Review: Extension.
Title: Special form of Assignment for U.S. Registered Definitive Securities and U.S. Bearer Securities for Conversion to BECCS or CUBES.
Description: PD F 1832 and PD F 1832–1 are used to certify assignments of U.S. Registered and Bearer Securities.
Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions, Federal Government, State, local or tribal government.
Estimated Number of Respondents: 10,000.
Estimated Burden Hours Per Respondent: 15 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden Hours: 2,500 hours.

OMB Number: 1535–0070.
Form Number: PD F 5192.
Type of Review: Extension.
Title: Stop Payment/Replacement Check Request.
Description: PD F 5192 is used by the payee to report loss, stolen, destroyed or nonreceipt of fiscal agency check and to request a replacement check.
Respondents: Individuals or households, Business or others for-profit, Not-for-profit institutions, State, local or tribal government.
Estimated Number of Respondents: 500.
Estimated Burden Hours Per Respondent: 15 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden Hours: 125 hours.
OMB Number: 1535–0113.
Form Number: PD F 1849.
Type of Review: Extension.
Title: Disclaimer and Consent With Respect to United States Savings Bonds/ Notes.
Description: PD F 1849 is used to obtain a disclaimer and consent as the result of an error in registration or otherwise the payment, refund of the purchase price, or reissue as requested by one person would appear to affect the right, title or interest of some other person.
Respondents: Individuals or households.
Estimated Number of Respondents: 7,000.
Estimated Burden Hours Per Respondent: 6 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden Hours: 700 hours.
OMB Number: 1535–0114.
Form Number: PD F 2001.
Type of Review: Extension.
Title: Release.
Description: PD F 2001 is used by the owner, co-owner, or other person entitled to ratify payment of savings bonds/notes and release the United States of America from any liability.
Respondents: Individuals or households.
Estimated Number of Respondents: 200.
Estimated Burden Hours Per Respondent: 6 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden Hours: 20 hours.
Clearance Officer: Vicki S. Thorpe, (304) 480–8150, Bureau of the Public Debt, 200 Third Street, Parkersburg, West VA 26106–1328.
OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Treasury PRA Clearance Officer.
[FR Doc. 05–7781 Filed 4–18–05; 8:45 am]
BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the OCC, the Board, and the FDIC (the "agencies") may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget

(OMB) control number. On August 17, 2004, the agencies requested public comment for 60 days on proposed revisions to the Country Exposure Report (FFIEC 009) and the Country Exposure Information Report (FFIEC 009a) (August proposal), which are currently approved information collections. After considering the comments received, the Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has modified the August proposal and is requesting public comment on the modified set of proposed revisions.

DATES: Comments must be submitted on or before June 20, 2005.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies. All comments, which should refer to the OMB control number, will be shared among the agencies.

OCC: Comments should be sent to the Public Information Room, Office of the Comptroller of the Currency, Mailstop 1–5, Attention: 1557–0100, 250 E Street, SW., Washington, DC 20219. Due to delays in the OCC's mail service since September 11, 2001, commenters are encouraged to submit comments by fax or e-mail. Comments may be sent by fax to (202) 874–4448, or by e-mail to *regs.comments@occ.treas.gov*. You can inspect and photocopy the comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–5043.

Board: You may submit comments, identified by FFIEC 009, by any of the following methods:

- Agency Web site: *http://www.federalreserve.gov*. Follow the instructions for submitting comments on the *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *regs.comments@federalreserve.gov*. Include docket number in the subject line of the message.
- FAX: (202) 452–3819 or (202) 452–3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://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.

FDIC: Written comments should identify "Information Collection 3064–0017, FFIEC 009" as the subject and be submitted by any of the following methods:

- Agency Web site: *http://www.fdic.gov/regulations/laws/federal/propose.html*.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *Comments@FDIC.gov*.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, FDIC, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

A copy of the comments may also be submitted to the OMB desk officer for the agencies: Mark Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or electronic mail to *MMenchik@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Additional information or a copy of the collection may be requested from:

OCC: Mary Gottlieb, OCC Clearance Officer, or Camille Dixon, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Michelle Long, Federal Reserve Board Clearance Officer, (202) 452–3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

FDIC: Leneta G. Gregorie, Counsel, (202) 898–3719, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Proposal to revise the following currently approved collections of information:

Report Title: Country Exposure Report and Country Exposure Information Report.

Form Number: FFIEC 009 and FFIEC 009a.

Frequency of Response: Quarterly.

Affected Public: Business or other for profit.

OCC:

OMB Number: 1557–0100.

Estimated Number of Respondents: 21 (FFIEC 009), 21 (FFIEC 009a).

Estimated Average Time per Response: 70 burden hours (FFIEC 009), 5.25 burden hours (FFIEC 009a).

Estimated Total Annual Burden: 5,880 burden hours (FFIEC 009), 441 burden hours (FFIEC 009a).

Board:

OMB Number: 7100–0035.

Estimated Number of Respondents: 31 (FFIEC 009), 16 (FFIEC 009a).

Estimated Average Time per Response: 70 burden hours (FFIEC 009), 5.25 burden hours (FFIEC 009a).

Estimated Total Annual Burden: 8,680 burden hours (FFIEC 009), 336 burden hours (FFIEC 009a).

FDIC:

OMB Number: 3064–0017.

Estimated Number of Respondents: 22 (FFIEC 009), 22 (FFIEC 009a).

Estimated Average Time per Response: 70 burden hours (FFIEC 009), 5.25 burden hours (FFIEC 009a).

Estimated Total Annual Burden: 6,160 burden hours (FFIEC 009), 462 burden hours (FFIEC 009a).

General Description of Reports

These information collections are mandatory: 12 U.S.C. 161 and 1817 (national banks), 12 U.S.C. 248(a), 1844(c), and 3906 (state member banks and bank holding companies); and 12 U.S.C. 1817 and 1820 (insured state nonmember banks). The FFIEC 009 data are given confidential treatment (5 U.S.C. 552(b)(4) and (b)(8)). The FFIEC 009a data are not given confidential treatment.

Abstract

The Country Exposure Report (FFIEC 009) is filed quarterly with the agencies and provides information on international claims of U.S. banks and bank holding companies that is used for supervisory and analytical purposes. The information is used to monitor country exposure of banks to determine the degree of risk in their portfolios and the possible impact on U.S. banks of adverse developments in particular countries. The Country Exposure Information Report (FFIEC 009a) is a supplement to the FFIEC 009 and provides publicly available information on material foreign country exposures

(all exposures to a country in excess of 1 percent of total assets or 20 percent of capital, whichever is less) of U.S. banks and bank holding companies that file the FFIEC 009 report. As part of the Country Exposure Information Report, reporting institutions must also furnish a list of countries in which they have lending exposures above 0.75 percent of total assets or 15 percent of total capital, whichever is less.

Current Action

On August 17, 2004, the OCC, the Board, and the FDIC jointly published a notice soliciting comments for 60 days on proposed revisions to the FFIEC 009 and FFIEC 009a (69 FR 51145). The agencies proposed to revise the FFIEC 009 to harmonize U.S. data with data on cross-border exposures collected by other countries and disseminated by the Bank for International Settlements (BIS) as their "consolidated banking statistics." The proposed revisions included the collection of additional detail on foreign-office claims of U.S. banks on local residents, including sector breakdowns and a currency split; a split between commitments and guarantees plus credit derivatives; and trade finance after adjustments for collateral and guarantees. Under the August proposal, the definition of public (*i.e.*, government) sector was to be brought into agreement with the definition used in the Consolidated Reports of Condition and Income (Call Report) (FFIEC 031 and 041) filed by banks. No changes to the FFIEC 009a were proposed, although the change in the definition of public sector in the FFIEC 009 called for a change in the amounts reported in columns 6 and 7 of the FFIEC 009a by corresponding amounts. The FFIEC 009a instructions were to be changed, however, to reflect column changes on the FFIEC 009. In addition, comments were requested on the way claims are adjusted for collateral and guarantees and on the reporting of the potential future exposure of derivative contracts.

In response to the August 17, 2004, notice, the agencies received two substantively similar comment letters from a banking trade association and a bank holding company. To clarify the comments received, the agencies met with the commenters and a few large financial institution members of the trade association. The FFIEC and the agencies have considered the comments received from the commenters and during the meeting with the financial institutions. Due to the substantive nature of the comments and subsequent revisions to the proposal, the FFIEC and the agencies have decided to request public comment again. The agencies propose to implement changes to the FFIEC 009 effective with the September 30, 2005, report date, as discussed below.

Detailed Discussion of the Comments and Modifications to the August Proposal

Foreign-Office Claims on Local Residents Denominated in a Non-Local Currency

The commenters suggested removing foreign-office claims on local residents that are denominated in a non-local currency from columns 1–3, and placing this information in a separate column. (This would make columns 1–3 exclusively cross-border claims.) They were concerned that combining a portion of foreign-office claims on local residents with cross-border claims might mislead data users. In general, the agencies concurred with this suggestion and agreed to add three additional columns to collect, by sector, foreign-office claims on local residents in a non-local currency (rather than adding only one column to collect total foreign-office claims on local residents in a non-local currency). This revision would help prevent misinterpretation of the data while maintaining compliance with the BIS Guidelines for their consolidated banking statistics. During the meeting with commenters and financial institutions, the majority of institutions stated that they currently have this information in their systems and all institutions felt that the burden of having three extra columns, rather than just one extra column, would be small.

Foreign-Office Commitments to and Guarantees on Foreign Residents

The commenters disagreed with including commitments to and guarantees on local residents made by foreign offices with cross-border commitments and guarantees (proposed columns 17 and 18). They suggested that the agencies should collect only cross-border commitments to and guarantees on foreign residents. The agencies declined to take this suggestion. By collecting both cross-border and foreign office commitments and guarantees, the FFIEC 009 reporting form would be in compliance with the BIS Guidelines for ultimate risk data and the data would provide more comprehensive information about commitments and guarantees than is currently collected on the reporting form. Moreover, the burden associated with proposed columns 17 and 18 would be small. The agencies did agree that when publishing the aggregate data, they will make clear that these columns include both cross-border and foreign-office business.

One commenter suggested combining commitments and guarantees, or at least redefining "commitments" as "commitments plus guarantees, excluding credit derivatives," and redefining "guarantees" as "protection sold via credit derivatives" (proposed columns 17 and 18). The agencies declined to take this suggestion in order to achieve compliance with the BIS Guidelines and to keep information about commitments and guarantees separate. However, the agencies agreed to clarify the distinction between commitments and guarantees in the instructions for the FFIEC 009.

Sector Reporting

The commenters stated that decreasing the sector splits for inward and outward risk transfers from three columns on the current reporting form (banks, public, and other; columns 8–10 and 11–13) to two columns (banks and non-banks; proposed columns 6–7 and 8–9) would increase burden. Although reporters would still have to maintain all the underlying data, the revision would increase programming costs and could be confusing for the respondents. Therefore, the commenters suggested removing the collection of data on inward and outward risk transfers (columns 6–9) and, in its place, calculating net (rather than gross) risk transfers. The agencies agreed to revise the proposal to collect three sector breaks for inward and outward risk transfers, as in the current reporting form. This would leave U.S. data in line with the BIS Guidelines, provide additional useful information, and reduce burden in comparison to the original proposal.

One commenter stated that sector splits for foreign office claims on local residents that are denominated in local currency (a component of proposed columns 13–15) are not relevant for country risk. The agencies declined to take this suggestion to ensure that the FFIEC 009 will be consistent with the BIS Guidelines for ultimate risk data. Moreover, this definition is consistent with the fairly broad definition of country risk that banking supervisors now use.

Resale Agreements

The commenters suggested revising the instructions regarding risk redistributions for resale agreements. The agencies concurred with this comment and agreed to change the instructions to allocate resale agreements on an ultimate risk basis

according to the country of the ultimate counterparty (*i.e.*, to the country of the parent bank in the case of a bank branch counterparty and to the country of any other entity providing an explicit guarantee on the transaction) without regard to the country of the collateral. This change would reduce burden and be more consistent with the internal risk practices of many, if not most, internationally active institutions.

Repayment Structures

The commenters suggested, and the agencies concurred with, changing the risk redistributions with regard to the treatment of repayment structures. The agencies agreed to note in the instructions that reporters can contact their supervisory agency to discuss whether individual structures qualify for redistribution in columns 6 through 9.

Collection of Data on Foreign-Office Liabilities by Country of Creditor's Residence

The commenters strongly supported the addition of a column to collect foreign-office liabilities by country of residence of the creditor, facilitating a reduction in the number of submissions of the Quarterly Report of Assets and Liabilities of Large Foreign Offices of U.S. Banks (FR 2502q) to the Federal Reserve. The agencies agreed to add the column; the collection of this data would not begin until the reduction in reporting is implemented on the FR 2502q and would be required only from institutions that otherwise would have had to file the FR 2502q. The commenters also suggested possibly further revising the FFIEC 009 (*i.e.*, by incorporating offshore financial centers) to allow the elimination of the FR 2502q. The agencies are currently investigating this possibility.

Potential Future Credit Exposures of Derivative Contracts

The commenters suggested leaving unchanged the reporting of derivatives on the FFIEC 009 reporting form because it is all on an ultimate risk basis (*i.e.*, use a current mark-to-market calculation after application of Financial Accounting Standards Board Interpretation No. 39 and do not collect potential future exposures (PFEs) of derivative contracts). The agencies decided, however, to add a column to Schedule 2 to collect the total credit equivalent amount, following the U.S. risk-based capital standards, for all foreign exchange and derivative contracts by country of ultimate counterparty. Banks compute the credit equivalent amounts for risk-based capital purposes, and these data are deemed to be a better measure of counterparty exposure arising from derivative contracts than market value alone.

Reporting Burden

The commenters stated that reporting burden is actually higher than the agencies' current estimate of an average of 30 hours. One commenter estimated reporting burden of 60 to 1,000 hours. Most of the reporting burden comes from compiling the underlying data. Banks with a large number of foreign offices, each of which needs to compile and validate its data before sending these data to the parent, have significantly higher burden. One of the most burdensome tasks is reallocating risk to determine ultimate-risk claims. Given the same amount of underlying data, changes in the actual number of cells they report on a form changes burden relatively little. The agencies agreed to increase the estimated response time for the FFIEC 009 to an average of 70 hours. This average takes into consideration smaller institutions with only one foreign office and more complex institutions with many foreign offices.

Delay Implementation

The commenters suggested delaying the implementation of the FFIEC 009 revisions until September 2005 or later and not before other participating countries implement corresponding changes to their collections of data on banks' cross-border exposures. The agencies agreed to delay the implementation of the revisions until September 2005. At that time, the United States will be the last G–10 country to implement the enhancements to the BIS consolidated banking statistics.

Extend Filing Period

During the meeting with commenters and financial institutions, it was suggested that the agencies allow a 60-day filing period for the first few quarters that the banks file the revised reporting form. The agencies agreed to extend the filing period to 60 days for the initial revised report in September 2005.

Delete Some Memoranda Items

During the meeting with commenters and financial institutions, it was suggested that the agencies consider deleting one or more memoranda items. Since the information reported in each memorandum item is considered very useful, the agencies decided to retain all memoranda items. In addition, to improve the usefulness of these items, the definition of trade financing will be revised.

Request for Comment

Comments are invited on:

a. Whether the information collections are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy of the agencies' estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collections 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.

Comments submitted in response to this notice will be shared among the agencies. All comments will become a matter of public record. Written comments should address the accuracy of the burden estimates and ways to minimize burden including the use of automated collection techniques or the use of other forms of information technology as well as other relevant aspects of the information collection request.

Dated: April 12, 2005.

Stuart Feldstein,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System, April 13, 2005.

Jennifer J. Johnson,

Secretary of the Board.

Dated in Washington, DC, this 12th day of April, 2005.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 05–7762 Filed 4–18–05; 8:45 am]

BILLING CODE 4810–33–P 6210–01–P 6714–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form CT–1

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form CT–1, Employer's Annual Railroad Retirement Tax Return.

DATES: Written comments should be received on or before June 20, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, Room 6516, 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 R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Employer's Annual Railroad Retirement Tax Return.

OMB Number: 1545-0001.

Form Number: Form CT–1.

Abstract: Railroad employers are required to file an annual return to report employer and employee Railroad Retirement Tax Act (RRTA) taxes. Form CT–1 is used for this purpose. The IRS uses the information to insure that the employer has paid the correct tax.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations, not-for-profit institutions, and State, local or tribal governments.

Estimated Number of Respondents: 2,817.

Estimated Time Per Respondent: 21 hours, 19 minutes.

Estimated Total Annual Burden Hours: 46,359.

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: April 13, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–1812 Filed 4–18–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8891

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 8891, U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.

DATES: Written comments should be received on or before June 20, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, Room 6515, 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 R. Joseph Durbala at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622-3634, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.

OMB Number: 1545–1928.

Form Number: Form 8891.

Abstract: Notice 2003–75 requires that a new form be developed under Internal Revenue Code section 6001 for U.S. citizens or resident aliens who hold an interest in certain Canadian registered retirement plans. The form will report distributions from certain Canadian registered retirement plans and the taxpayer can make an election to defer U.S. income tax on these distributions. The form will be attached to Form 1040. Form 8891 is used for this purpose.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and farms.

Estimated Number of Respondents: 750,000.

Estimated Time per Respondent: 1 hr. 57 min.

Estimated Total Annual Burden Hours: 1,462,500.

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: April 13, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–1813 Filed 4–18–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8858 and Schedule M

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 8858, Information Return of U.S. Persons With Respect To Foreign Disregarded Entities, and Schedule M, Transaction Between Foreign Disregarded Entity of a Foreign Tax Owner and the Filer on Other Related Entities.

DATES: Written comments should be received on or before June 20, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Information Return of U.S. Persons With Respect To Foreign Disregarded Entities (Form 8858), and Transaction Between Foreign Disregarded Entity of a Foreign Tax Owner and the Filer on Other Related Entities (Schedule M).

OMB Number: 1545–1910.

Form Number: Form 8858 and Schedule M.

Abstract: Form 8858 and Schedule M are used by certain U.S. persons that own a foreign disregarded entity (FDE) directly or, in certain circumstances, indirectly or constructively.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other-for-profit organizations, and individuals or households.

Estimated Number of Respondents: 50,000.

Estimated Time Per Respondent: 36 hours, 39 minutes.

Estimated Total Annual Burden Hours: 1,832,500.

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: April 8, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–1814 Filed 4–18–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The TAP will be discussing issues pertaining to lessoning the burden for individuals. Recommendations for IRS systemic changes will be developed.

DATES: The meeting will be held Monday, May 2, 2005.

FOR FURTHER INFORMATION CONTACT: Mary O'Brien at 1–888–912–1227, or 206 220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be held Monday, May 2, 2005, from 1 p.m. eastern time to 2 p.m. eastern time via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or (206) 220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or you can contact us at *http://www.improveirs.org*. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms O'Brien can be reached at 1–888–912–1227 or (206) 220–6096.

The agenda will include the following: various IRS issues.

Dated: April 13, 2005.

Martha Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E5–1815 Filed 4–18–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

United States Mint

Notification of Citizens Coinage Advisory Committee April 2005 Public Meeting

SUMMARY: Pursuant to United States Code, Title 31, section 5135 (b)(8)(C), the United States Mint announces a previously unscheduled Citizens Coinage Advisory Committee (CCAC) public meeting scheduled for April 28, 2005. The purpose of this meeting is to advise the Secretary of the Treasury on themes and designs pertaining to the coinage of the United States and for other purposes.

Date: April 28, 2005.

Time: 1 p.m. to 2 p.m.

Location: Via Videoconference at the United States Mint; 801 9th Street, NW., Washington, DC; 2nd floor, Conference Room C.

Subject: Consider themes for a 24-Karat bullion coin and other business.

Interested persons should call 202–354–7502 for the latest update on meeting time, and location.

Public Law 108–15 established the CCAC to:

- Advise the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional gold medals, and national and other medals.
- Advise the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.
- Make recommendations with respect to the mintage level for any commemorative coin recommended.

FOR FURTHER INFORMATION CONTACT: Madelyn Simmons Marchessault, United States Mint Liaison to the CCAC, 801 Ninth Street, NW., Washington, DC 20220, or call 202–354–6669.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6830.

Authority: 31 U.S.C. 5135(b)(8)(C).

Dated: April 14, 2005.

Henrietta Holsman Fore,

Director, United States Mint.

[FR Doc. 05–7840 Filed 4–18–05; 8:45 am]

BILLING CODE 4810–37–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0362]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine the amount owed to a holder of a defaulted VA guaranteed home loan.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 20, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0362" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Claim Under Loan Guaranty, VA Form 26–1874.

b. Claim Form—Adjustable Rate Mortgages, VA Form 26–1874a.

OMB Control Number: 2900–0362.

Type of Review: Extension of a currently approved collection.

Abstract:

a. Lenders and holders of VA guaranteed home loans use VA Form 26–1874 as notification to VA of default loans.

b. Lenders and holders use VA Form 26–1874a as an attachment to VA Form 26–1874 when filing a claim under the loan guaranty resulting from the termination of an Adjustable Rate Mortgage Loan. VA uses the information obtained on both forms to determine the amount owed to the holder under the guaranty home loan.

Affected Public: Business or other for profit.

Estimated Annual Burden: 26,139 hours.

a. VA Form 26–1874—25,806 hours.

b. VA Form 26–1874a—333 hours.

Estimated Average Burden Per Respondent:

a. VA Form 26–1874—60 minutes.

b. VA Form 26–1874a—20 minutes.

Frequency of Response: On occasion.

Estimated Number of Total Respondents: 26,806.

a. VA Form 26–1874—25,806.

b. VA Form 26–1874a—1,000.

Dated: April 6, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–7737 Filed 4–18–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Health 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 Health Administration (VHA), 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 May 19, 2005.

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–New"

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–New" in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Civil Rights Discrimination Complaint, VA Form 10–0381.

OMB Control Number: 2900–New.

Type of Review: New collection.

Abstract: Veterans and other VHA customers who believe that their civil rights were violated by agency employees while receiving medical care or services in VA medical centers, or institutions such as state homes that receive federal financial assistance from VA complete VA Form 10–0381 to file a formal complaint of the alleged discrimination.

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 December 1, 2004, at page 69993.

Affected Public: Individuals or Households.

Estimated Total Annual Burden: 46 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 183.

Dated: April 6, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–7738 Filed 4–18–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on CARES Business Plan Studies; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Pub. L. 92–463 (Federal Advisory Committee Act) that the Advisory Committee on CARES Business Plan Studies will meet on Friday, April 29, 2005, at The Clifton Center, 2117 Payne Street, Louisville, KY 40206. The meeting will begin at 9 a.m. and is expected to continue until 1 p.m. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs on proposed business plans at those VA facility sites identified in May 2004 as requiring further study by the Capital Asset Realignment for Enhanced Services (CARES) Decision document.

The agenda will include presentations on objectives of the CARES project and the project's timeframes. Additional presentations will focus on the VA-selected contractor's methodology and tools to develop business plan options, as well as the methodology for gathering and evaluating stakeholder input. The agenda will also accommodate public commentary on site-specific issues.

Interested persons may attend and present oral or written statements to the Committee. For additional information regarding the meeting, please contact Mr. Jay Halpern, Designated Federal Officer, (00CARES), 810 Vermont Avenue, NW., Washington, DC 20024 by phone at (202) 273–5994, or by e-mail at *jay.halpern@hq.med.va.gov*.

Dated: April 11, 2005.

By direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 05–7732 Filed 4–18–05; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Geriatrics and Gerontology Advisory Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Pub. L. 92–463 (Federal Advisory Committee Act) that a meeting of the Geriatrics and Gerontology Advisory Committee (GGAC) will be held on May 3, 2005, in the Federal Room at Hotel Washington, 515 15th Street, NW., Washington, DC. The meeting will convene at 8:30 a.m. and conclude at 5 p.m. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs and the Under Secretary for Health on all matters pertaining to geriatrics and gerontology by assessing the capability of VA health care facilities to meet the medical, psychological and social needs of older veterans and by evaluating VA facilities designated as Geriatric Research, Education and Clinical Centers (GRECCs).

The meeting will feature presentations on VA research initiatives in areas that affect aging veterans, pilot programs authorized by the Millennium Act in assisting living, the White House Conference on Aging, and performance and oversight of VA Geriatric Research Education and Clinical Centers. During the afternoon portion of the meeting the Committee will discuss strategic planning activities, potential site visits, and future meeting dates.

No time will be allocated at this meeting for receiving oral presentations from the public. Interested parties can provide written comments for review by the Committee in advance of the meeting to Ms. Jacqueline Holmes, Geriatrics and Extended Care Strategic Healthcare Group (114), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Individuals who wish to attend the meeting should contact Ms. Jacqueline Holmes at (202) 273–8539.

Dated: April 8, 2005.

By direction of the Secretary

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 05–7733 Filed 4–18–05; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register
Vol. 70, No. 74
Tuesday, April 19, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers of Record for the Pacific Southwest Region; California

Correction

In notice document 05–5134 beginning on page 12841 in the issue of Wednesday, March 16, 2005 make the following corrections:

1. On page 12841, in the third column, under the heading **Angeles National Forest, California**, under the entry "*Forest Supervisor Decisions:*" in the first line, "*times*" should read "*Times*".

2. On page 12843, in the first column, under the heading **Six Rivers National Forest, California**, under the entry "Orleans and Lower Trinity Districts:", in the first line, "*The Kourie*" should read "*The Kourier*".

[FR Doc. C5–5134 Filed 4–18–05; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Tuesday,
April 19, 2005

Part II

Securities and Exchange Commission

17 CFR Part 275

Certain Broker-Dealers Deemed Not To Be Investment Advisers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release Nos. 34–51523; IA–2376; File No. S7–25–99]

RIN 3235–AH78

Certain Broker-Dealers Deemed Not To Be Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting a rule addressing the application of the Investment Advisers Act of 1940 to broker-dealers offering certain types of brokerage programs. Under the rule, a broker-dealer providing advice that is solely incidental to its brokerage services is excepted from the Advisers Act if it charges an asset-based or fixed fee (rather than a commission, mark-up, or mark-down) for its services, provided it makes certain disclosures about the nature of its services. The rule states that exercising investment discretion is not "solely incidental to" the business of a broker or dealer within the meaning of the Advisers Act or to brokerage services within the meaning of the rule. The rule also states that a broker or dealer provides investment advice that is not solely incidental to the conduct of its business as a broker or dealer or to its brokerage services if the broker or dealer charges a separate fee or separately contracts for advisory services. In addition, the rule states that when a broker-dealer provides advice as part of a financial plan or in connection with providing planning services, a broker-dealer provides advice that is not solely incidental if it: holds itself out to the public as a financial planner or as providing financial planning services; or delivers to its customer a financial plan; or represents to the customer that the advice is provided as part of a financial plan or financial planning services. Finally, under the rule, broker-dealers are not subject to the Advisers Act solely because they offer full-service brokerage and discount brokerage services (including electronic brokerage) for reduced commission rates.

DATES: *Effective date:* April 15, 2005, except that 17 CFR 275.202(a)(11)–1(a)(1)(ii) is effective May 23, 2005. *Compliance dates:* see Section IV of this Release.

FOR FURTHER INFORMATION CONTACT: Robert L. Tuleya, Senior Counsel, or Nancy M. Morris, Attorney-Fellow, at 202–551–6787, *larules@sec.gov*, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission" or "SEC") is adopting new rule 202(a)(11)–1[1] under the Investment Advisers Act of 1940 ("Advisers Act" or "Act").[2]

Table of Contents

I. Introduction

This rulemaking addresses the question of when the investment advisory activities of a broker-dealer subject it to the Advisers Act. The activities of broker-dealers are regulated primarily under the Securities Exchange Act of 1934[3] and by the self-regulatory organizations ("SROs"). The activities of investment advisers are regulated primarily under the Advisers Act.

The Advisers Act and the Exchange Act are not exclusive in their application to advisers and broker-dealers, respectively. Many broker-dealers are also registered with us as advisers because of the nature of the services they provide or the form of compensation they receive. Until recently, the division between broker-dealers and investment advisers was fairly clear, and the regulatory obligations of each fairly distinct. Of late, however, the distinctions have begun to blur, raising difficult questions regarding the application of statutory provisions written by Congress more than half a century ago.

Our efforts to address this question, which began in 1999, have prompted substantial interest from advisers and broker-dealers as well as groups representing the interests of investors. We very much appreciate the efforts of these groups in commenting on our proposal, meeting with us and our staff, and offering their many suggestions. The evolution of our thinking about these questions, and the important contribution these commenters have made to that evolution, is demonstrated in the rule we are today adopting.

Although many commenters urge that all who render investment advice must be regulated as advisers, Congress created a different scheme of regulation—one that excepted many who provide investment advice, including many broker-dealers registered under the Exchange Act, from the Advisers Act. As a consequence, many of the concerns about broker-dealer conduct voiced in the course of this rulemaking may be more appropriately addressed under the Exchange Act. Although we share the concern that there is confusion about the differences between broker-dealers and investment advisers, and although we believe that some of that confusion may be a result of broker-dealer marketing (including the titles broker-dealers use), we do not believe that this confusion arises as a result of this rulemaking or that it is confined to the new programs addressed by this rulemaking. Indeed, to a large extent, this rulemaking does address confusion in the context of the brokerage programs addressed here. Again, however, we believe that many of these concerns may more appropriately fall under broker-dealer regulation and, as stated below, the Chairman has directed our staff to determine and report to us within 90 days the options for most effectively responding to these issues and a recommended course of action. This schedule reflects both our appreciation of the significance of these concerns and our determination to pursue an appropriate and effective solution.

We begin with a discussion of the relevant provisions of the Advisers Act and the changes in brokerage services that raise these vexing issues. Finally, and before describing the rule we are

[1] 17 CFR 275.202(a)(11)–1. When we refer to rule 202(a)(11)–1 or any paragraph in that rule, we are referring to 17 CFR 275.202(a)(11)–1 where it is published in the Code of Federal Regulations.

[2] 15 U.S.C. 80b–1. When we refer to the Advisers Act, or any paragraph of the Act, we are referring to 15 U.S.C. 80b of the United States Code in which the Act is published.

[3] 15 U.S.C. 78a ("Exchange Act").

today adopting, we review the history of this rulemaking and the evolution of our thinking on this subject.

II. Background

A. The Advisers Act Broker-Dealer Exception

The Advisers Act regulates the activities of certain "investment advisers," which are defined in section 202(a)(11) as persons who receive compensation for providing advice about securities as part of a regular business.[4] Section 202(a)(11)(C) of the Advisers Act excepts, from the definition, a broker or dealer "whose performance of [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." The broker-dealer exception thus has two prongs, both of which a broker-dealer must meet in order to avoid application of the Act: (i) The broker-dealer's advisory services must be "solely incidental to" its brokerage business; and (ii) the broker-dealer must receive no "special compensation" for the advice. The Advisers Act defines neither of the quoted phrases, and the Act's legislative history offers limited explanation of them. We (and our staff) have stated our views of what the phrases mean in several releases we have issued over the years. One of the earliest of these releases explained that the broker-dealer exception "amounts to a recognition that brokers and dealers commonly give a certain amount of advice to their customers in the course of their regular business and that it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business."[5]

As we noted above, many broker-dealers are also registered as advisers. We have viewed the Advisers Act, and the protections afforded by the Act, as applying only to those accounts to which the broker-dealer provides investment advice that is *not* solely incidental to brokerage services or for which the firm receives special compensation.[6] For these firms, the issues raised in this rulemaking relate not to whether the firm is subject to the Advisers Act, but to which of its accounts must be treated as advisory accounts.

B. The Current Rulemaking

1. The 1999 Proposal

This rulemaking began on November 4, 1999, when we first proposed new rule 202(a)(11)–1.[7] Our 1999 Proposal responded to the introduction of two new types of brokerage programs—"fee-based brokerage programs" and "discount brokerage programs"[8]—that full-service broker-dealers were offering in response to changes in the market place for retail brokerage.[9] The 1999 Proposal addressed whether, as a result of introducing these programs, broker-dealers would be unable to rely on the broker-dealer exception in the Advisers Act. If so, some broker-dealers would be required to register under the Act, and those already registered would be required to treat customers with such accounts as advisory clients rather than brokerage customers.

Fee-based brokerage programs provide customers a package of brokerage services—typically including execution, investment advice, arranging for delivery and payment, and custodial and recordkeeping services—for a fee based on the amount of assets on account with the broker-dealer (*i.e.*, an asset-based fee) or a fixed-fee. A broker-dealer receiving such fee-based compensation may be unable to rely on the statutory broker-dealer exception because the fee constitutes "special compensation" under the Act—*i.e.*, it involves the receipt by a broker-dealer of compensation other than brokerage commissions or dealer compensation (*i.e.*, mark-ups, mark-downs, or similar fees).[10]

Discount brokerage programs, including electronic trading programs, give customers who do not want or need advice from brokerage firms the ability to trade securities at a lower commission rate. Electronic trading programs provide customers the ability to trade on-line, typically without the assistance of a registered representative, from any personal computer connected to the Internet. Customers trading electronically may devise their own investment or trading strategies, or may seek advice separately from investment advisers. The introduction of electronic trading and other discount services at a lower commission rate may trigger application of the Advisers Act to any full-service accounts for which the broker-dealer provides some investment advice. This is because the difference in the commission rates represents a clearly definable portion of the brokerage commission that may be primarily attributable to investment advice. Our staff has viewed such a two-tiered fee structure as involving "special compensation" under the Advisers Act.[11]

Fee-based brokerage programs responded to concerns we have long held about the incentives that commission-based compensation provides to churn accounts, recommend unsuitable securities, and engage in aggressive marketing of brokerage services.[12] We were troubled that

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[4] For a discussion of the scope of the Advisers Act, see *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, Investment Advisers Act Release No. 1092 (Oct. 8, 1987) [52 FR 38400 (Oct. 16, 1987)] ("Advisers Act Release No. 1092").

[5] See *Opinion of the General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 2 (Oct. 28, 1940) [11 FR 10996 (Sept. 27, 1946)] ("Advisers Act Release No. 2").

[6] *Certain Broker-Dealers Deemed Not to be Investment Advisers*, Investment Advisers Act Release No. 2340 (Jan. 6, 2005) [70 FR 2716 (Jan. 14, 2005)] ("Reproposing Release" or "Reproposal"); *Certain Broker-Dealers Deemed Not to be Investment Advisers*, Investment Advisers Act Release No. 1845 (Nov. 4, 1999) [64 FR 61226 (Nov. 10, 1999)] ("Proposing Release" or "1999 Proposal"). *Cf. Final Extension of Temporary Rules*, Investment Advisers Act Release No. 626 (Apr. 27, 1978) [43 FR 19224 (May 4, 1978)] ("Advisers Act Release No. 626").

[7] Proposing Release, *supra* note 6.

[8] Proposing Release, *supra* note 6. In the Proposing Release, we referred to what we now term "discount brokerage" programs as "execution-only" programs. "Discount brokerage" more fully describes the programs referenced in this Release.

[9] See Patrick McGeehan, *The Media Business: Advertising, Schwab Takes Another Kind of Swipe at the Big Wall Street Firms in a New Campaign*, N.Y. Times, Aug. 28, 2000, at C11; Jack White and Doug Ramsey, *A Belle Epoque for Wall Street*, Barron's, Oct. 18, 1999, at 54; John Steele Gordon, *Manager's Journal: Merrill Lynch Once Led Wall Street. Now It's Catching Up*, Wall St. J., June 14, 1999, at A20.

[10] See S. Rep. No. 76–1775, 76th Cong., 3d Sess. 22 (1940) ("S. Rep. No. 76–1775") (section 202(a)(11)(C) of the Advisers Act applies to broker-dealers "insofar as their advice is merely incidental to brokerage transactions for which they receive *only* brokerage commissions.") (emphasis added). See also *Disclosure by Investment Advisers Regarding Wrap Fee Programs*, Investment Advisers Act Release No. 1401 (Jan. 13, 1994) at n.2. Our references in this Release to "commission-based brokerage" include transactions effected on a principal basis for which the broker-dealer is compensated by a mark-up or mark-down.

[11] Advisers Act Release No. 626, *supra* note 6; Advisers Act Release No. 2, *supra* note 5; Robert S. Strevell, SEC Staff No-Action Letter (Apr. 29, 1985)("Strevell No-Action Letter")("If two general fee schedules are in effect, either formally or informally, the lower without investment advice and the higher with investment advice, and the difference is primarily attributable to this factor there is special compensation.")

[12] These concerns led to the formation of a broad-based committee whose mandate was to identify conflicts of interest in brokerage industry compensation practices and "best" practices in compensating registered representatives. The committee was formed in 1994 at the suggestion of then Commission Chairman Arthur Levin. The committee found that fee-based compensation would better align the interests of broker-dealers and their clients and allow registered representatives to focus on what the committee described as their most important role—providing

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application of the Advisers Act to broker-dealers offering these new brokerage programs would discourage their development, which we viewed as potentially providing benefits to brokerage customers. After reviewing these new fee-based brokerage programs, we concluded that they were not fundamentally different from traditional brokerage programs. We viewed broker-dealers offering these new programs as having re-priced traditional brokerage programs rather than as having created advisory programs. We proposed rule 202(a)(11)-1 because we believed that Congress could not have intended to subject full-service broker-dealers offering these programs to the Advisers Act when, in conducting these programs, broker-dealers offer advice as part of a traditional package of brokerage services.[13]

Under the 1999 Proposal, a broker-dealer providing investment advice to customers would be excluded from the definition of investment adviser regardless of the form that its compensation takes as long as: (i) The advice is provided on a non-discretionary basis; (ii) the advice is solely incidental to the brokerage services; and (iii) the broker-dealer discloses to its customers that their accounts are brokerage accounts. These provisions of the proposed rule were designed to make application of the Advisers Act turn more on the nature of the services provided by the broker-dealer than on the form of compensation. In addition, we proposed that a broker or dealer would not be deemed to have received special compensation solely because the broker or dealer charges one customer a commission, mark-up, mark-down, or similar fee for brokerage services, that is greater than or less than one it charges another customer. This provision was designed to permit full-service broker-dealers to offer discount brokerage, including electronic trading, without having to treat full-price, full-service brokerage customers as advisory clients.[14]

We received over 1700 comment letters on the 1999 Proposal, most of which addressed only the rule provisions concerning fee-based brokerage programs.[15] Generally, broker-dealers commenting on the proposed rule strongly supported it,[16] asserting that fee-based brokerage programs benefited customers by aligning the interests of representatives with those of their customers.[17] The application of the Advisers Act, broker-dealers argued, would discourage the introduction of fee-based programs by imposing a duplicative and unnecessary regulatory regime.[18]

A large number of investment advisers—in particular, financial planners—and several groups representing investor interests—submitted letters strongly opposed to the proposed rule.[19] Some of these commenters took issue with our conclusions that the new programs do not differ fundamentally from traditional brokerage programs.[20] Many of these commenters asserted that adoption of the rule would deny investors important protections provided by the Advisers Act, in particular, the fiduciary duties and disclosure obligations to which advisers are held.[21] Another theme among some opponents of the rule was the competitive implications for financial planners, who would generally be subject to the Act, while broker-dealers would not.[22] Many commenters focused on whether and when advisory services can be considered "solely incidental to" brokerage and urged us to provide guidance on the meaning of the phrase.[23]

The many comments we received caused us to reconsider our proposed rule. We decided to repropose the rule with some modifications, reflecting the thoughtful comments we received, and sought comment on our Reproposal.[24]

2. The Reproposal

In January we published a release in which we affirmed the basic approach of the 1999 Proposal.[25] Like our 1999 Proposal, our reproposed rule would deem a broker-dealer registered under

investment advice to individual clients, not generating transaction revenues. *See* Report of the Committee on Compensation Practices (Apr. 10, 1995) ("Tully Report").

[11] *See infra* notes 41–50 and accompanying text (discussing "traditional brokerage services"). We did not then, nor do we now, intend to suggest that brokerage services (including advice) have remained advice) have remained static throughout the years. We simply conclude that the broad services we identify as part of the package of traditional brokerage services have not changed.

[14] *See supra* note 11 and accompanying text.

[15] Twenty-five letters were submitted during the comment period for the 1999 Proposal. Following the close of the comment period, however, we received hundreds more letters. In view of ongoing and significant public interest in the Proposal, and in order to provide all persons who were interested in this matter a current opportunity to comment, we reopened the period for public comment on the 1999 Proposal in August 2004. Investment Advisers Act Release No. 2278 (Aug. 18, 2004) [69 FR 51620 (Aug. 20, 2004)]. The reopened comment period closed on September 22, 2004. Comment letters received throughout this rulemaking are generally available for viewing and downloading on the Internet at *http://www.sec.gov/rules/proposed/s72599.shtml*. Letters are otherwise available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549 (File No. S7–25–99).

[16] *See, e.g.*, Comment Letter of Merrill, Lynch, Pierce, Fenner & Smith Incorporated (Sept. 22, 2004) ("Merrill Lynch Sept. 22, 2004 Letter"); Comment Letter of Raymond James Financial, Inc. (Sept. 21, 2004); Comment Letter of Northwestern Mutual Investment Services, LLC (Sept. 22, 2004); Comment Letter of Smith Barney Citigroup (Jan. 14, 2000). *See also* Comment letter of Securities Industry Association (Sept. 22, 2004) ("SIA Sept. 22, 2004 Letter").

[17] *See, e.g.*, Comment Letter of Citigroup Global Markets Inc. (Sept. 22, 2004) ("CGMI Sept. 22, 2004 Letter"); Comment Letter of Charles Schwab & Co. (Sept. 22, 2004) ("Charles Schwab Sept. 22, 2004 Letter"); Comment Letter of Securities Industry Association (Sept. 13, 2000) ("SIA Sept. 13, 2000 Letter"); Comment Letter of Securities Industry Association (Aug. 5, 2004).

[18] *See, e.g.*, CGMI Sept. 22, 2004 Letter, *supra* note 17, Merrill Lynch Sept. 22, 2004 Letter, *supra* note 16; SIA Jan. 13, 2000 Letter, *supra* note 17.

[19] *See, e.g.*, Comment Letter of Carl Kuuhardt (Dec. 28, 1999); Comment Letter of Pamela A. Jones (Jan. 4, 2000); Comment Letter of Investment Counsel Association of America (Jan. 12, 2000) ("ICAA Jan. 12, 2000 Letter") (representing SEC-registered investment advisers); Comment Letter of Consumer Federation of America (Jan. 13, 2000) ("CFA Jan. 13, 2000 Letter"); Comment Letter of The Financial Planning Association (Jan. 14, 2000) ("FPA Jan. 14, 2000 Letter"); Comment Letter of AARP (Nov. 17, 2003); Comment Letter of PFPG Fee-Only Advisors (June 21, 2004); Comment Letter of Timothy M. Montague (Sept. 10, 2004); Comment Letter of William S. Hrank (Sept. 20, 2004); Comment Letter of Marilyn C. Dimitroff (Sept. 21, 2004).

[20] *See, e.g.*, Comment Letter of Arthur V. von der Linden (May 10, 2000); CFA Jan. 13, 2000 Letter, *supra* note 19; FPA Jan. 14, 2000 Letter, *supra* note 19; ICAA Jan. 12, 2000 Letter, *supra* note 19.

[21] *See, e.g.*, Comment Letter of American Institute of Certified Public Accountants (Sept. 22, 2004) ("AICPA Sept. 22, 2004 Letter"); CFA Jan. 13, 2000 Letter, *supra* note 19; FPA Jan. 14, 2000 Letter, *supra* note 19.

[22] *See, e.g.*, Comment Letter of Dan Jamieson (June 1, 2000); Comment Letter of Joel P. Bruckenstein (May 31, 2000); Comment Letter of Margaret Lofaro (May 8, 2000); Comment Letter of Shawnee Barbour (Sept. 13, 2004); Comment Letter of Roselyn Wilkinson (Sept. 13, 2004); Comment Letter of Robert J. Lindner (Sept. 14, 2004); Comment Letter of Robert Lawson (Sept. 16, 2004); Comment Letter of Linda Patchett (Sept. 20, 2004); Comment Letter of John Ellison (Sept. 20, 2004); Comment Letter of Connie Brezik (Sept. 18, 2004); Comment Letter of Keven M. Doll (Sept. 20, 2004); Comment Letter of Phoebe M. White (Sept. 20, 2004); Comment Letter of Eric G. Shisler (Sept. 20, 2004); Comment Letter of Jami M. Thornton (Sept. 20, 2004); *see also* Comment Letter of Consumer Federation of America (Feb. 28, 2000) ("CFA Feb. 28, 2000 Letter").

[23] AICPA Sept. 22, 2004 Letter, *supra* note 21; Comment Letter of The Financial Planning Association (June 21, 2004); Comment Letter of Consumer Federation of America (Nov. 4, 2004); ICAA Jan. 12, 2000 Letter, *supra* note 19.

[24] Reproposing Release, *supra* note 6. In a companion release issued on the same day, the Commission adopted a temporary rule under which a broker-dealer providing non-discretionary advice to customers would be excluded from the definition of investment adviser under the Advisers Act regardless of its form its compensation takes, as long as the advice is solely incidental to its brokerage services. Investment Advisers Act Release No. 2339 (Jan. 6, 2005) [70 FR 2712 (Jan. 14, 2005)]. The temporary rule expires on April 15, 2005.

[25] Reproposing Release, *supra* note 6.

the Exchange Act not to be an investment adviser solely as a result of receiving special compensation if the securities advice given to customers is provided on a non-discretionary basis, and it is solely incidental to the brokerage services provided to the customers, provided certain disclosure is made. We did, however, propose some significant changes in response to comments we received on the 1999 Proposal.

First, we proposed expanded disclosure to address many commenters' concerns that investors were confused about the differences between brokers and advisers. As reproposed, the rule would require that all advertisements for, and all agreements, contracts, applications and other forms governing the operation of, a fee-based brokerage account contain a prominent statement that the account is a brokerage account *and* not an advisory account. In addition, the disclosure would have to explain that, as a consequence, the customer's rights and the firm's duties and obligations to the customer, including the scope of the firm's fiduciary obligations, may differ. Finally, broker-dealers would have to identify an appropriate person at the firm with whom the customer could discuss those differences.

Second, we responded to concerns that commenters raised about the lack of guidance as to when the advisory services of broker-dealers were not solely incidental to their brokerage activities. We included in the Reproposing Release a proposed statement of interpretive position under which investment advice would be "solely incidental to" brokerage services provided to an account when those advisory services are in connection with and reasonably related to the brokerage services. The proposed interpretation provided that, under certain circumstances, financial planning services would not be solely incidental to the business of brokerage. Finally, we proposed to add a provision to rule 202(a)(11)–1 interpreting a broker-dealer's exercise of investment discretion on behalf of a customer as providing advice that is not solely incidental to its business as a broker.

We received over 300 comment letters on the reproposed rule. Many commenters, including most financial planners, strongly objected to the rule. They viewed fee-based brokerage accounts as advisory accounts, and urged that they be regulated as such under the Advisers Act.[26] Many urged that broker-dealers be subject to the Advisers Act *whenever* they provide investment advice.[27] Others urged us to adopt a narrow interpretation of "solely incidental to" under which many more activities (and customer accounts) of broker-dealers would be subject to the Advisers Act.[28] Broker-dealers strongly supported the rule for many of the same reasons they supported the 1999 Proposal.[29] Most, but not all, however, objected to our proposed interpretation that would require them to treat financial planning customers as advisory clients.[30]

[26] *See, e.g.*, Comment Letter of Richard L. Cox (Jan. 6, 2005) ("Cox Letter"); Comment Letter of Bill McDonald (Jan. 14, 2005); Comment Letter of Timothy F. Bock (Jan. 6, 2005); Comment Letter of Harry Scheyer (Jan. 15, 2005); Comment Letter of William M. Harris (Jan. 16, 2005); Comment Letter of Colin S. Mackenzie (Jan. 17, 2005); Comment Letter of James L. Gruning (Jan. 17, 2005); Comment Letter of Roy L. Komack (Feb. 5, 2005); Comment Letter of Terry P. Welsh (Feb. 7, 2005); Comment Letter of Leon Morris (Feb. 9, 2005).

[27] *See, e.g.*, Comment Letter of Stephanie Berger (Jan. 7, 2005); Comment Letter of Mote Wealth Management (Jan. 11, 2005); Comment Letter of Donny E. Long (Jan. 12, 2005); Comment Letter of Mark Greenberg (Jan. 14, 2005); Comment Letter of Kelly F. Crane (Jan. 14, 2005); Comment Letter of William B. Burns, Jr. (Jan. 14, 2005); Comment Letter of Randy Gerard (Jan. 17, 2005); Comment Letter of Margery K. Schiller (Jan. 18, 2005); Comment Letter of Michael J. Zmistowski (Jan. 18, 2005); Comment Letter of Glencrest Investment Advisors (Jan. 20, 2005); Comment Letter of Evensky & Katz (Feb. 3, 2005); Comment Letter of Financial Planning Association (Feb. 7, 2005) ("FPA Letter"); Comment Letter of John K. Ritter (Feb. 7, 2005); Comment Letter of Thomas M. Wargin (Feb. 7, 2005). *See also* Comment Letter of International Association of Registered Financial Consultants (Jan. 4, 2005).

[28] *See, e.g.*, Comment Letter of Michael Boyd (Jan. 11, 2005) ("Boyd Letter"); Comment Letter of Michael O. Babin (Jan. 17, 2005); Comment Letter of Daniel H. Boyce (Jan. 18, 2005); Comment Letter of Certified Financial Planner Board of Standards (Feb. 6, 2005) ("CFP Board Letter"); Comment Letter of Consumer Federation of America (Feb. 7, 2005) ("CFA Letter"); Comment Letter of Fund Democracy, Consumer Federation of America, Consumers Union, Consumer Action (Feb. 7, 2005) ("Joint Letter of Fund Democracy *et al.*"); Investment Counsel Association of America (Feb. 7, 2005) ("ICAA Letter"); Comment Letter of T. Rowe Price Associates (Feb. 22, 2005) ("T. Rowe Price Letter"); Comment Letter of AARP (Mar. 9, 2005) ("AARP Letter").

[29] *See, e.g.*, Comment Letter of Merrill, Lynch, Pierce, Fenner & Smith (Feb. 7, 2005) ("Merrill Lynch Letter"); Comment Letter of Raymond James & Associates, Inc. (Feb. 7, 2005) ("Raymond James Letter"); Comment Letter of Citigroup Global Markets Inc. ("CGMI Letter"); Comment Letter of Morgan Stanley (Feb. 7, 2005) ("Morgan Stanley Letter"); Comment Letter of Northwestern Mutual Investment Services, LLC (Feb. 7, 2005) ("Northwestern Mutual Letter"); Comment Letter of UBS Financial Services, Inc. (Feb. 7, 2005) ("UBS Letter"); Comment Letter of Wachovia Securities, LLC (Feb. 7, 2005) ("Wachovia Letter"). *See also* Comment Letter of Securities Industry Association (Feb. 7, 2005) ("SIA Letter"); Comment Letter of National Association of Securities Dealers (Feb. 11, 2005) ("NASD Letter").

[30] *See, e.g.*, Merrill Lynch Letter, *supra* note 29; Raymond James Letter, *supra* note 29; CGMI Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; Northwestern Mutual Letter, *supra* note 29; SIA Letter, *supra* note 29; UBS Letter, *supra* note 29; Wachovia Letter, *supra* note 29.

[31] *See, e.g.*, Cox Letter, *supra* note 26; Comment Letter of Public Investors Arbitration Bar Association (Feb. 4, 2005) ("PIABA Letter"); FPA Letter, *supra* note 27; Joint Letter of Fund Democracy *et al.*, *supra* note 28; Comment Letter of National Association of Personal Financial Advisors (Feb. 7, 2005) ("NAPFA Letter"); Comment Letter of American Institute of Certified Public Accountants (Feb. 7, 2005) ("AICPA Letter"). *See also* Comment Letter of Federated Investors, Inc. (Jan. 14, 2000) ("Federated Letter"); ICAA Jan. 12, 2000 Letter, *supra* note 19; CFA Feb. 28, 2000 Letter, *supra* note 22; FPA Jan. 14, 2000 Letter, *supra* note 19; Comment Letter of Joseph Capital Management, LLC (Aug. 30, 2004); Comment Letter of Jared W. Jameson (Sept. 16, 2004); Comment Letter of Geoffrey F. Fosie (Sept. 22, 2004); Comment Letter of the Foundation for Fiduciary Studies (Sept. 12, 2004).

[32] *See, e.g.*, Cox Letter, *supra* note 26; Comment Letter of Anna M. Taglieri (Jan. 9, 2005); Comment Letter of Harrod Financial Planning (Jan. 14, 2005); PIABA Letter, *supra* note 31; FPA Letter, *supra* note 27; Joint Letter of Fund Democracy *et al.*, *supra* note 28; NAPFA Letter, *supra* note 31; AICPA Letter, *supra* note 31. *See also* Comment Letter of Roy T. Diliberto (Aug. 24, 2004); Comment Letter of Don B. Akridge (Sept. 7, 2004); Comment Letter of William K. Dix, Jr. (Sept. 21, 2004) ("Dix Letter"); CFA Jan. 13, 2000 Letter, *supra* note 19.

[33] *See, e.g.*, Merrill Lynch Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; Wachovia Letter, *supra* note 29; NASD Letter, *supra* note 29; Comment Letter of American Express Financial Advisers, Inc. (Mar. 4, 2005) ("American Express Letter"). *See also* Comment Letter of Paine Webber Incorporated (Jan. 14, 2000); Comment Letter of U.S. Bancorp Piper Jaffray Inc. (Jan. 19, 2000) ("U.S.

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III. Discussion

We are today adopting new rule 202(a)(11)–1 under the Advisers Act for the reasons discussed below and in this rulemaking record. The rule is designed to avoid application of the Advisers Act to broker-dealers merely because they re-price their full-service brokerage or provide execution-only or similar discount brokerage services in addition to full-service brokerage. As discussed in more detail below, we believe the rule draws an appropriate line as to when a broker-dealer's advisory activities trigger application of the Advisers Act.

A. Fee-Based Brokerage Programs

Commenters on the Reproposal viewed these new fee-based brokerage accounts through entirely different prisms and came to entirely different conclusions. Some saw the introduction of fee-based brokerage programs as a significant migration from a brokerage relationship to an advisory relationship.[31] They urged, therefore, that we treat all fee-based brokerage accounts as advisory accounts.[32] Broker-dealers, on the other hand, viewed the new fee-based programs as providing the same services, including investment advice, that they have traditionally provided to customers.[33] They did not

view the change in pricing as significant except insofar as it better aligns the interests of registered representatives with those of their customers.[34]

In order to explain how we have resolved the issues on which the commenters disagree, and consistent with our authority in the Advisers Act,[35] we consider Congress' intent in defining the scope of the Act. We first review the historical context in which Congress passed the Advisers Act, including the broker-dealer exception, in 1940.[36]

1. Historical Context

Until after World War I, broker-dealers provided investment advice exclusively as a part of the brokerage services for which customers paid fixed commissions ("traditional brokerage services")[37]—in other words, customers did not pay a separate fee for that advice.[38] Beginning in approximately 1920, however, some broker-dealers began offering investment advice for a separate and specific fee, typically through "special departments" within their firms.[39] By 1940, when the Advisers Act was enacted, broker-dealers were providing investment advice in two distinct ways—as an auxiliary part of the traditional brokerage services for which their brokerage customers paid fixed commissions and, alternatively, as a distinct advisory service for which their advisory clients separately contracted and paid a fee.[40]

The advice that broker-dealers provided as an auxiliary component of traditional brokerage services was referred to as "brokerage house advice" in a leading study of the time.[41] "Brokerage house advice" was extensive and varied,[42] and included information about various corporations, municipalities, and governments;[43] broad analyses of general business and financial conditions;[44] market letters and special analyses of companies' situations;[45] information about income tax schedules and tax consequences;[46] and "chart reading."[47] The principal sources of auxiliary advice were firm representatives—known as "customers' men" until 1939[48]—who served as the main point of contact with brokerage customers,[49] and the "statistical departments" within firms, which provided research and analysis to customers' men or directly to the firms' brokerage customers.[50]

Bancorp Jan. 19, 2000 Letter"); Comment Letter of Prudential Securities Incorporated (Jan. 31, 2000) ("Prudential Jan. 31, 2000 Letter"); Merrill Lynch Sept. 22, 2004 Letter, *supra* note 16.

[34] *See, e.g.*, Merrill Lynch Letter, *supra* note 29; American Express Letter, *supra* note 33. *See also* U.S. Bancorp Jan. 19, 2000 Letter, *supra* note 33; Prudential Jan. 31, 2000 Letter, *supra* note 33; CGMI Sept. 22, 2004 Letter, *supra* note 17; Merrill Lynch Sept. 22, 2004 Letter, *supra* note 16; SIA Sept. 22, 2004 Letter, *supra* note 16.

[35] Section 202(a)(11)(F) excludes from the definition of investment adviser, and thus the Act, "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order." *See also* Section X of this Release, *infra*.

[36] In the Reproposing Release, we solicited comments on our reading of the history and background of the Act and, in particular, the broker-dealer exception. Some commenters agreed with our reading (*see, e.g.*, SIA Letter, *supra* note 29) and others did not (*see, e.g.*, CFA Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; FPA Letter, *supra* note 27; Comment Letter of Morgan, Lewis & Bockius LLP (Feb 7, 2005) ("Morgan, Lewis Letter")). Our views about the issues raised by these commenters are set out throughout this Release.

[37] Then, as now, brokerage services included services provided throughout the execution of a securities transaction, including providing research and advice prior to a decision to buy or sell, implementing that decision on the most advantageous terms and executing the transaction, arranging for delivery of securities by the seller and payment by the buyer, maintaining custody of customer funds and securities, and providing recordkeeping services. *See* Exchange Act section 28(e)(3), 15 U.S.C. 78bb(e)(3). *See also generally* Charles F. Hodges, Wall Street (1930) ("Wall Street").

[38] Sec, Report on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services (1939) (H.R. Doc. No. 477) ("Investment Counsel Report") at 3. Such investment advice provided by broker-dealers was "an additional incentive to a purchaser or trader in securities to patronize particular brokers or investment bankers with the resultant increase in their brokerage or securities business." *Id.* at 4; *see* Inspection Report on the Soft-Dollar Practices of Broker-Dealers, Investment Advisers and Mutual Funds (prepared by the Commission's Office of Compliance Inspections and Examinations) (Sept. 22, 1998) (available on the Internet at *http://www.sec.gov/news/studies/softdolr.htm*) ("Since the early days of the brokerage industry, full-service broker-dealers have provided research and other services to customers in addition to executing trades as part of an overall package of services provided to customers. Customers have always paid for this in-house (or proprietary) research, as well as the other services, with commissions; normally no separate price tag was attached to such research or other services. Customers' commissions are used to pay, not only for execution services, but also for proprietary research, access to information and analysts' opinions on an as-needed basis, the brokerage firm's commitment to work difficult trades, and for the firm's willingness to commit capital and other resources for the customer's benefit. These practices continue today. The costs of these services are not separately itemized or billed to customers of brokerage firms but instead are considered part of the overall service provided to customers.").

[39] *See* Twentieth Century Fund, The Security Markets (1935) at 646–47 ("Security Markets"). Additionally, some broker-dealers created subsidiary companies to offer advisory services for a fee, or established affiliations with independent investment advisory firms to which they directed brokerage customers for paid advisory services. *See id.* at 647; *see also Brokers to Bore Advisory Services*, N.Y. Times, Oct. 19, 1934, at 33; Investment Counsel Report, *supra* note 38, at 4–5, 19–20.

[40] *See, e.g., Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. 736 (1940) ("Hearings on S. 3580") (testimony of Dwight C. Rose, president of the Investment Counsel Association of America) ("Most * * * investment dealers * * * and brokers advise on investment problems, either as an auxiliary service without charge, or for specific charges allocated to this specific function.").

[41] *See* Security Markets, *supra* note 39, at 633–46 (discussing "brokerage house advice"). *See also* Wall Street, *supra* note 37, at 253–85; Investment Counsel Report, *supra* note 38, at 1 n.1.

[42] *E.g.*, Report of Public Examining Bd. on Customer Protection to N.Y. Stock Exchange, at 3 (Aug. 31, 1939): The customer entrusts the broker with information regarding his financial affairs and dealings which he expects to be kept in strict confidence. Frequently he looks to the broker to perform a whole series of functions relating to the investment of his funds and the care of his securities. Although he could secure similar services at his bank, he asks his broker, as a matter of choice and convenience, to hold credit balances of cash pending instructions; to retain securities in safekeeping and to collect dividends and interest; to advise him respecting investments; and to lend him money on suitable collateral.

[43] Security Markets, *supra* note 39, at 633; Wall Street, *supra* note 37, at 254 ("This information includes current and comparative data for a number of years on earning and earnings records, capitalization, financial position, dividend record, comparative balance sheets and income statements . . . production and operating statistics, territory and markets served, officers and directors of the company and much other information of value to the investor in appraising the value of a security").

[44] Security Markets, *supra* note 39, at 634; Wall Street, *supra* note 37, at 254.

[45] Security Markets, *supra* note 39, at 640–43; Wall Street, *supra* note 37, at 277–85.

[46] Security Markets, *supra* note 39, at 641.

[47] *Id.* at 643 (defining "chart reading" as "the study of the charted course of prices and volume of trading over a long period of time in order to discover typical conformations recurring in the past with sufficient frequency to be utilized in the present as a basis of judgment as to impending price changes").

[48] *Customers' Men Undecided on New Nome; They Will Be Called Registered Representatives By Stock Exchange, Along With Other Groups*, Wall St. J., May 13, 1939 at 7. *See also* SEC, Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker (June 20, 1936) (submitted to Congress by the Commission pursuant to section 11(e) of the Exchange Act) ("Segregation Study") at 3; *United States* v. *Brown*, 79 F.2d 321, 323 (2d Cir. 1935) ("Brokers have managers, clerks and so on who deal directly with their customers and on their advice the customers rely in investing").

[49] Oliver J. Gingold, *Give the Poor Customers' Man His Due*, Barron's, May 24, 1937 at 11; *The Broker Changes with the Changing Times*, N.Y. Times Magazine, May 30, 1937 at 22 ("[T]he brunt of the demand for market advice falls on the boardroom philosopher and economist, otherwise known as the customers' man").

[50] Security Markets, *supra* note 39, at 640; Wall Street, *supra* note 37, at 253. In the years following the stock market crash in 1929, customers' men were made subject to a series of rules designed to ensure that they had the knowledge and experience required to advise customers and that they acted in the best interests of the customer. *See* Security Markets, *supra* note 39, at 638–40 (discussing and quoting rules adopted on May 7, 1930 by the Committee on Quotations of the New York Stock Exchange and on June 28, 1933 by the Exchange's Governing Committee); *Wall St. Problem in*

The second way in which broker-dealers dispensed advice was to charge a distinct fee for advisory services, which typically were provided through special "investment advisory departments" within broker-dealer firms that advised customers for a fee in the same manner as did firms whose sole business was providing "investment counsel" services.[51] Through these special departments, broker-dealers offered two types of advisory accounts, one known as "purely advisory" and the other as "discretionary."[52] In purely advisory accounts, the "investment counsel undert[ook] to advise the client at stated intervals, or to keep him constantly advised, as to what changes ought, in the opinion of counsel, to be made in his holdings" but left the ultimate decision about such changes to the client.[53] Discretionary advisory accounts, on the other hand, provided the broker-dealer—through powers of attorney or otherwise—additional "control over the client's funds, with the power to make the ultimate determination with respect to the sale and purchase of securities for the client's portfolio."[54] Broker-dealers generally charged for the advisory services provided to these accounts under the same system that had been adopted by the independent investment counseling firms—a fee based on a percentage of the market value of the cash and securities in the account being supervised.[55] Securities transactions for the discretionary accounts were effected through the broker-dealer, and clients paid a commission on each trade.

Between 1935 and 1939, the Commission conducted a congressionally mandated study of investment trusts and investment companies and in connection with this study surveyed investment advisers.[56] For those entities that did not engage solely in the business of providing investment advice for a fee, the "study dealt only with the department of the organization engaged in the business of furnishing such service,"[57] including broker-dealers with investment advisory departments.[58] Following the survey, the Commission held a public hearing at which representatives of the investment counsel industry offered testimony about the history of the investment counsel business, the nature of the services investment counsel provided, and what they saw as the main problems involved in the business of providing investment advice.[59]

In a report to Congress (the "Investment Counsel Report"), the Commission informed Congress that the Commission's study had identified two broad classes of problems relating to investment advisers that warranted legislation: "(a) the problem of distinguishing between bona fide investment counselors and 'tipster' organizations; and (b) those problems involving the organization and operation of investment counsel institutions."[60] Based on the findings of the Investment Counsel Report, representatives of the Commission testified at the Congressional hearings on what ultimately became the Advisers Act in favor of regulating the largely unregulated community of persons engaged in the business of providing investment advice for compensation. As Commission staff explained, a "compulsory census" in the form of a registration requirement for investment advisers was necessary both to protect investors against the unregulated "fringe" offering investment advisory services and to advance the interests of legitimate investment counselors by eliminating "tipsters" who "crash in on the good will of these reputable organizations * * * by giving themselves a designation of investment counselors."[61]

Congress chose to fill this regulatory gap by passing the Advisers Act. Section 202(a)(11) of the Act defined "investment adviser"—those subject to the requirements of the Act—broadly to include "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities * * *" In adopting this broad definition, Congress necessarily rejected arguments presented during its hearings that legitimate investment counselors should be free from any oversight except, perhaps, by the few states that had passed laws regulating investment counselors[62] and by private

Customers' Men, N.Y. Times, Jan. 14, 1934 at N7 ("[T]he Stock Exchange has approved rules prohibiting customers' men from handling discretionary accounts, which powers are now delegated with few exceptions, only to partners in Stock Exchange firms. * * * These employees, who were regarded merely as business getters in 1929, should be well-informed on financial matters and able to give sound investment advice to customers, brokers now believe.").

[51] *See* Advisers Act Release No. 2, *supra* note 5. *See also* Security Markets, *supra* note 39, at 646, 653 (referring to "investment supervisory departments" and "special investment management departments" of broker-dealers). In general, contemporaneous literature used the term "investment counsel" or "investment counselor" to refer to those who provided investment advice for a fee and whose advisory relationship with clients had a supervisory or managerial character. *See id.* at 646 (defining "investment counselor" as "an individual, institution, organization, or department of an institution or organization which undertakes for a fee to advise or to supervise the investment of funds by, and on occasion to manage the investment accounts of, clients"). Under the Investment Advisers Act, "investment counsel" is a defined subset of the "investment advisers" to whom the Act applies. *See* section 208(c) of the Act.

[52] Security Markets, *supra* note 39, at 649–50. *See also* Investment Counsel Report, *supra* note 38, at 13–14.

[53] Security Markets, *supra* note 39, at 649. *See also* Investment Counsel Report, *supra* note 38, at 13.

[54] Investment Counsel Report, *supra* note 38, at 13; Security Markets, *supra* note 39, at 649 (noting that "[g]enerally speaking, the larger independent investment counsel firms [were] more willing to take discretionary accounts than [were] the trust companies, the investment banks and those brokerage houses which undertake to perform the functions of investment counsel").

[55] For example, one brokerage firm that had added an "extensive counsel service" to its brokerage business in 1931 put that service on a "fee basis" in 1933 and charged an annual advisory fee of 0.25 percent of the market value of the account being supervised on accounts with a value of less than $1 million (with a minimum fee of $250) and a fee of 0.1 percent on accounts in excess of $1 million. Security Markets, *supra* note 39, at 653. *See also* Investment Counsel Report, *supra* note 38, at 16–17.

[56] Investment Counsel Report, *supra* note 38, at 1. The study was conducted pursuant to section 30 of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79z–4].

[57] Investment Counsel Report, *supra* note 38, at 1.

[58] *See* Hearings on S. 3580, *supra* note 40, at 995–96.

[59] Excerpts from that testimony are included in the Investment Counsel Report, *supra* note 38. A complete transcript of the Commission's February 11, 1938 hearing is reproduced in the 1938 Investment Counsel Annual, At pages 97–154.

[60] Investment Counsel Report, *supra* note 38, at 27.

[61] Hearings on S. 3580, *supra* note 40, at 50–51. *See also* S. Rep. No. 76–1775, *supra* note 10, at 21–22; H.R. Rep. No. 76–2639, 76th Cong., 3d Sess. 28 (1940) ("H.R. Rep. No. 76–2639") at 28.

[62] Hearings on S. 3580, *supra* note 40, at 745–748. Two commenters suggested that this testimony by investment counselors, which included references to differences between independent investment counselors and broker-dealers who provided investment advice, supports the notion that Congress intended the Act to broadly cover broker-dealer investment advice. *See* CFA Letter, *supra* note 28; FPA Letter, *supra*, note 27. In support of this, one commenter points to the statement of Dwight Rose that "[s]ome of these organizations using the descriptive title of investment counsel were in reality dealers or brokers offering to give advice free in anticipation of sales and brokerage commissions on transactions executed upon such free advice" as evidence that Congress was concerned about bringing such broker-dealers under the scope of the Act. CFA Letter, *supra* note 28 (*citing* Hearings on S. 3580, *supra* note 40, at 736). Mr. Rose's comments, however, were part of his identification of the various sorts of persons who rendered advice—not a call for regulation of those persons. Instead, consistent with the bulk of the hearings, the comments were offered in the context of an extended discussion of why investment counselors believed that the proposed legislation was *unnecessary* in its entirety. Moreover, the members of the committees holding hearings on the

Continued

organizations, such as the Investment Counsel Association of America.[63] Instead, in responding to such views, congressional committee members repeatedly observed that those whose business was limited to providing investment advice for compensation were subject to little if any regulatory oversight, and questioned why they should not be subject to regulation even though other professionals were.[64]

Conversely, in recognition of the fact that the broad definition of "investment adviser" also captured a number of individuals and entities that *were already subject* to substantial oversight and regulation,[65] the Act specifically excepted such persons, among others, to the extent they rendered investment advice as part of their other regular business.[66] Broker-dealers were among these already-regulated persons, and section 202(a)(11)(C) of the Act excepts from the definition of "investment adviser" a broker-dealer who provides investment advice that is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

2. Our Conclusions

We draw two relevant conclusions from this legislative history as well as from the brokerage customs of 1940. First, as drafted in 1940, the Advisers Act avoided additional and largely duplicative regulation of broker-dealers, which were regulated under provisions of the Exchange Act that had been enacted six years earlier.[67] Second, the broker-dealer exception in the Advisers Act was understood to distinguish between broker-dealers who provided advice to customers only as part of the package of traditional brokerage services for which customers paid fixed commissions—who were not covered by the Advisers Act[68]—and broker-dealers who also provided advisory services (typically through their special advisory departments) for which customers separately contracted and paid a fee—who were covered by the Act.[69] As the legislative history shows, representatives of the investment counsel industry who participated in the Advisers Act hearings (and cooperated in drafting the version of the

proposed legislation were also informed by investment counselors who testified on the legislation, that it would cover only broker-dealers who were separately paid for the giving of investment advice (*see* Hearings on S. 3580, *supra* note 40, at 711; *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the House Committee on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. at 87 (1940) ("Hearings on H.R. 10065")]—which would not include the broker-dealers to which Mr. Rose was referring.

[63] Hearings on S. 3580, *supra* note 40, at 716–18, 736–38, 740–41, 744–45, 760, 763.

[64] Hearings on S. 3580, *supra* note 40, at 738–39, 745–49. 751–53 (Senators Wagner and Hughes). David Schenker, chief counsel for the Commission's study, offered the following observations in response to investment counselors' arguments against the registration and regulation required by the Act:

"Then there is another curious thing, Senator, that those people who are subject to supervision by some authoritative body of some kind, such as securities dealers or investment bankers have to register with us as brokers and dealers. People, who are brokers and members of stock exchanges and are supervised by the stock exchanges. Curiously enough, the people in the investment-counsel business who are supervised are not eligible for membership in the investment counsel association; because the association says that if you are in the brokerage or banking business you cannot be a member of the association.

"So the situation is that if you take their analysis, the only ones who would not be subject to regulation by the S.E.C. would be the people who are not subject to regulation by anybody at all. These investment counselors who appeared here are no different from the over-the-counter brokers and dealers or the members of the New York Stock Exchange. All we ask them to do is file a registration statement which asks "What is your name and address, and have you ever been convicted of a crime?"

Hearings on S. 3580, *supra* note 40, at 995–96. Eventually, members of the investment counsel industry agreed with the proposed legislation. *See id.* at 1124; Hearings on H.R. 10065, *supra* note 62. *See also* S. Rep. No. 76–1775, *supra* note 10, at 21; H.R. Rep. No. 76–2639, *supra* note 61, at 27.

[65] Members of the congressional committees conducting the hearings on the Advisers Act suggested that the broad definition could result in overlapping (and unnecessary) regulation—particularly of lawyers providing investment advice. *See*, e.g., Hearings on H.R. 10065, *supra* note 62, at 88 (statement of Congressman Cole) ("[I]n the hearings in the Senate, several of the Senators raised considerable objection to the possibility of the bill reaching law firms * * * and I gather from reading the testimony and discussions on the bill, that the only reason these law firms are not under the bill is that they are pretty well regulated at home."). One commenter argued that we "created a distorted picture" of the historical record, however, by failing to cite to congressional testimony of a Commission employee that it was appropriate to except lawyers from the proposed legislation because, in addition to being regulated by state bar associations, lawyers are subject to a "high fiduciary duty" to their clients. *See* CFA Letter, *supra* note 28 (*citing* Hearings on S. 3580, *supra* note 40, at 49). From this, the commenter implies that Congress would have considered a "high fiduciary duty" to be a prerequisite for an exception from the definition of "investment adviser." We cannot agree, however, because the same provision excepting lawyers also excepts other professionals (engineers and teachers) who have never been regarded as traditional fiduciaries.

[66] This exception for certain professionals is very similar to certain state-law provisions governing investment counselors at the time, which excepted "brokers, attorneys, banks, savings and loan associations, trust companies, and certified public accountants." *See* Statutory Regulation of Investment Advisers (prepared by the Research Department of the Illinois Legislative Council) ("Illinois Legislative Council Report") reprinted in Hearings on S. 3580, supra note 40, at 1007. That report stated that "the basic reason [for such exceptions] seems to be that such persons and firms are already subject to governmental regulation of one type or another [and] * * * the investment advice furnished by these excepted groups would seem to be merely incidental to some other function being performed by them." *Id.*

[67] Pub. L. 73–291, 48 Stat. 881 (June 6, 1934). Four years later in the Maloney Act, Congress amended the Exchange Act to authorize the Commission to register national securities associations. Pub. L. No. 75–719, 52 Stat. 1070 (June 25, 1938). One commenter suggested that, in determining that the broker-dealer exception (and the other exceptions) reflected a decision to avoid additional and largely duplicative regulation, we disregarded evidence that the exception was included for other reasons that support a narrower construction of the exception. *See* CFA Letter, *supra* note 28. In fact, we have not stated that the *only* purpose of section 202(a)(11)(C) was to avoid duplicative regulation. We have also focused on strong evidence that the exception reflected an intent to remove from the coverage of the Act only certain broker-dealers: those who provided investment advice as part of the package of brokerage services for which customers were paying commissions, as opposed to those broker-dealers who were providing advice for a fee, typically through separate advisory departments.

[68] *See* S. Rep. No. 76–1775, *supra* note 10, at 22; H.R. Rep. No. 76–2639, *supra* note 61, at 28. *See also* Thomas P. Lemke & Gerald T. Lins, Regulation of Investment Advisers § 1:19 ("The exception in section 202(a)(11)(C) was included in the Advisers Act because broker-dealers routinely give investment advice as part of their brokerage activities, yet are already subject to extensive regulation under the 1934 Act and possibly state law"); Thomas P. Lemke, *Investment Advisers Act Issues for Broker-Dealers*, Securities & Commodities Regulation at 214 (Dec. 9, 1987) ("While most broker-dealers initially will come within the definition of an investment adviser, it is clear that Congress did not intend brokerage activities to be regulated under the 1940 Act [citing S. Rep. No. 76–1775]. Rather, such activities were intended to be regulated under the 1934 Act without the additional and often duplicative requirements under the 1940 Act.").

[69] One commenter disputed our conclusion that the Act was drafted to cover the sort of advice that, in 1940, was provided through the separate advisory departments of broker-dealers. CFA Letter, *supra* note 28. In support of its contrary contention that Congress intended the Act to apply to most of the advice provided by broker-dealers in 1940—including advice provided as part of the package of brokerage services for which broker-dealers received only commissions—this commenter pointed to an excerpt from the Illinois Legislative Council Report that describes the risk that investment counselors associated with brokerage houses would "unduly urge frequent buying and selling of securities, even when the wisest procedure might be for the client to retain existing investments." CFA Letter, *supra* note 28 (*quoting* Illinois Legislative Council Report, *supra* note 66, at 1014). This excerpt, however, is consistent with our reading of the broker-dealer exception. In describing the sort of "association" with brokerage houses that would give rise to the risk described above, the report stated that "[m]any counselors have some connection, direct or indirect, with [broker-dealer] * * * firms, although such connections are not universal. Furthermore, brokers and dealers in securities frequently maintain an investment counsel service in connection with their other activities." Illinois Legislative Council Report, *supra* note 66, at 1014). This excerpt indicates that, to the extent that broker-dealers were the investment counselors who gave rise to the concern, they were offering advisory services through special investment advisory departments—precisely the sort of advisory services we have concluded the Act was drafted to reach.

bill that Congress ultimately enacted)[70] understood that broker-dealers offered investment advice both as part of their traditional commission brokerage services and, alternatively, for a separate fee through special departments,[71] and that the Advisers Act was intended to reach only the latter.[72] The earliest Commission staff interpretations of the Advisers Act also reflect the same understanding, *i.e.*, that the Act was intended to cover broker-dealers only to the extent that they were offering investment advice as a distinct service for which they were specifically compensated (which it was "well known" they were doing through special advisory departments).[73]

Although, as discussed above, the Advisers Act was written in such a way that it covers fee-based programs because the fee would constitute "special compensation," we do not believe that it would be consistent with Congress' intent to apply the Act to cover broker-dealers providing advice as part of the package of brokerage services they provide under fee-based brokerage programs. First, as we have said, one of the reasons Congress enacted the broker-dealer exception was to avoid largely duplicative regulation. If anything, broker-dealers today are subject to a level of regulation far greater than in 1940, as we explain below. Much of that regulation concerns matters pertinent to their advice-giving function.

Second, the Advisers Act was enacted in an era when broker-dealers were paid fixed commission rates[74] for the traditional package of services (including investment advice) excepted from the Act, and, therefore, Congress understood "special compensation" to mean non-commission compensation.[75] There is no evidence that the "special compensation" requirement was included in section 202(a)(11)(C) for any purpose beyond providing an easy way of accomplishing the underlying goal of excepting only advice that was provided as part of the package of traditional brokerage services.[76] In particular, neither the legislative history of section 202(a)(11)(C) nor the broader legislative history of the Advisers Act as a whole suggests that, in 1940, Congress viewed the form of compensation for the services at issue—commission versus fee-based compensation—as having any *independent* relevance in terms of the advisory services the Act was intended to reach.

To the extent fee-based brokerage programs offer a package of the same types of services that Congress intended the Advisers Act *not* to cover,[77] the rule we are adopting today is necessary to prevent the Act from reaching beyond Congress' intent.[78] Today, fee-based brokerage programs are offered by most of the larger broker-dealers, and hold over $268 billion of customer assets.[79] Although this is still a relatively small number, it is estimated that assets in fee-based brokerage programs nationwide grew by 60.9 percent during 2003–2004.[80] Industry observers expect that fee-based programs will continue to grow as broker-dealers move away from transaction-based brokerage relationships that provide unsteady sources of revenue.[81] Our failure to adopt this rule could eventually result in the extension of the Advisers Act to many brokerage relationships. Such a result would be inconsistent with the

[70] *See* Hearings on S. 3580, *supra* note 40, at 1124.

[71] *Id.* at 736.

[72] *Id.* at 711 (testimony of Douglas T. Johnston, vice-president of Investment Counsel Association of America) ("The definition of 'investment adviser' as given in the bill * * * would include * * * certain investment banking and brokerage houses which maintain investment advisory departments and make charges for services rendered * * *."). One commenter asserted that because this testimony was offered at a time when the draft legislation contained no explicit exception for broker-dealers, it cannot be taken as evidence of the type of advisory services by broker-dealers that the legislation was intended to cover. *See* CFA Letter, *supra* note 28, at 7. Instead, the commenter contended, the final legislation—which contains an express exception for broker-dealers—reaches a *broader* range of broker-dealer investment advice than Mr. Johnston's testimony suggested. We believe that the later addition of the exception for broker-dealers cannot reasonably be read to have *expanded* the group of broker-dealers to which the Act would apply. In our view, the better reading of the record is that Mr. Johnston—who participated in the Commission hearings that gave rise to the proposed legislation (*see* Investment Counsel Report, *supra* note 38, at 2, n.7)—understood that the legislation was never intended to reach the sort of investment advice provided by broker-dealers as part of the package of brokerage services for which customers paid commissions. *See* Investment Counsel Report, *supra* note 38, at 1, n.1 (the Commission study "included only those persons or organizations who were engaged primarily in the business of furnishing investment counsel or advice and therefore did not include lawyers, accountants, trustees, customers' men in brokerage offices, security brokers and dealers, and other similar persons who may give investment advice in similar capacities").

[73] *See* Advisers Act Release No. 2, *supra* note 5 ("[T]hat portion of clause (C) which refers to 'special compensation' amounts to an equally clear recognition that a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the Act merely because he is also engaged in effecting market transactions in securities. It is well known that many brokers and dealers have investment advisory departments which furnish investment advice for compensation in the same manner as does an investment adviser who operates solely in an advisory capacity."). One commenter argued that the foregoing reference to "investment advisory departments" does not support our conclusion that the Act was drafted to cover the sort of advisory services provided by such departments, but "simply supports the document's preceding assertion, that a broker is not 'excluded from the purview of the Act merely because he is also engaged in effecting market transactions in securities.'" *See* CFA Letter, *supra* note 28. We cannot agree. The point of the reference is to identify the *type* of advisory services provided by broker-dealers for compensation that the Act was intended to reach.

[74] The practice of fixing commission rates on stock exchanges in the United States is generally traced back to the so-called Buttonwood Tree Agreement of 1792, which provided: "We, the Subscribers, Brokers for the Purchase and Sale of Public Stock, do hereby solemnly promise and pledge ourselves to each other, that we will not buy or sell from this day forward for any person whatsoever, any kind of Public Stock at a less rate than one-quarter percent Commission on the Specie value of, and that we will give a preference to each other in our Negotiations. In Testimony whereof we have set our hands this 17th day of May, at New York, 1792." Eames, The New York Stock Exchange 14 (1894).

In 1975, the Commission adopted rule 19b–3 [17 CFR 19b–3] which eliminated the fixed commission rate structure on national securities exchanges. *See generally* Exchange Act Release No. 11203 (Jan. 23, 1975) [40 FR 7394 (Feb. 20, 1975)].

[75] At the time the Advisers Act was enacted, Congress understood "special compensation" to mean compensation *other than* commissions. S. Rep. No. 76–1775, *supra* note 10, at 22 ("The term 'investment adviser' is so defined as specifically to exclude * * * brokers (insofar as their advice is merely incidental to brokerage transactions for which they receive *only brokerage commissions*.)") (emphasis added). *See also* H. Rep. No. 2639, supra note 61.

[76] Of course, the absence of "special compensation" was necessary but not sufficient for the section 202(a)(11)(C) exception. The other requirement—that the advice be provided "solely incidental to" the conduct of the brokerage business—has always required a judgment based on the facts and circumstances and was not the sort of "bright-line" test that non-commission "special compensation" was.

[77] When brokers re-price traditional commission-based brokerage accounts, they create a different set of incentives for their registered representatives. Thus, it is not surprising to us, nor is it inconsistent with the design of the rule we are today adopting, that customers with fee-based brokerage accounts may obtain a different level or quality of services, including advisory services, than do customers with commission-based brokerage accounts. Indeed, one of the aims of the Tully Commission, as articulated in its report, was to create incentives for brokers to improve the quality of the services provided their customers. *See* Tully Report, *supra* note 12.

[78] In reaching this conclusion, we are exercising our authority under section 202(a)(11)(F) to except "such other persons not within the intent of" the definition of "investment adviser" in section 202(a)(11). Broker-dealers who provide investment advice solely incidental to traditional brokerage services for a fee are a group which, as discussed above, could not have existed at the time Congress enacted the Advisers Act because, in 1940, broker-dealers were paid *only* fixed commissions for traditional brokerage services. Such broker-dealers are therefore "other persons" within the meaning of section 202(a)(11)(F).

[79] The Cerulli Edge, Managed Accounts Edition (1st Quarter 2005) ("Cerulli Edge 1st Quarter 2005"). One commenter asserted that fee-based accounts represent 6.4% of the $3.9 trillion of securities currently held by individual investors. FPA Letter, *supra* note 27.

[80] Cerulli Edge 1st Quarter 2005, *supra* note 79.

[81] The Cerulli Edge, Managed Accounts Edition (1st Quarter 2004).

intent of the Advisers Act, which, as discussed earlier, was designed to fill a regulatory gap that had permitted firms and individuals to engage in advisory activities without being regulated.[82] Moreover, such a result would create substantial regulatory overlap, which the Act was drafted to avoid.[83] Far from being a radical departure from existing regulatory policy as suggested by some commenters, we believe the primary effect of rule 202(a)(11)–1 will be to maintain the historical ability of full-service broker-dealers to provide a wide variety of services, including advisory services, to brokerage customers, without requiring those broker-dealers to treat those clients as advisory clients.

The arguments of many commenters opposed to the reproposed rule go to a fundamental set of issues they have with the statutory broker-dealer exception in the Advisers Act. Notwithstanding the statutory exception, these commenters argue that broker-dealers providing *any* investment advice should be registered as investment advisers under the Advisers Act.[84] They assert that today, brokerage is incidental to the advisory services provided by full-service broker-dealers,[85] and point to brokerage advertising that emphasizes the quality of the advisory services provided by the broker-dealer as indicative of this change.[86] These comments fail to give weight to Congress' decision to include the exception in the Advisers Act, and fail to recognize the historical role of advice in retail brokerage.

Broker-dealers have traditionally provided investment advice that is substantial in amount, variety, and importance to their customers.[87] Full-service broker-dealers have always sought to develop long-term relationships with their customers who often come to rely on them for expert investment advice.[88] And full-service retail broker-dealers have always relied on ancillary services, such as advisory services, to promote and sell their brokerage services.[89] The nature, amount and significance of the advice broker-dealers provided as part of traditional brokerage services was evident in 1940 when Congress expressly excepted broker-dealers from the Advisers Act to the extent they were providing advice in that context.[90] A rule or interpretation of the Advisers Act that would apply the Act to broker-dealers merely because their advice is important or valuable to customers, or who market themselves based on their advice, as commenters suggested, would extend the Act to most full-service broker-dealers—a result at conflict with the purpose of the statutory exception.

As a general matter, broker-dealers and investment advisers have, in the past, often provided similar advisory services and competed for similar clients seeking similar advice. Applying the Act to a broker-dealer whenever it provides investment advice would seem to necessarily apply the Act to every full-service brokerage account once advice is provided. Whatever policy advantages one might conclude could be gained by such a result, we believe it would be inconsistent with the conclusions reached by Congress when it passed the Act.[91]

Many commenters opposing the proposed rule focused their arguments on additional investor protections that regulation under the Advisers Act provides and argued that the rule would harm investors.[92] There are differences between the regulatory frameworks provided by the Exchange Act and the Advisers Act, but Congress was well aware of these differences when it passed the Advisers Act and excepted broker-dealers from the definition of investment adviser.[93] Broker-dealers are

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[82] *See supra* notes 56–64 and accompanying text.

[83] *See supra* notes 65–66 and accompanying text. One commenter contended that in reaching this conclusion about the purpose of the broker-dealer exception, we did not adequately account for a discussion in the Illinois Legislative Council Report addressing different ways the State of Illinois might exempt certain professionals from regulation as investment counselors. *See* CFA Letter, *supra* note 28. The Illinois report stated that "[a]part from deciding the merits of each claim for exemption, a decision would have to be made as to whether to exempt only those who incidentally *and occosionally* give advice as to investments or whether to exempt as a general rule all who regularly furnish investment advice if they also belong to one of the groups in relation to which some other form of government regulation exists." Illinois Legislative Council Report, *supra* note 66, at 1007–1008 (emphasis supplied). According to the commenter, this excerpt indicates that, because Congress did not provide a "blanket exception" for broker-dealers, (1) Congress necessarily chose to except only broker-dealers who " 'incidentally *and occosionolly* give advice on investments' "; and (2) the exception cannot have been based on any concern about overlapping or duplicative regulation. CFA Letter, *supra* note 28. We cannot agree. Most critically, the broker-dealer exception in the Advisers Act says nothing about advisory services being only "occasional." Thus, to the extent the formulation in the state report is relevant here, it tends to indicate that the drafters of the Advisers Act chose *not* to limit the broker-dealer advice excepted by section 202(a)(11)(C) to advice that is provided only occasionally. Further, even accepting the commenter's reading of the state report, there is no basis for concluding that *Congress'* concern about duplicative or overlapping regulation could have been addressed *only* by a blanket exception from the Act. The more reasonable view is that the drafters of the qualified exception in section 202(a)(11)(C) took account of the recent and substantial regulation of broker-dealers (*see supra* note 67) and balanced the interest in avoiding multiple regulation of broker-dealers against the interest in regulating as advisers, broker-dealers who were providing investment advisory services through "investment advisory departments * * * for compensation in the same manner as does an investment adviser who operates solely in an advisory capacity." Investment Advisers Act Release No. 2, *supra* note 5. Indeed, although there are clear statements in the historical record that the exception for lawyers in section 202(a)(11)(B) was based in large part on a desire to avoid multiple regulation (Hearings on H.R. 10065, *supra* note 62, at 88) the Act does not provide a blanket exception for lawyers, either.

[84] *See supra* note 27.

[85] *See, e.g.*, AICPA Letter, *supra* note 31; Joint Letter of Fund Democracy *et al.*, *supra* note 28. *See also* FPA Jan. 14, 2000 Letter, *supra* note 19.

[86] *See, e.g.*, CFA Letter, *supra* note 28; CFP Board Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; T. Rowe Price Letter, *supra* note 28. *See also* CFA Jan. 13, 2000 Letter, *supra* note 19; Joint Comment Letter of Consumer Federation of America, Fund Democracy, Investment Counsel Association of America, Financial Planning Association, Certified Financial Planner Board of Standards, Inc., and National Association of Personal Financial Advisors (May 6, 2003); Comment Letter of Strategic Compliance Concepts, Ltd. (Sept. 9, 2004); Dix Letter, *supra* note 32; Comment Letter of Joseph Capital Management (Nov. 7, 2004).

[87] *See supra* notes 37–55 and accompanying text.

[88] *See id.*

[89] *See, e.g.*, Investment Counsel Report, *supra* note 38, at 4 ("The availability of such [advisory] service to investors created an additional incentive to a purchaser or trader in securities to patronize particular brokers or investment bankers with the resultant increase in their brokerage or securities business").

[90] *See supra* notes 37–66 and accompanying text. In the 1930s, there were a significant number of individual security holders. Thus, for example, according to the Twentieth Century Fund's 1935 discussion of the securities markets, in 1930 around 10 million individuals owned stock in American corporations and these ten million were about 20 per cent of the population "over 10 years of age gainfully employed." Security Markets, *supra* note 39, at 54. In 1940, the Temporary National Economic Committee estimated that in 1937 there were from eight to nine million individual share owners—about 1 in 15 inhabitants of the country and around 1 in 5 persons receiving income—who held stock in at least one corporation. Temporary National Economic Committee, *The Distribution of Ownership in the 20 Largest Nonfinancial Corporations* at 9. *See also* Brookings Institution, *Share Ownership in the United States*, App. A (1952) (discussing shareholdings in 45 common stocks listed on the New York Stock Exchange for the years 1930 to 1950 and noting that there was an extremely sharp rise in shareholdings from 1930 to 1935 followed by an "apathetic market" in the period 1935–1940).

[91] For the same reason, we do not believe that the competitive concerns of many of the financial planners that commented on the proposal and reproposal counsel against adopting this rule.

[92] AICPA Letter, *supra* note 31; CFP Board, *supra* note 28; FPA Letter, *supra* note 27; NAPFA Letter, *supra* note 31; AARP Letter, *supra* note 28. *See also* CFA Jan. 13, 2000 Letter, *supra* note 19; FPA Jan. 14, 2000 Letter, *supra* note 19; ICAA Jan. 12, 2000 Letter, *supra* note 19.

[93] Many commenters focused on the conflicts under which broker-dealers function, arguing that the rule is "anti-consumer" in that broker-dealers are not subject to the same obligations to disclose conflicts as are advisers. *See, e.g.*, FPA Letter, *supra* note 27. As noted above, however, Congress was well aware of these conflicts when it passed the Advisers Act. *See, e.g.*, Hearings on S. 3580, *supra* note 40 at 736 ("Some of these organizations using the descriptive title of investment counsel were in

reality dealers or brokers offering to give advice free in anticipation of sales and brokerage commissions on transactions executed upon such free advice"); Investment Counsel Report, *supra* note 38, at 23–25 (quoting testimony of investment advisers regarding "vital conflicts" in broker-dealers providing investment advice when they were at the same time intending to sell particular securities they owned); Illinois Legislative Council Report, *supra* note 66, at 1010 ("This might give rise to questions as to whether a counselor who is also a dealer or broker can be relied upon always to give unbiased advice."); Segregation Study, *supra* note 48, at xv ("A broker who trades for his own account or is financially interested in the distribution or accumulation of securities, may furnish his customers with investment advice inspired less by any consideration of their needs than by the exigencies of his own position."). Despite such conflicts, Congress nonetheless determined to except brokers providing such advice from the scope of the Advisers Act.

One commenter challenged this conclusion, maintaining that the legislative history showed that "the intermingling of brokerage and advising functions was a significant part of the problem Congress was attempting to resolve" by passing the Advisers Act, implying that the Act was drafted to broadly cover investment advice provided by broker-dealers. FPA Letter, *supra* note 27. The testimony on which the commenter relies (see Hearings on S. 3580, *supra* note 40, at 725), however, did not address advice supplied by brokers as a part of the package of brokerage services for which they charged only commissions, but concerned broker-dealers that had separate investment advisory departments that provided investment advice to clients for a fee, precisely the sort of advisory services that we have stated the Act was drafted to cover.

Broker-dealers are subject to more obligations to disclose conflicts today than they were in 1940. Those obligations derive from many sources, including agency law, the shingle theory, antifraud provisions of the securities laws and the rules and regulations of the Commission and the SROs. Required disclosures in client communications include those relating to investment recommendations (e.g., the nature of any financial interest the broker-dealer and/or any of its officers or directors have in any securities of an issuer (NASD IM–2210–1)); confirmations (e.g., disclosure of principal or agency execution status and compensation to the broker (Exchange Act rule 10b–10)); marketing materials (e.g., must be fair and balanced and provide a sound basis for evaluating the facts (NASD Rule 2210(d)); customer statements (e.g., quarterly account statements must contain a description of any securities positions, money balances and account activity (NASD Rule 2340(a)), and margin disclosure statements (e.g., must discuss operation and risks of trading on margin (NASD Rule 2341)). In addition, the Commission has proposed "point of sale" disclosure requirements and additional customer confirmation requirements for broker-dealers to provide cost and conflict of interest information to investors in mutual funds, unit investment trust interests and college savings plan interests. *See* Securities Act Release No. 8358 (Jan. 29, 2004 [69 FR 6438 (Feb. 10, 2004)] and Securities Act Release No. 8544 (Feb. 28, 2005 [70 FR 10521 [Mar. 4, 2005]). Broker-dealers must also disclose information about revenue sharing arrangements for the sale of mutual funds. *See In the Matter of Morgan Stanley DW Inc.*, Exchange Act Release No. 34–48789 (Nov. 17, 2003); *In the Matter of Edward D. Jones & Co., L.P.*, Exchange Act Release No. 34–50910 (Dec. 22, 2004); *In the Matter of Putnam Investment Management*, LLC, Advisers Act Release No. 2370 (Mar. 23, 2005). *See also In the Matter of Citigroup Global Markets, Inc.*, Exchange Act Release No. 34–51415 (Mar. 23, 2005) (in addition to revenue sharing arrangements, also required to disclose material information regarding overall rate of return for purchase of Class A shares rather than Class B shares).

[94] An entity that wishes to act as a broker-dealer, and that does not qualify for an exemption, must register both with the Commission and with at least one SRO. *See* Exchange Act section 15(b)(8). The Uniform Application for Broker-Dealer Registration, Form BD, requires broker-dealers to disclose detailed information about their business, including their disciplinary history, if any. Similar information about registered personnel of broker-dealers must be disclosed on Form U4, the Uniform Application for Securities Industry Registration. This information is maintained in the Central Registration Depository (CRD), which is operated by the National Association of Securities Dealers, Inc. (NASD). Much of this information, including disciplinary history, is made publicly available by NASD through BrokerCheck. All registered personnel of broker-dealers must pass examinations administered by the NASD in order to work for a broker-dealer and complete continuing education requirements. Registered securities representatives must be supervised by a principal of the broker-dealer who is also registered with the NASD. *See* NASD Conduct Rule 3010(a)(5).

Under the anti-fraud provisions in Sections 9(a), 10(b), and 15(c)(1) and (2) of the Exchange Act and the regulations thereunder, as well as the rules of the various SROs, broker-dealers owe their customers a duty of fair dealing, have a duty of best execution and are required to make only suitable recommendations. They are also subject to various financial responsibility requirements, including segregation of customer assets and capital adequacy requirements, as well as recordkeeping and reporting requirements. *See* Exchange Act Rules 15c3–1, 15c3–3, 17a–3, 17a–4, 17a–5, and 17c–11. Moreover, broker-dealers are subject to statutory disqualification standards and the Commission's disciplinary authority, which are designed to prevent persons with any disciplinary history from becoming, or becoming associated with, registered broker-dealers. *See* Exchange Act sections 3(a)(39), 15(b)(4) and 15(b)(6). *See also* Reproposing Release, *supra* note 6, at n. 51–52 and accompanying text.

[95] For example, while our staff examinations of broker-dealers offering fee-based accounts suggest that some firms may be maintaining such accounts for customers in instances in which they are not appropriate—for example for a customer whose trading activity is limited—we note that the SROs are taking steps to address this practice. The NASD has issued a Notice to Members requiring supervisory procedures to determine whether fee-based brokerage is appropriate for a customer and periodic review of the customer's accounts to determine whether it continues to be appropriate. NASD Notice to Members No. 03–68 (Nov. 2003). The NYSE has filed a proposed rule with the Commission that would also deal with these issues. SR–NYSE–2004–13.

subject to oversight by the Commission as well as by one or more SROs under the Exchange Act. The Exchange Act, Commission rules, and those of the SROs provide substantial protections for broker-dealer customers.[94] Given that broker-dealers are today subject to a level of regulation far greater than in 1940, we believe that the rule is consistent with the statute's intent to avoid largely duplicative regulation of firms already subject to Commission oversight.[95]

Some commenters opposed to the rule asserted that the Commission, by providing the proposed exception in the rule, would relieve broker-dealers of the fiduciary responsibility to clients that the Advisers Act imposes.[96] Many of these commenters believed that, as a result, we would be denying fee-based brokerage customers an important investor protection. Investment advisers are fiduciaries by virtue of the nature of the position of trust and confidence they assume with their clients. They owe their clients "an affirmative duty of 'utmost good faith, and full and fair' disclosure of all material facts."[97] In some cases, such as when broker-dealers assume positions of trust and confidence with their customers similar to those of advisers, broker-dealers have been held to similar standards.[98] As we noted in our Reproposing Release, however, broker-dealers often play roles substantially different from investment advisers and in such roles they should not be held to standards to which advisers are held.[99] Thus, we believe that broker-dealers and advisers should be held to similar standards depending not upon the statute under which they

[96] AICPA Letter, *supra* note 31; CFA Letter, *supra* note 28; CFP Board Letter, *supra* note 28; FPA Letter, *supra* note 28; Fund Democracy Letter, *supra* note 28; NAPFA Letter, *supra* note 31. *See also* AICPA Sept. 22, 2004 Letter, *supra* note 21; CFA Jan. 13, 2000 Letter, *supra* note 19; FPA Jan. 14, 2000 Letter, *supra* note 19.

[97] *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 184 (1963) (*quoting* Prosser, LAW OF TORTS (1955), 534–35). *See also Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979).

[98] See, e.g., *Arleen W. Hughes*, 27 S.E.C. 629 (1948) (noting that fiduciary requirements generally are not imposed upon broker-dealers who render investment advice as an incident to their brokerage unless they have placed themselves in a position of trust and confidence), *aff'd sub nom. Hughes* v. *SEC*, 174 F.2d 969 (D.C. Cir. 1949); *Leib* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978), aff'd, 647 F. 2d. 165 (6th Cir. 1981) (recognizing that broker who has de facto control over non-discretionary account generally owes customer duties of a fiduciary nature; looking to customer's sophistication, and the degree of trust and confidence in the relationship, among other things, to determine duties owed); *Paine Webber, Jackson & Curtis, Inc.* v. *Adams*, 718 P.2d. 508 (Colo. 1986) (evidence "that a customer has placed trust and confidence in the broker" by giving practical control of account can be "indicative of the existence of a fiduciary relationship"); *MidAmerica Federal Savings & Loan* v. *Shearson/American Express*, 886 F.2d. 1249 (10th Cir. 1989) (fiduciary relationship existed where broker was in position of strength because it held its agent out as an expert); *SEC* v. *Ridenour*, 913 F.2d. 515 (8th Cir. 1990) (bond dealer owed fiduciary duty to customers with whom he had established a relationship of trust and confidence); C. Weiss, *A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty*, 23 Iowa J. Corp. Law 65 (1997). *Cf. De Kwiatkowski* v. *Bear, Stearns & Co.*, 306 F.3d 1293, 1302–03, 1308–09 (2d Cir. 2002) (noting that brokers normally have no ongoing duty to monitor non-discretionary accounts but that "special circumstances," such as a broker's de facto control over an unsophisticated client's account, a client's impaired faculties, or a closer-than-arms-length relationship between broker and client, might create extra-contractual duties).

[99] Reproposing Release, *supra* note 6, at n. 53–54 and accompanying text.

are registered, but upon the role they are playing.

We acknowledge that the lines between full-service broker-dealers and investment advisers continue to blur. But we do not believe requiring most or all full-service broker-dealers to treat most or all of their customer accounts as advisory accounts is an appropriate response to this blurring. Nor do we believe that Congress would have intended the Advisers Act to apply to all brokerage accounts receiving advice even when that advice is substantial. Congress did not mandate that the nature or amount of the advice rendered by broker-dealers remain static in order for broker-dealers to avail themselves of the statutory exception. Instead, Congress required only that such advice be performed "solely incidental to" a person's "business as a broker or dealer" and not for "special compensation." The exception does not foreclose—but, instead, accommodates—the foreseeable likelihood that the "business" of broker-dealers, including the rendition of advice, would evolve. Thus, the emergence of these new fee-based brokerage accounts does not mean that broker-dealers have ceased to offer the general package of brokerage services they have traditionally provided to their customers or to dispense advice as part of that package.[100]

That is not to say, however, that broker-dealers can or should be "excluded from the purview of the Act merely because [they] are engaged in effecting market transactions."[101] The rule we are adopting today provides for an exception to the definition of investment adviser for broker-dealers only in circumstances in which the Commission believes that Congress did not intend to apply the Advisers Act, and clarifies certain circumstances in which we believe the Advisers Act is intended to apply.[102]

B. Exception for Fee-Based Brokerage Accounts

Under rule 202(a)(11)–1(a), a broker-dealer providing investment advice to its brokerage customers is not required to treat those customers as advisory clients solely because of the form of the broker-dealer's compensation.[103] The rule is available to any broker-dealer registered under the Exchange Act that satisfies two conditions: (i) Any investment advice it provides to an account must be solely incidental to the brokerage services provided to the account (and thus must be provided on a non-discretionary basis);[104] and (ii) advertisements for and contracts, agreements, applications and other forms governing its accounts must include a prominent statement that the account is a brokerage account and not an advisory account, and that the broker-dealer's interests may not always be the same as the customer's. Customers would be encouraged to ask questions about their rights and the broker-dealer's obligations to them, including the extent of the broker-dealer's obligations to disclose conflicts of interest and to act in their best interest. This would include information about sales incentives and how a broker-dealer is compensated. In addition, the broker-dealer must identify an appropriate person at the firm with whom the customer can discuss the differences between brokerage and advisory accounts.[105]

A broker-dealer receiving special compensation for advisory services provided to customers must satisfy *both* of these requirements to avoid application of the Advisers Act. The failure of a broker-dealer to meet either of the requirements of the rule will result in loss of the exception, and, unless another Advisers Act exception is available, the broker-dealer will likely violate one or more provisions of the Act.[106]

1. Solely Incidental To

Rule 202(a)(11)–1(a) includes the requirement, taken from the statutory broker-dealer exception, that advisory services provided in reliance on the rule must be solely incidental to the brokerage services provided.[107] The rule provides that the advice a broker-dealer provides to any account must be solely incidental to brokerage services provided by the broker-dealer to that account rather than to the overall operations of the broker-dealer. With that one difference, the Commission intends that this provision be interpreted consistently with the statutory provision, which is addressed in paragraph (b) of the rule and discussed in Section III.E of this document.

As a result (and as proposed), the advice that a broker-dealer provides to fee-based brokerage accounts must be non-discretionary advice.[108] Commenters favoring the rule generally agreed that discretionary accounts that are charged an asset-based fee should be subject to the Advisers Act.[109] These accounts bear a strong resemblance to traditional advisory accounts, and it is highly likely that investors will perceive such accounts to be advisory accounts. Fee-based discretionary accounts were clearly the type of accounts that Congress understood would be covered by the Advisers Act when it passed the Act in 1940.

2. Customer Disclosure

As reproposed, rule 202(a)(11)–1(a) would have required that all advertisements for accounts excepted under the rule and all agreements, contracts, applications and other forms governing the operation of such accounts ("customer documents") must contain a statement that the accounts are brokerage accounts and not advisory accounts. In addition, the reproposed rule would have required that the disclosure explain that the customer's rights and the firm's duties and obligations to the customer, including the scope of the firm's fiduciary

[100] For this reason, we disagree with the arguments of those commenters (e.g., Letter of CFP Board, *supra* note 28) that merely because the level and type of advisory services included in the package of brokerage services offered today may differ from what was provided in 1940, Congress could not have intended to except such services from the Advisers Act.

[101] Advisers Act Release No. 2, *supra* note 5.

[102] To the extent that statements made in Release Number 626 may be interpreted to be inconsistent with our conclusion that excepting broker-dealers from the Advisers Act under the conditions established in the rule is consistent with the purposes of the Act, we reject them. *See* Advisers Act Release No. 626, *supra* note. At the time, we were not confronted with a situation in which broker-dealers had, in fact, migrated toward providing brokerage services for compensation other than commissions. Today, they have done so (in a manner consistent with the findings of the Tully Report) and, after careful consideration of the congressional intent underlying the broker-dealer exception, we do not believe that the incremental benefit of applying protections unique to the Advisers Act to full-service brokerage would justify applying the Act in circumstances in which Congress would have expected that the Act would not apply. *See also* discussion at Section III.E of this Release.

[103] When the form of compensation demonstrates that the advice is not solely incidental to brokerage, however, as in the case of separate fees paid specifically for advice, the exception will not be available. *See infra* notes 144–147 and accompanying text.

[104] *See* Section III.E, *infra*.

[105] As reproposed, the rule contained a third condition: that the broker-dealer must not exercise investment discretion over the account from which it receives special compensation. *See* Reproposing Release, *supra* note 6. Because that condition is unnecessary, given our interpretation of "solely incidental to" as not including investment discretion, we have eliminated that condition from the rule we adopt today.

[106] Broker-dealers should pay careful attention to their obligations in relying on this rule and the consequences of their failing to satisfy these obligations. The Advisers Act authorizes the Commission to bring administrative proceedings and initiate civil actions for violations of the Act. Advisers Act section 209.

[107] Rule 202(a)(11)–1(a)(1)(i).

[108] *See supra* note 104.

[109] *See*, e.g., SIA Letter, *supra* note 29; Morgan Stanley Letter, supra note 29; Comment Letter of Investment Company Institute (Feb. 7, 2005) ("ICI Letter").

obligations, could differ. Finally, under the reproposed rule, broker dealers would have been required to identify an appropriate person at the firm with whom the customer could discuss the differences.[110]

As reproposed, the disclosure was designed to put investors selecting a fee-based brokerage account on notice that their account is a brokerage account, with all the legal attributes of a brokerage account, rather than an advisory account. Only a few commenters were satisfied with the disclosure.[111] Some commenters thought it should be "strengthened" by focusing on what these commenters considered a lack of investor protections associated with a broker-dealer relationship.[112] Others expressed a great deal of skepticism about the ability of any disclosure to convey to investors the differences between broker-dealers' and advisers' legal obligations to clients in a reasonably succinct way because of the complexity of the issues.[113]

Some commenters expressed concern about the usefulness of providing a contact person within the broker-dealer to aid investors with questions about the differences between investment advisers and broker-dealers.[114] They thought it would be very unlikely that such a person would accurately describe the differences in legal rights and obligations.[115] Some of these commenters urged us to direct investors to a neutral source of information, such as the Commission's web site, for the information.[116]

The federal securities laws place disclosure obligations on persons registered with us because they are in the best position to know what is and is not material to their circumstances. Like all registrants, broker-dealers are responsible for the accuracy and veracity of their statements. The legal obligations a broker-dealer owes to a customer vary from firm to firm and account to account depending upon such matters as the terms of the brokerage agreement, the state in which the broker-dealer is located, the SRO of which it is a member, the nature of the relationship between the broker-dealer and its customer, and the product the broker-dealer is selling.[117] Thus, we believe broker-dealers are in the best position to make the disclosures most appropriate to their customers.

Recently, we convened focus groups of investors to gauge the impact of this rule. Our investor focus groups found that the proposed disclosure statement alerted them to the fact that differences existed between brokerage accounts and advisory accounts,[118] although the disclosure did not communicate what those distinctions might mean. Focus group participants viewed the terms such as "duties," "rights" and "obligations" as important terms that "would prompt [them] to ask questions."[119] The ability to contact a person at the broker-dealer was considered to be a positive factor.[120] Focus group investors were, however, confused by the use of legal terms in the disclosure, including "fiduciary," "rights" and "obligations." They suggested using a "plain-English" approach that would avoid terms such as "fiduciary" and "specify the actual differences between brokerage and advisory accounts."[121]

We believe it is appropriate to inform broker-dealer customers of the nature of the account they are opening.[122] At the same time, we are concerned about mandating detailed disclosure on complex legal issues, the outcome of which may vary depending upon the nature of the particular customer relationship. Our investor focus groups, however, indicated the need for some language that would help identify the actual differences between brokerage and advisory accounts. Thus, we believe it is most appropriate to emphasize that an investor's account is a brokerage account and not an advisory account, to provide some information on the nature of the conflicts inherent in the broker-dealer relationship, and to encourage investors to ask questions about their rights and the broker-dealer's obligations to them. We are also mindful of the need for plain-English disclosure, and accordingly, we are making modifications to the disclosure language to help achieve that goal. As adopted, rule 202(a)(11)–1(a) now requires all customer documents to contain a clear, prominent statement[123] as follows:

Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time.[124]

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[110] Reproposing Release, *supra* note 6.

[111] ICI Letter, *supra* note 109; Morgan Stanley Letter, *supra* note 29; American Express Letter, *supra* note 33.

[112] FPA Letter, *supra* note 27; CFP Board Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; ICAA Letter, *supra* note 28; AICPA Letter, *supra* note 31; T. Rowe Price Letter, *supra* note 28; Comment Letter of Government of the District of Columbia, Department of Insurance, Securities and Banking (Feb. 23, 2005) ("D.C. Securities Bureau Letter"); AARP Letter, *supra* note 28.

[113] CFA Letter, *supra* note 28; NAPFA Letter, *supra* note 31; PIABA Letter, *supra* note 31; Comment Letter of TD Waterhouse (Feb. 7, 2005) ("TD Waterhouse Letter").

[114] FPA Letter, *supra* note 27; CFP Board Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; AICPA Letter, *supra* note 31; T. Rowe Price Letter, *supra* note 28; D.C. Securities Bureau Letter, *supra* note 112; PIABA Letter, *supra* note 31; Comment Letter of the Consortium (Jan. 24, 2005) ("The Consortium Letter").

[115] PIABA Letter, *supra* note 31; Northwestern Mutual Letter, *supra* note 29.

[116] FPA Letter, *supra* note 27; CFP Board Letter, *supra* note 28.

[117] Some commenters echoed this concern. *See, e.g.*, Northwestern Mutual Letter, *supra* note 29.

[118] *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures*, Report to the Securities and Exchange Commission, Siegel & Gale, LLC, Gelb Consulting Group, Inc. (Mar. 10, 2005) at 4 ("Focus Group Report"). The Focus Group Report is available for viewing and downloading on the Internet at *http://www.sec.gov/rules/proposed/s72599.shtml*. Two other investor surveys were cited by commenters on the Reproposal. *See* TD Waterhouse Letter, *supra* note 113 (citing a survey conducted at the request of TD Waterhouse USA); Joint Letter of Fund Democracy *et al.*, *supra* note 28 (citing a survey prepared for the Consumer Federation of America and the Zero Alpha Group) (available at *http://www.zeroalphagroup.com/news/RIvestmentZAG_CFAFINAL_102704.ppt*). Our focus group study differed in methodology from the CFA Survey and the TD Waterhouse survey. *See infra* notes 212–214 and accompanying text. Because of these differences, we discuss only our Focus Group Report.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 4 & 9.

[122] The Commission expects to consider the broader broker-dealer disclosure and sales practice concerns discussed in the reproposing release in the study discussed in section V of this Release.

[123] Some commenters suggested that the Commission establish minimum standards, including font size, for the disclosure statement. Rather than specify a particular size or placement for the disclosure, however, we believe that establishing general guidelines will be most effective. To be "prominent," the statement should be included, at a minimum, on the front page of each document or agreement in a manner clearly intended to draw attention to it. In a televised or video presentation, a voice overlay must clearly convey the required information.

[124] Some commenters sought confirmation that they could tailor the language of the disclosure (*see, e.g.*, Northwestern Mutual Letter, *supra* note 29). The rule is intended to be responsive to focus group investor concerns that all broker-dealers be required to use standard language. *See* Focus Group Report, *supra* note 118, at 9. We recognize, however, that it may be appropriate to make minor modifications to the language to fit individual circumstances. For example, in marketing material, it may be appropriate to substitute the name of the account, such as the "ABC Account" in lieu of "your account." The substance of the disclosure should not, however, be altered materially.

The rule does not prohibit broker-dealers from providing additional disclosure materials discussing such matters as the nature of the fee-based account, customers' rights, the broker-dealer's obligations, and the differences from an advisory account, so long as it does not interfere with the prominence of the disclosure statement and contact information. In addition, additional disclosure,

Continued

Finally, broker-dealers must identify an appropriate person at the firm with whom the customer can discuss the differences between brokerage and advisory accounts.[125]

We are aware that this approach to disclosure of the nature of a brokerage account and the differences between such an account and an advisory account addresses many, but not all, concerns about investor confusion. As a consequence, as indicated in Section V of this Release, the Chairman has directed our staff to report to us regarding other options for addressing this confusion, including a study to consider, among other things, the need for additional investor education efforts and limits on broker-dealer marketing.

C. Discount Brokerage Programs

Rule 202(a)(11)–1(a)(2), which we are adopting as proposed, provides that a broker-dealer will not be considered to have received special compensation solely because the broker-dealer charges one customer a commission, mark-up, mark-down or similar fee for brokerage services that is greater than or less than one it charges another customer.[126] This provision is intended to keep a full-service broker-dealer from being subject to the Act solely because it also offers electronic trading or some other form of discount brokerage. Conversely, a discount broker-dealer would not be subject to the Act solely because it introduces a full-service brokerage program.

The rule supersedes staff interpretations under which a full-service broker-dealer would be subject to the Act with respect to accounts for which it provides advice incidental to its brokerage business merely because it offers electronic trading or other forms of discount brokerage.[127] These staff interpretations were not compelled by the Act and have led to the odd result that a full-service broker-dealer cannot offer discount brokerage without treating its full-service brokerage accounts as advisory accounts even though the services offered to those full-service accounts remained unchanged. Moreover, the staff interpretations create disincentives for full-service broker-dealers to offer electronic or other types of discount brokerage, and may therefore limit customers' choices of the types of brokerage service they want from a broker-dealer, and may reduce competition in discount brokerage.[128] The new rule makes a broker-dealer's eligibility for the broker-dealer exception with respect to an account turn on the characteristics of that account and not other accounts. Commenters discussing this aspect of the proposed rule generally supported it.[129]

D. Scope of Exception

Rule 202(a)(11)–1(c) provides that a broker-dealer that is registered under the Exchange Act and registered under the Advisers Act would be an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker or dealer to the Advisers Act.[130] We received few comments regarding this provision of the rule, and we are adopting it as proposed.[131] The provision codifies our earlier interpretation of the Act that permits a broker-dealer registered under the Advisers Act to distinguish its brokerage customers from its advisory clients.[132]

E. Solely Incidental To

As discussed above, the exceptions from the Advisers Act provided by section 202(a)(11)(C) and new rule 202(a)(11)–1 are available to broker-dealers only with respect to advice provided that is solely incidental to the broker-dealer's business (or, in the case of the rule, to the brokerage services provided to the account). In the Reproposing Release, we set forth our views on when advice is solely incidental to brokerage services and solicited comment on our interpretation of section 202(a)(11)(C). We also requested comment on our preliminary conclusions that certain advisory services did not appear to be solely incidental to brokerage services.

In general, investment advice is "solely incidental to" the conduct of a broker-dealer's business within the meaning of section 202(a)(11)(C) and to "brokerage services" provided to accounts under the rule when the advisory services rendered are in connection with and reasonably related to the brokerage services provided. This is consistent with the language Congress chose and the legislative history of the Advisers Act, including contemporaneous industry practice, which indicates Congress' intent to exclude broker-dealers providing advice as part of traditional brokerage services.[133] It is also consistent with the Commission's contemporaneous construction of the Advisers Act as excepting broker-dealers whose investment advice is given "*solely as an incident* of their regular business."[134]

Several commenters, some of whom examined the statutory language[135] and

interactive websites, or multimedia software cannot be used to substitute for the broker-dealer's obligation to provide a contact person under the rule. Of course, if a broker-dealer were to choose to treat an account as an advisory account, the disclosure would not be required.

[125] The rule does not require the contact person to be specifically named; it is sufficient if a broker-dealer provides customers with a designated contact point that allows the customer to speak to a person within the firm who can answer customers' questions about the differences between fee-based brokerage accounts and advisory accounts. Because different broker-dealers will likely experience differences in the level and nature of customer inquiries and may choose differing approaches to responding efficiently within the firm's particular structure, we are not establishing qualifications or criteria for contact personnel at this time. Each broker-dealer is responsible for implementing and monitoring an approach designed to deliver answers that are accurate and not misleading.

[126] Rule 202(a)(11)–1(a)(2).

[127] *See, e.g.*, Advisers Act Release No. 2, *supra* note 5.

[128] In 1978, our staff raised the possibility of such consequences and suggested, as a possible interpretation, the approach we are today adopting in this rule. *See* Advisers Act Release No. 626, *supra* note 6, at n.14.

[129] Merrill Lynch Letter, *supra* note 29; UBS Letter, *supra* note 29; Wachovia Letter, *supra* note 29. *See also* Federated Letter, *supra* note 31; Charles Schwab Sept. 22, 2004 Letter, *supra* note 17; Comment Letter of NASD (Feb. 24, 2000). *But see* D.C. Securities Bureau Letter, *supra* note 112.

[130] Rule 202(a)(11)–1(c). Of course, applicability of the Advisers Act does not excuse the broker-dealer from compliance with the Exchange Act and its rules and applicable SRO requirements with respect to the account.

[131] *See* The Consortium Letter, *supra* note 114; PIABA Letter, *supra* note 31; UBS Letter, *supra* note 29.

[132] Proposing Release, *supra* note 6. *See also* Advisers Act Release No. 626, *supra* note 6.

[133] *See supra* notes 65–73 and accompanying text.

[134] Advisers Act Release No. 1 (emphasis supplied). *See also* Advisers Act Release No. 2, *supra* note 5; SEC 1941 Annual Report available at *http://www.sechistorical.org/museum/papers/pdf/SEC_1941_AR.pdf* ("Exempted from the provisions of the Act * * * are * * * brokers and security dealers whose investment advice is given solely as an incident of their regular business for which no special fee is charged.").

[135] We discussed the statutory language at length in the Reproposing Release. Some commenters took issue with our discussion of the language, calling it "highly selective" and "strained," arguing that we have picked a secondary meaning of "incidental" and have ignored the word "solely." *See, e.g.*, Joint Letter of Fund Democracy *et al.*, *supra* note 28; FPA Letter, *supra* note 27. According to *The American Heritage Dictionary of the English Language* (4th ed. 2000), "solely" means alone, singly, entirely, or exclusively. In combination then, and as discussed in the Reproposing Release, the phrase "solely incidental to his business as a broker or dealer" means exclusively following as a consequence of his "business of effecting transactions in securities for the account of others" (*see* Advisers Act section 202(a)(3) and Exchange Act section 3(a)(4)(A) defining "broker") or of his business of buying and selling securities for his own account (*see* Advisers Act section 202(a)(7) and Exchange Act section 3(a)(5)(A) defining "dealer"). We believe another (and simpler way) of saying the same thing is to say that the "solely incidental to" requirement means that the advisory services must be rendered in connection with and be reasonably related to the brokerage services provided. Although we acknowledge that there are other definitions of "incidental," we believe that those definitions that indicate that the side

legislative history themselves, disagreed with us. They urged us to adopt a very narrow view of the meaning of "solely incidental to," arguing that it should include only advice that is provided on an "isolated," "occasional," "unpredictable" or "limited" basis,[136] advice arising out of specific transactions,[137] or advice that that is not marketed by a broker-dealer.[138] We disagree with commenters for several reasons.

First, the view that only minor, insignificant, or infrequent advice is excepted by section 202(a)(11)(C) misapprehends the historical background, including the legislative history of the Act.[139] It fails to adequately appreciate the fact that the advice broker-dealers gave as part of their traditional brokerage services in 1940 was often substantial in amount and importance to the customer.[140] This has remained true throughout the following decades.[141] Indeed, the importance of the broker-dealer's role as advice-giver in connection with brokerage transactions has shaped how we and the self-regulatory organizations have regulated and continue to regulate broker-dealers.[142]

Second, this narrow reading of section 202(a)(11)(C) urged by commenters would lead to brokers being required to treat many, if not most, full service brokerage accounts as advisory accounts, regardless of the nature of the compensation provided to the broker. Thus, it would extend the Advisers Act well beyond what we believe Congress intended when it enacted the broker-dealer exception.[143]

Finally, this narrow view would lead to results we believe even these commenters may not have intended. If a broker could give advice only infrequently (unless it registered under the Advisers Act), customers could not obtain advice in connection with each transaction they propose to make, even if that advice is simply seeking assurances of the wisdom of the proposed transaction. If a broker were permitted to give advice only in connection with a transaction, the broker (unless it registered under the Act) would be unable to advise clients to stay out of the market or to refrain from a particular transaction, or to provide generalized market reports to their clients. Yet brokers have long provided such advice as part of their traditional brokerage services, and continue to do so today. We do not believe that Congress in 1940, fully informed of then-extant brokerage practices, would have passed an exception from the Advisers Act that had such limited utility to broker-dealers.

In a new section (b) of the rule, we are identifying three general circumstances under which we believe the provision of advisory services by a broker-dealer would not be solely incidental to brokerage. In addition, we are re-affirming our long-held view that advisory services provided by certain brokers in connection with wrap fee programs are not solely incidental to brokerage. As the rule makes clear, these are, of course, not an exclusive list of advisory services that are not solely incidental to brokerage and thus may lead to the loss of the broker-dealer exception.

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occurrence (here the "performance of [advisory] services") is something that can be *expected* to arise in connection with the main action (here the "business as a broker or dealer") more closely reflect the pertinent historical practices of brokers and dealers than do those definitions that treat the side occurrence as something that merely happens "by chance" or on an "isolated," "unpredictable" and/or "occasional" basis. As we explain above, brokers do not render advice "by chance" or as "an unpredictable or minor accompaniment" of their businesses.

[136] *See, e.g.*, FPA Letter, *supra* note 27; CFP Board Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; CFA Letter, *supra* note 28; AARP Letter, *supra* note 28.

[137] *See, e.g.*, Joint Letter of Fund Democracy *et al.*, *supra* note 28. *See also* CFA Letter, *supra* note 28; ICAA Letter, *supra* note 28.

[138] *See, e.g.*, Boyd Letter, *supra* note 28; CFA Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; FPA Letter, *supra* note 27; CFP Board Letter, *supra* note 28. *See also* T.Rowe Price Letter, *supra* note 28; ICAA Letter, *supra* note 28; Comment Letter of Austin Gallaher (Jan. 19, 2005) ("Gallaher Letter"); Comment Letter of Michael L. Jones (Jan. 20, 2005).

[139] One commenter, for example, argued that our construction of "solely incidental to" in section 202(a)(11)(C) fails to take account of certain comments relating to the meaning of the exception for lawyers in section 202(a)(11)(B) made during the congressional testimony of Professor E. Merrick Dodd, which, the commenter argues, require a narrow construction of the broker-dealer exception. See CFA Letter, *supra* note 28 (*citing* testimony of Professor Dodd, Hearings on S. 3580, *supra* note 40, at 765–66). We disagree for several reasons. First, unlike the typical lawyer's business, a broker-dealer's business deals entirely with investments in securities, and the sort of investment advisory services that would be solely incidental to that business are logically broader than the sort of services that are solely incidental to the business of a lawyer. Second, the cited testimony appears to place few, if any, limits on the nature, extent, or duration of advisory services a lawyer might render and nevertheless be exempt from the Act, with the sole exception of a limit on holding out, which, given the securities-based nature of their business, cannot apply with equal force to broker-dealers. Finally, the commenter did not refer to *other* Congressional testimony suggesting that the "solely incidental to" limitation of section 202(a)(11)(B) embraces a substantial amount of advisory services and would result in extremely few lawyers who offer investment advice being subject to the Act. *See* Hearings on H.R. 10065, *supra* note 62, at 87; *see also id.* at 90. The view that the exception for lawyers—as well as the exceptions for broker-dealers and other professionals—made the Act inapplicable to *most* of the investment advice provided by these professionals was also expressed, without contradiction, by members of Congress during debate on the final version of the legislation. *See* 86 Cong. Rec. 9813 (Aug. 1, 1940) (statements of Reps. Hinshaw and Sabath).

[140] *See supra* notes 41–49 and accompanying text.

[141] *See, e.g.*, Current Quotations on Stockbrokers, N.Y. Times, May 10, 1953, at SM19 ("[W]hen the Korean War began * * * [c]ustomers then wanted to know whether to expect confiscatory taxes that would reduce corporate profits, how price controls might effect their securities, and whether some businesses would be squeezed out entirely for lack of materials. 'You have to talk to them,' one broker said. 'Buying and selling is the least part of the service we give them for our commissions.' "); SEC, SPECIAL STUDY OF THE SECURITIES MARKETS (1963) at 330 ("SPECIAL STUDY") ("Both the volume and the variety of the written investment information and advice originated by broker-dealers, who for the most part furnish it free to their customers as part of their effort to sell securities, are impressive."); *id.* at 386 (terming investment advice furnished by broker-dealers an "integral part of their business of merchandising securities" even if only "incidental" to that business); *Interpretive Releases Relating to the Securities Exchange Act of 1934 and General Rules and Regulations Thereunder: Future Structure of Securities Markets* (Feb. 2, 1972) [37 FR 5286, 5290 (Mar. 14, 1972)] ("In our opinion, the providing of investment research is a fundamental element of the brokerage function for which the bona fide expenditure of the beneficiary's funds is completely appropriate, whether in the form of high commissions or outright cash payments."); TULLY REPORT, *supra* note 12, at 3 ("The most important role of the registered representative is, after all, to provide investment counsel to individual clients, not to generate transaction revenues.").

[142] For example, under the rules of self-regulatory organizations and consistent with Commission precedent, a broker must render advice that is based on a knowledge of the security involved and that is suitable for a customer in light of the customer's needs, financial circumstances, and investment objectives. *E.g.*, NASD Rule 2310; NYSE Rule 405. In addition, under certain circumstances, such as when a broker-dealer assumes a position of trust and confidence similar to that of an adviser with its customer, it has been held to a fiduciary standard with its customer akin to that of an adviser and a client. *See supra* notes 97–98 and accompanying text.

[143] Two commenters contended that our discussion of the purpose and scope of the broker-dealer exception is inconsistent with evidence that a "significant" reason for the Advisers Act was the need to regulate the investment advisory activities of broker-dealers, which, the commenters argue, supports reading the exception very narrowly. *See* CFA Letter, *supra* note 28; FPA Letter, *supra* note 27. In fact, the record shows that investment advisory services provided by broker-dealers simply were not a significant concern of those conducting the hearings on this legislation. *See, e.g.*, Hearings on S. 3580, *supra* note 40, at 739. The statements on which the commenters rely, on balance, do not support their view that the Advisers Act was drafted to reach all but an insignificant amount of broker-dealer investment advice. Indeed, to the contrary, statements by members of Congress during debate on the final version of the legislation indicate that those members saw the exceptions in section 202(a)(11) as broadly excepting investment advice provided by broker-dealers and other professionals. *See, e.g.*, 86 CONG. REC. 9813 (Aug. 1, 1940) (statements of Reps. Hinshaw and Sabath).

1. Separate Contract or Fee

Our rule contains a provision that a broker-dealer that separately contracts with a customer for investment advisory services (including financial planning services) cannot be considered to be providing advice that is solely incidental to its brokerage.[144] A separate contract specifically providing for the provision of investment advisory services reflects a recognition that the advisory services are provided independent of brokerage services and, therefore, cannot be considered solely incidental to the brokerage services. Some commenters agreed that separate contracts provide a sensible approach to dealing with this issue.[145]

Similarly, advisory services are not solely incidental to brokerage services when those services are rendered for a separate fee. Charging a separate fee reflects the recognition that such services are provided independently of brokerage services and, therefore, cannot be considered to be solely incidental to brokerage services. Many commenters agreed with this approach.[146] We understand that many broker-dealers already use the payment of a separate fee as a bright line test to distinguish their brokerage activities from their advisory activities.[147]

2. Financial Planning

Under rule 202(a)(11)–1(b)(2), a broker-dealer would not be providing advice solely incidental to brokerage if it provides advice as part of a financial plan or in connection with providing planning services and: (i) holds itself out generally to the public as a financial planner or as providing financial planning services;[148] or (ii) delivers to its customer a financial plan; or (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services. As a result, when the advice described above is provided, a broker-dealer that advertises (or otherwise generally lets it be known that it is available to provide) financial planning services must register under the Act (unless an exemption from registration is available). Further, a broker-dealer that provides such advice and delivers a financial plan to a customer or represents to a customer that its advice is provided as part of a financial plan or in connection with financial planning services must also register under the Act (unless another exemption from registration is available) and treat that customer as an advisory client.

Financial planning services typically involve assisting clients in identifying long-term economic goals, analyzing their current financial situation, and preparing a comprehensive financial program to achieve those goals. A financial plan generally seeks to address a wide spectrum of a client's long-term financial needs, including insurance, savings, tax and estate planning, and investments, taking into consideration the client's goals and situation, including anticipated retirement or other employee benefits.[149] Typically, what distinguishes financial planning from other types of advisory services is the breadth and scope of the advisory services provided.

Although most financial planners are registered under the Advisers Act or similar state statutes, financial planners today belong to a distinct profession, and financial planning is a separate discipline from, for example, portfolio management.[150] This development has occurred only relatively recently, over approximately the last twenty-five years—well after the enactment of the Investment Advisers Act in 1940.[151]

In the Reproposing Release, we expressed the view that the advisory services provided by financial planners and the context in which they are provided may extend beyond what Congress, in 1940, reasonably could have understood broker-dealers to have provided as an advisory service ancillary to their brokerage business.[152] Moreover, we expressed concern that some broker-dealers may have promoted "financial planning" as a way of acquiring the confidence of investors and then offered their brokerage services without providing any meaningful financial planning services. We asked for comment on whether we should take an interpretive position that advice provided in connection with financial planning was not solely incidental to brokerage.[153]

We received many comment letters from firms and individuals with strongly held views on this topic. Advisers, financial planners, and investor groups asserted that financial planning was not solely incidental to brokerage.[154] Broker-dealers, on the other hand, argued that financial planning was an integral part of full-service brokerage, and that our proposed interpretation may interfere with broker-dealers' suitability obligations.[155] Some

[144] Section 202(a)(11)–1(b)(1).

[145] *See* Northwestern Mutual Letter, *supra* note 29; Raymond James Letter, *supra* note 29.

[146] *See, e.g.*, The Consortium Letter, *supra* note 114; Merrill Lynch Letter, *supra* note 29; Raymond James Letter, *supra* note 29; SIA Letter, *supra* note 29. Some of the commenters further argued, however, that broker-dealers should be permitted to offer financial planning type services without registering under the Advisers Act if the customer does not pay a separate fee for such services. Merrill Lynch Letter, *supra* note 29; Raymond James Letter, *supra* note 29; SIA Letter, *supra* note 29.

[147] *See, e.g.*, SIA Letter, *supra* note 29.

[148] Under the rule, a broker-dealer would hold itself out as a financial planner if, for example, it (1) advertises financial planning services; (2) maintains a listing as a financial planner in a telephone or building directory; (3) lets it be known by word of mount or otherwise that new financial planning clients will be accepted; or (4) uses letterhead or business cares referring to financial planning services.

[149] *See* Advisers Act Release No. 1092, *supra* note 4 ("Generally, financial planning services involve preparing a financial program for a client based on the client's financial circumstances and objectives. This information normally would cover present and anticipated assets and liabilities, including insurance, savings, investments, and anticipated retirement or other employee benefits. The program developed for the client usually includes general recommendations for a course of activity, or specific actions, to be taken by the client. For example, recommendations may be made that the client obtain insurance or revise existing coverage, establish an individual retirement account, increase or decrease funds held in savings accounts, or invest funds in securities. A financial planner may develop tax or estate plans for clients or refer clients to an accountant or attorney for these services.").

[150] *See*, Conrad S. Ciccotello *et al.*, *Will Consult For Food! Rethinking Barriers To Professional Entry In The Information Age*, 40 AM. BUS. L.J. 905 (2003) ("*Barriers to Professional Entry*") at 921 ("Personal financial planning as a distinct profession is quite new"). *Cf.* Clifford E. Kirsch, INVESTMENT ADVISER REGULATION (May 2004) ("INVESTMENT ADVISER REGULATION") at § 2:5.1 ("Even though the financial community distinguishes between financial planners and investment advisers * * * financial planners generally fall within the definition of section 202(a)(11) and are required to register as advisers").

[151] *See* Jeffrey H. Rattiner, GETTING STARTED AS A FINANCIAL PLANNER at 1–6 (2000); *Barriers to Professional Entry*, *supra*, note 150. *See also* FINANCIAL PLANNERS, SEC Staff Report to Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce (Feb. 12, 1988) at 6–7 (noting an increase in the number of people engaged in financial planning).

[152] Reproposing Release, *supra* note 6, at n.113.

[153] Our staff has previously expressed the view that advice provided in connection with financial planning is not solely incidental to brokerage. *See, e.g.*, Townsend and Associates, SEC Staff No-Action Letter (Sept. 21, 1994) (advice is not incidental that is provided "as part of an overall financial plan that addresses the financial situation of a customer and formulates a financial plan."). *See also* Investment Management & Research, Inc., SEC Staff No-Action Letter (Jan. 27, 1977). It is also consistent with views expressed in two of the leading treatises on investment advisers. *See* Thomas P. Lemke & Gerald T. Lins, REGULATION OF INVESTMENT ADVISERS § 1:20 (2004); INVESTMENT ADVISER REGULATION, *supra* note 150 at § 2:5:1. It may, however, be inconsistent with statements made in a few of our staff's other letters. *See, e.g.*, Nathan & Lewis Securities, SEC Staff No-Action Letter (Mar. 3, 1988) ("Nathan & Lewis No-Action Letter"); Elmer D. Robinson, SEC Staff No-Action Letter (Dec. 6, 1985).

[154] *See, e.g.*, FPA Letter, *supra* note 27; CFA Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; CFP Board Letter, *supra note* 28; AICPA Letter, *supra note* 31; T. Rowe Price Letter, *supra* note 28; ICAA Letter, *supra* note 28; ICI Letter, *supra* note 109.

[155] *See, e.g.*, SIA Letter, *supra* note 29; Merrill Lynch Letter, *supra* note 29; Northwestern Mutual

commenters were concerned that if the applicability of the Act turned on whether a broker-dealer held itself out as being a financial planner, broker-dealers would simply use a slightly different title, such as "financial consultant," to create the same impression in the minds of investors.[156]

We do not believe that financial planning, as it is understood today, necessarily follows as a consequence of rendering brokerage services. Instead, it is a relatively new service that many brokers provide in a manner essentially independent of their brokerage services. That being said, and as we acknowledged in the Reproposing Release, elements of financial planning have been, are, and should be a part of every broker-dealer's considerations as to the suitability of their recommendations. We have concluded that it would be unwise for us to attempt to distinguish when a suitability analysis ends and financial planning begins, and we do not want to interfere in any way with a broker-dealer's fulfillment of its suitability obligations.

We have determined instead to rely primarily on how a broker-dealer holds itself out to the public and its customers in distinguishing the advice provided in connection with financial planning from other types of investment advice, such as transaction-specific advice, which may be solely incidental to brokerage.[157] Our experience generally informs us that investors understand financial plans and financial planning to mean something different from brokerage. Our investor focus groups showed that investors were confused about the differences among financial service providers generally, but in many cases understood financial planning to be a separate category, and assumed financial planners held responsibilities relating to the long-term needs of their clients.[158] Moreover, our approach would provide broker-dealers the certainty they need to determine when their advisory activities will trigger obligations under the Advisers Act because they can control how they hold themselves out to the public and their customers.

Under the rule, a broker-dealer would be subject to the Advisers Act if it portrays itself to the public as a financial planner or as providing financial planning services, whether it uses those particular terms or not. And it must treat as advisory clients all those customers to whom it delivers a financial plan, regardless of what it chooses to call the plan. While we have recognized there are some common elements in a financial plan and a broker-dealer's advice based on its understanding of a customer's needs and objectives, which is incumbent in its suitability analysis, we do no not consider this broker-dealer advice alone as constituting a financial plan.

The broker-dealer must also treat as advisory clients those customers to whom it represents that its advice is part of a financial plan even if it uses some other term to describe the plan.[159] Whether a particular document is, under the rule, a financial plan will turn on whether the document or representation bears the characteristics of a financial plan. Whether a communication represents that the services provided are financial planning services will depend on how a reasonable investor would understand the services described in the communication.[160]

3. Holding Out

We have decided not to include in rule 202(a)(11)–1 any other limitations on how a broker-dealer may hold itself out or titles it may employ without complying with the Advisers Act. Many commenters argued that we should prohibit broker-dealers from calling themselves financial advisors, financial consultants or other similar names. These commenters asserted such titles are inconsistent with the broker-dealer exception for advice that is solely incidental to brokerage.[161] Other commenters, however, argued that, in many instances, such titles are fully consistent with the services provided to brokerage customers, whether fee-based or commission-based, and should not be proscribed.[162]

The statutory broker-dealer exception is a recognition by Congress that a broker-dealer's regular activities include offering advice that could bring the broker-dealer within the definition of investment adviser, but which should nonetheless not be covered by the Act. The terms "financial advisor" and "financial consultant," for example, are descriptive of such services provided by broker-dealers. As part of their ongoing business, full service broker-dealers consult with or advise customers as to their finances. Indeed, terms such as "financial advisor" and "financial consultant" are among the many generic terms that describe what various persons in the financial services industry do, including banks, trust companies, insurance companies, and commodity professionals. Moreover, we are concerned that any list of proscribed names we develop could lead to the development of new ones with similar connotations.

We believe the better approach, which we are adopting today, is to require broker-dealers to inform clients clearly that they are entering into a brokerage, and not an advisory, relationship. The customer disclosure requirements, which we discuss above, must be included in all customer documents for fee-based brokerage accounts. We encourage brokers to consider making similar disclosure in other communications.[163]

4. Discretionary Asset Management

Under the rule we adopt today, discretionary investment advice is not "solely incidental to" brokerage services within the meaning of the rule (or to the business of a broker-dealer within the meaning of section 202(a)(11)(C)) and,

Letter, *supra* note 29; Wachovia Letter, *supra* note 29; CGMI Letter, *supra* note 29. At least one broker-dealer commenter, however, argued that financial planning services are unconnected from any securities transaction, are not solely incidental, and therefore should be provided only in accounts subject to full investment advisory registration. TD Waterhouse Letter, *supra* note 113.

[156] *See, e.g.*, CFP Board Letter, *supra* note 28; FPA Letter, *supra* note 27.

[157] However, we do go beyond focusing exclusively on "holding out" as a determining factor, and also include a restriction on financial planning activity, when we include the delivery of a financial plan as not solely incidental to brokerage. We do so because, even though this restriction may, in certain circumstances, result in limiting a broker-dealer's "financial planning" activity, this restriction addresses another form of holding out. The delivery of a financial plan to a customer demonstrates to the customer that the broker-dealer is offering its financial planning services, and thus delivery has the same effect as other forms of holding out. Accordingly, we have concluded that, on balance, this type of financial planning activity should also be restricted.

[158] Focus Group Report, *supra* note 118, at 2, 9 & 13. Many focus group participants perceived that financial planning involved separate and distinct services, in addition to services that other financial service professionals might provide.

[159] The rule would not, however, require broker-dealers to treat as an advisory client a customer to whom it merely makes known that financial planning services are available but to whom it does not provide such services.

[160] Including a disclaimer that comprehensive advisory services offered to customers would not constitute "financial planning services" or is "not comprehensive" would not permit a broker-dealer to avoid application of the Advisers Act under the rule.

[161] *See, e.g.*, T. Rowe Price Letter, *supra* note 28; CFA Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, *supra* note 28; ICAA Letter, *supra* note 28; The Consortium Letter, *supra* note 114; Gallaher Letter, *supra* note 138; Comment Letter of Daniel H. Foster (Jan. 17, 2005); Comment Letter of Meyer Advisory Services (Feb. 7, 2005); Comment Letter of Shawbrook (Feb. 7, 2005).

[162] *See, e.g.*, Merrill Lynch Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29. *See also* Northwestern Mutual Letter, *supra* note 29; Raymond James Letter, *supra* note 29; Wachovia Letter, *supra* note 29.

[163] *See also* Sections I and V of this Release for additional steps that may be taken in the future to address issues of investor confusion and broker-dealer marketing.

accordingly, brokers and dealers are not excepted from the Act for any accounts over which they exercise investment discretion as that term is defined in section 3(a)(35) of the Exchange Act [164] (except that investment discretion granted by a customer on a temporary or limited basis is excluded). The rule terminates the existing staff approach, under which a discretionary account is subject to the Act only if the broker-dealer has enough *other* discretionary accounts to trigger the Act.[165] Under the new rule, the exception provided by section 202(a)(11)(C) is unavailable for any account over which a broker-dealer exercises investment discretion, regardless of the form of compensation and without regard to how the broker-dealer handles other accounts.[166]

We believe that a broker-dealer's authority to effect a trade without first consulting a client is qualitatively distinct from simply providing advice as part of a package of brokerage services. When the broker-dealer has discretion, it is not only the source of advice, it is also the person with the authority to make investment decisions relating to the purchase or sale of securities on behalf of the broker-dealer's clients. This quintessentially supervisory or managerial character warrants the protection of the Advisers Act because of the "special trust and confidence inherent" in such relationships.[167] Most commenters addressing the issue, including those representing investors,[168] advisers,[169] broker-dealers,[170] and others,[171] generally agreed with us.

One commenter who disagreed with this provision disputed our interpretation of the Act. This commenter argued that Congress must have been aware that broker-dealers exercised discretionary authority over commission-based accounts and, by not expressly stating that brokers offering such accounts were subject to the Act, Congress indicated its intent to except such broker-dealers from the Act.[172] We disagree. The Advisers Act does not address directly whether a broker-dealer exercising investment discretion over a commission-based account must comply with the Act. The Act applies unless the advisory services are "solely incidental to" the broker-dealer's business and no special compensation is received. Whether the exercise of investment discretion meets the requirements of the exception depends on the sort of analysis and judgment that we have made in this rulemaking.

This commenter also suggested that our failure to assert the applicability of the Act to commission-based discretionary accounts in the past, implicitly supports the view that the Act should not apply to such accounts.[173] As we explained in the Reproposing Release, however, we have previously expressed concern that brokerage relationships "which include discretionary authority to act on a client's behalf have many of the characteristics of the relationships to which the protections of the Advisers Act are important." [174] Although we determined not to take action in the past on whether discretionary accounts should be treated as advisory accounts, we explained that our staff would continue to examine the applicability of the federal securities laws to discretionary accounts. Our determination that the Act applies to all accounts over which broker-dealers exercise investment discretion (with certain exceptions) instead of only to the discretionary accounts of those broker-dealers whose accounts are almost exclusively discretionary (the staff's position since 1978) follows that examination and is based on the reasons stated above and in the Reproposing Release. We are not persuaded by certain commenters' challenge to our determination relating to discretionary commission-based accounts. Indeed, in criticizing our determination that the exercise of investment discretion cannot be "solely incidental to" a broker-dealer's business, one commenter acknowledges that (apart from the circumstances the commenter identifies) the exercise of investment discretion "would typically be viewed by customers as investment supervisory services where the broker-dealer or investment adviser makes decisions constrained only by investment guidelines or a description of the investment strategy." [175]

We remain unable to conclude that in 1940 Congress would have understood investment discretion to be part of the traditional package of services broker-dealers offered for commissions.[176] We

[164] 15 U.S.C. 78c(a)(35). Under section 3(a)(35) of the Exchange Act, a person exercises "investment discretion" with respect to an account if, "directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even through some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and the rules and regulations thereunder." Of course, such discretionary accounts continue to be subject to the Exchange Act and SRO rules.

[165] As we stated in our Reproposing Release, we believe that an account-by-account approach is preferable for several reasons. First, it better ensures that the Advisers Act is applied to customers who have the sort of relationship with a broker-dealer that the Commission has long recognized the Act was intended to reach. Second, it is consistent with the longstanding view that a broker-dealer is an investment adviser only with respect to those accounts for which the broker-dealer provides services or receives compensation that subject the broker-dealer to the Act. Third, unlike the existing staff approach, the new rule provides a bright-line test for the availability of the section 202(a)(11)(C) exception, and thereby gives clarity to that provision at a time when, as we have discussed previously, the line between advisory and brokerage services is blurring and the original "bright line"—"special compensation"—has ceased to function as a reliable indicator of the services the Act was designed to reach. Finally, the new rule results in all discretionary accounts being treated as advisory accounts without regard to the form of compensation and is therefore consistent with the design of rule 202(a)(11)–1 as a whole. Reproposing Release, *supra* note 6.

[166] The fact that discretionary brokerage accounts and financial planning services are subject to the Advisers Act does not affect the obligation of a person engaged in the business of effecting transactions in securities from registering as a broker-dealer under section 15(a) of the Exchange Act. To the extent that broker-dealer registration has previously been required, it will continue to be required.

[167] *Amendment and Extension of Temporary Exemption From the Investment Advisers Act for Certain Brokers and Dealers*, Investment Advisers Act Release No. 471 (Aug. 20, 1975) [40 FR 38156 (Aug. 27, 1975).

[168] *See, e.g.*, CFA Letter, *supra* note 28; Joint Letter of Fund Democracy *et al.*, supra note 28; AARP Letter, *supra* note 28.

[169] *See, e.g.*, ICAA Letter, *supra* note 28; T. Rowe Price Letter, *supra* note 28; CFP Board Letter, *supra* note 28; Comment Letter of 1st Global Capital Corporation (Feb. 7, 2005); Comment Letter of Ken Kessler (Feb. 8, 2005).

[170] *See, e.g.*, TD Waterhouse Letter, *supra* note 113; Merrill Lynch Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; Wachovia Letter, *supra* note 29; NASD Letter, *supra* note 29; American Express Letter, *supra* note 33; Comment Letter of Farm Creek Securities (Feb. 7, 2005).

[171] *See, e.g.*, AICPA Letter, *supra* note 31; D.C. Securities Bureau Letter, supra note 112; PIABA Letter, *supra note* 31.

[172] Morgan, Lewis Letter, *supra* note 36.

[173] *Id.*

[174] Advisers Act Release No. 626, *supra* note 6.

[175] *See* Morgan, Lewis Letter, *supra* note 36.

[176] One commenter challenged our statement in the Reproposing Release that, in the decade before the enactment of the Advisers Act, the NYSE had significantly restricted broker-dealers' exercise of investment discretion, arguing that the NYSE had merely acted to ensure proper supervision of such discretionary accounts. *See* Morgan, Lewis Letter, *supra* note 36. Not only did the NYSE in 1930 limit the individuals within broker-dealer firms who could exercise investment discretion, however, but it also subsequently further restricted such accounts by requiring firms wishing to have any employee exercise discretion over a customer's account (with limited exceptions) to obtain the specific prior approval of the NYSE's Committee on Member Firms. *See* NYSE Directory and Guide (1938), at C–359 (Rule 513). In addition to the NYSE's progressively more restrictive approach to such accounts, contemporary literature reflected the view that the exercise of broad investment discretion by broker-dealers—though not illegal in certain circumstances—was viewed by courts and

are aware of nothing in the legislative history of section 202(a)(11)(C) (or of the Act as a whole) or in the brokerage practices in 1940 that would preclude our interpretation of that section as being unavailable for all accounts over which broker-dealers exercise investment discretion.[177] Given the inherently managerial nature of investment discretion, we see no reason why Congress, as a general matter, would have intended to exclude such services from the reach of the Advisers Act.

Several commenters, however, persuade us that defining "discretionary authority" by reference to section 3(a)(35) of the Exchange Act, would as a practical matter preclude many forms of limited discretion commonly exercised by broker-dealers assisting customers with otherwise non-discretionary brokerage accounts.[178] We believe that such an effect would not benefit brokerage customers, nor would it be necessary to achieve the purpose of the rule. Therefore, the final rule permits broker-dealers to exercise investment discretion on a temporary or limited basis without becoming ineligible for the exception under the rule.[179] In such cases, the customer is granting discretion primarily for execution purposes and is not seeking to obtain discretionary supervisory services. Such discretion must be limited to a transaction or series of transactions and not extend to setting investment objectives or policies for the customer. For example, we would view a broker-dealer's discretion to be temporary or limited within the meaning of rule 202(a)(11)–1(d) when the broker-dealer is given discretion:

- As to the price at which or the time to execute an order given by a customer for the purchase or sale of a definite amount or quantity of a specified security;
- On an isolated or infrequent basis, to purchase or sell a security or type of security when a customer is unavailable for a limited period of time not to exceed a few months;[180]
- As to cash management, such as to exchange a position in a money market fund for another money market fund or cash equivalent;
- To purchase or sell securities to satisfy margin requirements;
- To sell specific bonds and purchase similar bonds in order to permit a customer to take a tax loss on the original position;
- To purchase a bond with a specified credit rating and maturity; and
- To purchase or sell a security or type of security limited by specific parameters established by the customer.[181]

5. Wrap Fee Sponsorship

Broker-dealers often serve as sponsors of wrap fee programs, under which broker-dealers effect securities transactions for one or more portfolio managers, which may be independent investment advisers. The sponsoring broker-dealer may provide wrap fee program clients with asset allocation models or with advice about selecting one or more of the portfolio managers in the program. The portfolio managers typically have discretionary authority over the client's assets. Traditionally, we have not viewed the sponsor's asset allocation or portfolio manager selection advice as incidental to the brokerage transactions initiated by the portfolio manager and executed by the sponsor.[182] In our Reproposing Release, however, we asked whether such broker-dealers may have available the exception provided by rule 202(a)(11)–1 if, among other things, the portfolio manager selection and asset allocation services could be viewed as solely incidental to the sponsor's business of brokerage.[183] Commenters urged the Commission to reaffirm its interpretation that portfolio manager selection and asset allocation services involved in wrap fee programs are advisory services that are not solely incidental to brokerage services,[184] and we do so here today.

IV. Effective and Compliance Dates

Rule 202(a)(11)–1 is effective April 15, 2005, except that paragraph (a)(1)(ii) of the rule is effective May 23, 2005. Consistent with the Administrative Procedures Act, the effective date of rule 202(a)(11)–1 is less than 30 days after publication because the rule recognizes an exemption, relieves a restriction, and contains interpretative rules.[185] In addition, the Commission for good cause finds that an effective date later than April 15, 2005 is impracticable, unnecessary and contrary to the public interest because, among other things, temporary rule 202(a)(11)T will expire on that date.[186] Beginning on April 15, 2005, broker-dealers may rely on rule 202(a)(11)–1(a)(2) when they offer discount brokerage accounts excluded under the rule. Also beginning on April 15, 2005, broker-dealers may rely on rule 202(a)(11)–1(a)(1) to provide non-discretionary investment advice in conjunction with fee-based brokerage accounts excluded under the rule. Broker-dealers relying on rule 202(a)(11)–1(a)(1) must comply with the disclosure requirements of paragraph (a)(1)(ii) by July 22, 2005. All advertisements for, and contracts, agreements, applications and other forms governing accounts opened after July 22, 2005 in reliance on rule 202(a)(11)–1(a)(1) must include the disclosure required by paragraph (a)(1)(ii). Broker-dealers relying on rule 202(a)(11)–1(a)(1) with respect to fee-based brokerage accounts opened prior to July 22, 2005 are not required to

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respected firms within the brokerage industry with suspicion and disapproval. *See, e.g.*, Wall Street, *supra* note 37, at 241; Security Markets, *supra* note 39, at 649–50; Charles H. Meyer, The Law of Stock Brokers and Stock Exchanges (1931) at 306.

[177] One commenter maintained that the legislative history showed that Congress was fully aware that broker-dealers were exercising investment discretion over commission-based accounts and not principally in the accounts they handled through their separate investment advisory departments. *See* Morgan, Lewis Letter, *supra* note 36. In our view, however, neither of the two documents in the legislative record on which the commenter relies supports this assertion. The commenter appears to assume that simply because a broker-dealer's customer paid commissions for executions of trades, that customer may not also have received investment advisory services related to those same trades (including the exercise of investment discretion) for a fee from a special advisory department of the same broker-dealer. But the Illinois Legislative Council Report to which the commenter refers was addressing circumstances in which the advisory departments of broker-dealers were paid a fee for advice, and then those departments advised the purchase or sale of securities for which the same broker-dealer firm also received commissions (or mark-ups or markdowns). *See* Illinois Legislative Council Report, supra note 66, at 1008, 1010, 1014. The same is true of the excerpt that the commenter quotes from a memorandum by the Commission's then General Counsel, which was included in the legislative record. *See Memorandum: Federal Power to Regulate Investment Advisers (S. 3580, Title II)* (reprinted in Hearings on S. 3580, *supra* note 40, at 1024).

[178] *See, e.g.*, SIA Letter, *supra* note 29; UBS Letter, *supra* note 29; CGMI Letter, *supra* note 29. *See also* Morgan, Lewis Letter, *supra* note 36.

[179] Rule 202(a)(11)–1(d).

[180] For example, a customer may be on vacation or otherwise unavailable for a short period of time and provide specific instructions as to the handling of his account during this time.

[181] A broker-dealer may purchase or sell a particular security, so long as all relevant material strategic features (*e.g.*, type of issuer, amount, maturity and yield) are specified by the client.

[182] We have viewed broker-sponsored wrap fee programs as being subject to the Advisers Act. *Disclosure by Investment Advisers Regarding Wrap Fee Programs*, Investment Advisers Act Release No. 1401 (Jan. 13, 1994) [59 FR 3033 (Jan. 20, 1994)], at n.2 (proposing amendments to Form ADV); Investment Advisers Act Release No. 1411 (Apr. 19, 1994) (adopting amendments to Form ADV) [59 FR 21657 (Apr. 26, 1994)].

[183] Reproposing Release, *supra* note 6.

[184] AICPA Letter, *supra* note 31; The Consortium Letter, *supra* note 114; Fund Democracy Letter, *supra note* 28; ICI Letter, *supra* note 109; ICAA Letter, *supra* note 28; T. Rowe Price Letter, *supra* note 28.

[185] *See* 5 U.S.C. 553(d)(1) and (d)(2).

[186] *See* 5 U.S.C. 553(d)(3).

amend existing contracts and agreements governing those accounts.[187]

With respect to paragraph (b)(3) of rule 202(a)(11)–1, which provides that exercising investment discretion is not "solely incidental to" brokerage services within the meaning of section 202(a)(11)(C) of the Advisers Act, broker-dealers must treat commission-based discretionary accounts as advisory accounts no later than October 24, 2005. With respect to paragraphs (b)(1) and (b)(2) of rule 202(a)(11)–1, broker-dealers must treat as advisory accounts those accounts to which the broker-dealer provides advice in the circumstances described in paragraphs (b)(1) and (b)(2) no later than October 24, 2005.

V. Further Examination of Issues

As we noted at the beginning of this release, this rulemaking has raised a number of important issues, implicating policy concerns well beyond the scope of this rulemaking. Although we have concluded that this rulemaking is not the appropriate mechanism for resolving these concerns, we are committed to pursuing the most effective solutions to these vital issues. Accordingly, the Chairman, after consulting with, and considering the views of, the entire Commission, has directed the Commission staff to report within 90 days on ways in which these issues could be addressed. The staff is to provide a detailed description or outline of any rulemaking action that the staff would be prepared to recommend that the Commission undertake in the near term, or to recommend that the Commission ask the NASD or other SROs to undertake in the near term. The staff is also to report on options and recommendations for a study to compare the levels of protection afforded retail customers of financial service providers under the Securities Exchange Act and the Investment Advisers Act, and to recommend ways to address any investor protection concerns arising from material differences between the two regulatory regimes. The scope of the study would include, but not necessarily be limited to, questions such as:

- Should the Commission seek legislation that would integrate the existing regulatory schemes applicable to broker-dealers and investment advisers that provide services to retail clients?
- Should sales practice standards and advertising rules applicable to advice provided by broker-dealers be enhanced?
- Should broker-dealers who provide investment advice but who are excepted from the Investment Advisers Act nonetheless be subject to the fiduciary obligations imposed by that Act on investment advisers?
- Should obligations under the Investment Advisers Act applicable to dually-registered broker-dealers be modified or streamlined in order to eliminate regulatory overlap and reduce regulatory burdens?
- Are there areas in which the Commission, alone or in concert with other agencies, can engage in investor education efforts to assist investors to better understand the duties and obligations of their financial service providers?

The staff is to provide options and recommendations concerning:

- The scope of the study;
- Appropriate persons, both within and outside of the Commission, to be involved in the study; and
- Time frames for providing deliverables to the Commission, and for expected action by the Commission and its staff.

VI. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits of its rules. In the Reproposing Release, we identified possible costs and benefits of the requirements that now comprise rule 202(a)(11)-1, and requested comment on our analysis.[188] The analysis and the comments we received are discussed below.

A. Fee-Based and Discount Brokerage Accounts

Under rule 202(a)(11)–1(a)(1), broker-dealers will not be deemed to be investment advisers with respect to accounts for which they receive asset-based fees, fixed fees, or similar non-commission compensation, provided that their investment advice is solely incidental to the brokerage services provided to the account, and they make certain disclosures in their advertising and agreements for such accounts. In addition, rule 202(a)(11)–1(a)(2) clarifies that broker-dealers are not subject to the Advisers Act solely because, in addition to full-service brokerage services, they also offer discount brokerage services, including execution-only brokerage, for reduced commission rates.

1. Benefits

a. Avoidance of Compliance Costs

The provisions of rule 202(a)(11)–1(a) are designed to permit broker-dealers to offer certain fee-based and discount brokerage programs without triggering regulation under the Advisers Act. Broker-dealers relying on rule 202(a)(11)-1(a) to continue offering these fee-based and discount brokerage programs will benefit in the form of saved costs they would otherwise expend in connection with Advisers Act compliance.

Broker-dealers, even those already dually-registered as investment advisers, will benefit in the form of costs saved by not having to convert their fee-based and full-service brokerage accounts into advisory accounts. For example, these accounts will not be subject to brochure delivery or other disclosure requirements under the Advisers Act, or to the principal trading restrictions under the Act. Other broker-dealers relying on rule 202(a)(11)-1(a) will not be subject to the Advisers Act at all. For these broker-dealers whose fee-based or discount brokerage programs would otherwise require adviser registration, we believe the rule's benefits will be significant in terms of avoiding an increased regulatory burden incurred as a result of changing the way they charge for their brokerage services. For example, if not excepted under rule 202(a)(11)–1(a), these broker-dealers would be required to prepare, submit and update adviser registration statements,[189] and to prepare and distribute client disclosures under Part II of Form ADV.[190] These broker-dealers would also be required to modify their compliance programs to address the Advisers Act and its requirements,[191] and to establish codes

[187] We nevertheless encourage broker-dealers opening fee-based accounts for customers in reliance on the rule after April 15, 2005 but before July 22, 2005, to include with respect to those accounts the disclosure required by rule 202(a)(11)–1(a)(1)(ii).

[188] Our 1999 Proposal also analyzed the costs and benefits of our first proposal to keep broker-dealers from being subject to the Advisers Act solely as a result of re-pricing their full-service brokerage services. The comments on our 1999 Proposal have also informed our analysis in preparing this cost benefit analysis.

[189] Advisers registered with the Commission must prepare Part 1A of Form ADV and file it with the SEC on the IARD system. Since Part 1A requires advisers to answer basic questions about their businesses, and can be completed using information readily available to the registrant, costs to prepare the form are typically small, but for some larger registrants with complex operations and many employees and affiliates, the costs may be somewhat higher, and may include professional fees. Adviser registrants submitting their Form ADVs through the IARD are required to pay filing fees to the operator of the system which range from $150 to $1,100 initially and $100 to $550 annually. *See Designation of NASD Regulation, Inc. to Establish the Investment Adviser Registration Depository; Approval of IARD Fees*, Investment Advisers Act Release No. 1888 (July 28, 2000) [65 FR 47807 (Aug. 3, 2000)].

[190] Rule 204–3 [17 CFR 275.204–3].

[191] Rule 206(4)–7 [17 CFR 275.206(4)–7].

of ethics required under the Act's rules.[192]

Because the costs of satisfying these and other requirements under the Advisers Act vary from firm to firm depending on its size and complexity, the benefits to brokers in the form of cost savings are difficult to quantify. Broker-dealer firms did not comment directly on the extent of these benefits in connection with fee-based or full-service accounts. However, we note that several broker-dealers commented on the costs of applying the Advisers Act in other contexts under our Reproposal, and most of these broker-dealers characterized the costs as significant.[193] We also note that the popularity of fee-based accounts is growing rapidly, so the extent of these benefits will grow accordingly. One broker-dealer commented that its holdings of fee-based accounts have tripled since 1999, and one consulting firm estimates that assets in fee-based brokerage programs nationwide grew by 60.9 percent during 2003 and 2004.[194]

Securities markets will also benefit because the rule would preserve the ability of broker-dealers to engage in principal transactions with these fee-based brokerage customers.[195] Principal transactions are an important source of liquidity in some market sectors.[196] While one commenter pointed out that the current effect on liquidity should be minor because fee-based accounts make up a small percentage of the overall securities markets,[197] continuing growth in fee-based accounts could, absent rule 202(a)(11)–1, eventually extend principal trading restrictions to many brokerage accounts, thereby expanding the effects.[198] Another commenter suggested the Commission could moderate the effects of principal transaction restrictions by creating exceptions as necessary to maintain market efficiency.[199]

b. Investor Benefits

By eliminating regulatory disincentives to re-pricing of brokerage services, rule 202(a)(11)–1(a) is expected to yield benefits for individual investors as a result of such re-pricing. Under the fee-based programs discussed above, a broker-dealer's compensation does not depend on the number of transactions or the size of mark-ups or mark-downs charged, thus reducing incentives for the broker-dealer to churn accounts, recommend unsuitable securities, or engage in high-pressure sales tactics. As such, these programs may better align the interests of broker-dealers and their customers. The rule will also benefit customers by enabling them to choose from among these new programs and other traditional brokerage services to select the program best for them.[200] While it is difficult to quantify the value of these benefits, we believe they are substantial. One broker-dealer estimates that, during the last five years, its fee-based account customers would have paid nearly $2 billion more using commission-based brokerage instead of their fee-based accounts.[201]

2. Costs

While we believe the benefits of rule 202(a)(11)–1(a) are substantial, we believe the incremental costs associated with this provision of the rule are small. The only incremental cost associated with this provision of the rule will be the cost of making the disclosure required by the rule. Broker-dealers relying on the rule's exception will be required to add a prominent disclosure statement to customer communications for accounts covered by the rule's exception. The disclosure consists of a brief plain-English statement that indicates the account is a brokerage account, not an advisory account, and encourages the customer to ask questions and gain an understanding of his or her rights and the broker-dealer's obligations, including the broker-dealer's obligations to disclose conflicts of interest. The disclosure also discusses compensation issues, including the fact that the firm's profits and salespersons' compensation may depend on what the customer buys and may include compensation from other persons. The disclosure statement must also direct the customers to a contact person who can discuss with the customers the differences between brokerage and advisory accounts.

The cost of disclosure would be incurred only by those broker-dealers electing to rely on the rule, and as we discuss in our Paperwork Reduction Act analysis, we believe the cost of the disclosure is insignificant.[202] In addition, we estimate that the total industry-wide costs for contact persons at broker-dealers to respond to customer questions about their fee-based accounts will be approximately $3.2 million annually.[203]

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[192] Rule 204A–1 [17 CFR 275.204A–1].

[193] *See infra* notes 224–228, 233–237, and accompanying text, discussing commenters' assessments of the costs of complying with the Advisers Act in connection with financial planning and discretionary accounts.

[194] Morgan Stanley Letter, *supra* note 29; Cerulli Edge 1st Quarter 2005, *supra* note 79.

[195] Section 206(3) of the Advisers Act prohibits an adviser, acting as principal for its own account, from knowingly selling any security to or purchasing any security from a client, without disclosing to the client in writing the capacity in which it (or an affiliate) is acting and obtaining the client's consent before the completion of the transaction. Notification and consent must be obtained separately for each transaction, *i.e.*, blanket consent for transactions is not permitted. Investment Advisers Act Release No. 40 (Jan. 5, 1945). Section 206(3) also prohibits an adviser from acting as broker for both its advisory client and the party on the other side of the brokerage transaction without obtaining its client's consent before each transaction. The SEC has adopted a rule permitting these "agency cross-transactions" without transaction-by-transaction disclosure if the client has given blanket consent in writing and certain other conditions are met, but the adviser must still act in the best interests of their clients, including the duty to obtain best price and execution for any transaction. Rule 206(3)–2 [17 C.F.R. 275.206(3)–2].

[196] *See* Merrill Lynch Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; UBS Letter, *supra* note 29.

[197] FPA Letter, *supra* note 27. The FPA's analysis focuses on the $3.9 trillion of securities currently held by individual investors (since the remainder of the $15 trillion in total securities currently in the market are held by institutional investors and public companies that are unlikely to pay asset-based brokerage fees). The currently-estimated $250–$260 billion of assets held in fee-based accounts represents only 6.4% of the $3.9 trillion held by individual investors.

[198] *See supra* note 82 and accompanying text.

[199] 199 D.C. Securities Bureau Letter, *supra* **Federal Register** note 112.

[200] SROs can also ensure that sales practices requirements address any investor protection concerns. For example, the NASD has issued a Notice to Members requiring supervisory procedures to determine whether fee-based brokerage is appropriate for a customer and periodic review of the customer's accounts to determine whether it continues to be appropriate. *See* NASD Notice to Members 03–68, *supra* note 95.

[201] Morgan Stanley Letter, *supra* note 29 (estimating commission savings for all fee-based accounts opened at the broker-dealer from 2000–2004).

[202] *See* Section VIII of this Release, *infra*. We estimate that a compliance manager at a broker-dealer relying on the rule would, in connection with reviewing the firm's new contracts, agreements and other forms (and advertising, if any), spend an additional five minutes each year verifying that the brief disclosure statement is included. At an estimated hourly compensation rate for a compliance manager of $45, this is $3.75 per firm relying on the exception. *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003) (average salary for a compliance manager (New York City) is $66,667, to which we have added 35% for benefits and overhead). In addition, based on information submitted by broker-dealers on Form BD as of December 15, 2004, approximately 40 percent of all broker-dealers engage exclusively in specialized types of broker-dealer activities that are extremely unlikely to involve fee-based customer accounts, and approximately 3,850 engage in types of broker-dealer activities that might potentially include offering fee-based accounts. Thus, the industry-wide cost of the disclosure statement is $3.75 per firm × 3,850 firms = $14,437.50.

[203] This estimate is premised on next year's growth of fee-based accounts continuing at current annual growth rates of approximately 30 percent, which would add approximately $80 billion to the current base of $268 billion in fee-based accounts. Based on an average size for a fee-based account of $211,600 (our staff's estimate based on examination observations), this equates to approximately 378,000 new accounts. This estimate is also premised on 75 percent of these new fee-based

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One broker-dealer expressed concern about the cost of litigation that might arise challenging the adequacy of contact persons' discussion of the differences between accounts, particularly in large firms where it may be necessary to make a number of contact persons available.[204] However, broker-dealers have typically encountered similar risks in connection with their operations, and can address these risks through usual measures such as written procedures and personnel training, followed up as necessary with compliance oversight. We recognize that large broker-dealers will incur certain costs to implement these controls, but we do not believe they are burdensome, and commenters generally did not suggest they would be. One large broker-dealer commented that disclosure of the differences between fee-based accounts and advisory accounts is consistent with its existing practice, and supported the contact person requirement as preferable to formulating long and detailed written explanations of the differences between accounts.[205]

Because it would only operate to except from the Advisers Act certain brokerage accounts, rule 202(a)(11)–1(a) will not increase the regulatory burden borne by investment advisers. Some commenters argued the proposed exception would grant broker-dealers—who give investment advice without complying with the Advisers Act—a competitive advantage over investment advisers subject to the Advisers Act, thereby indirectly imposing costs on investment advisers.[206] However, because the rule is restricted to investment advice which is solely incidental to brokerage services (and broker-dealers have long been subject to this solely incidental standard under section 202(a)(11)(C) of the Advisers Act), the rule does not establish new opportunities for broker-dealers to compete with advisers on the nature of their investment advice.[207] Also, in providing this advice, broker-dealers would remain subject to their own costs of regulation under the Exchange Act.[208] One broker-dealer characterized these costs of regulation under the Exchange Act as being so significant that the competitive advantage instead lies with advisers regulated under the Advisers Act.[209]

Some commenters additionally asserted rule 202(a)(11)–1(a) will impose costs on investors, who would not receive the same treatment afforded a client of an investment adviser under the Advisers Act.[210] While these commenters argued that the fiduciary duties of an adviser outweigh the duties of a broker-dealer, their comments do not fully recognize the extent of broker-dealers' obligations.[211] In addition, rule 202(a)(11)–1(a)'s disclosure requirements will put investors on notice that there are differences between fee-based brokerage accounts and advisory accounts, and provide them with a contact person who can answer any questions they may have about the investor protections they will receive in their particular circumstances.

Some commenters asserted that the proposed disclosure statement would be insufficient to dispel customer confusion about the differences between brokerage accounts and advisory accounts, citing surveys in which the majority of respondents believed that financial advice was a significant component of brokerage services and that broker-dealers are obligated to act in investors' best interests.[212] Most respondents in these surveys also indicated their choice between a stockbroker and an investment adviser would be affected by the level of investor protection available from each.[213] As discussed above, our participants in our investor focus groups found that the disclosure statement, as reproposed, alerted them to the fact that differences existed between brokerage accounts and advisory accounts. While the disclosures did not communicate what those distinctions might mean, focus group participants viewed terms such as "rights" and "obligations" as important terms that would prompt them to ask questions, and they viewed the ability to contact a person at the broker-dealer as a positive factor.[214] In

account customers contacting their broker-dealer and the contact person spending an average of 15 minutes to respond to their questions, for a total of 70,875 hours. At an estimated hourly wage rate for a compliance manager of $45, the estimated industry-wide cost is 70,875 × $45 = $3,189,375. *See supra* note 202.

[204] Wachovia Letter, *supra* note 29.

[205] UBS Letter, *supra* note 29.

[206] Some commenters argued the rule does competitive harm to financial planners in particular. These commenters expressed concerns that many broker-dealers market advice that is confusingly similar to financial planning, even though it is not the same comprehensive advice prepared under a financial plan by persons such as Certified Financial Planners (CFPs) acting under CFP professional standards. According to these commenters, brokers operating under suitability standards are able to provide this advice more efficiently than CFPs acting under their professional standards, often giving it to customers at no cost, and this erodes the value of financial planning and the emerging financial planning industry in the minds of the investing public. *See, e.g.*, FPA Letter, *supra* note 27; Comment Letter of David W. Demming (Jan. 16, 2005) ("Demming Letter"). On the other hand, several broker-dealers commented that they make higher-level comprehensive financial plans available for an additional fee, treating customers that elect this option as advisory clients. *See, e.g.*, Merrill Lynch Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; UBS Letter, *supra* note 29. Other broker-dealers also commented that many of their registered representatives are CFPs. *See, e.g.*, Northwestern Mutual Letter, *supra* note 29. We note that in focus groups of investors we convened recently, investors generally understood financial planners to have a wider scope of responsibilities for planning, to assist an investor in meeting longer-term goals and to address other issues such as insurance and estate planning. Some investors also believed financial planners would ordinarily have special credentials. Focus Group Report, *supra* note 118, at 9, 13.

[207] *See supra* notes 87–90 and accompanying text.

[208] *See supra* notes 94 and 98 and accompanying text.

[209] Comment Letter of Sennet Kirk (Feb. 4, 2005). In addition, one broker-dealer expressed concerns that financial planners not, in effect, be granted the exclusive right to offer planning services, thereby placing broker-dealers at a competitive disadvantage. UBS Letter, *supra* note 29.

[210] *See, e.g.*, Comment Letter of Bayard Bigelow (Jan. 4, 2005), whose experience in connection with underwriting errors and omissions ("E&O") insurance policies for broker-dealers and investment advisers leads him to infer that the standards of conduct for investment advisers result in better investor protection. Mr. Bigelow commented that E&O insurance claims against broker-dealers were twice as frequent and twice as severe as comparable claims against investment advisers.

[211] As we discuss *supra* in notes 94 and 98, and accompanying text, broker-dealers are subject to their own obligations to disclose conflicts, and are subject to an extensive investor protection regime.

[212] *See* Joint Letter of Fund Democracy *et al.*, *supra* note 28 (citing a survey prepared for the Consumer Federation of America and the Zero Alpha Group) ("CFA Survey") (available at *http://www.zeroalphagroup.com/news/RIvestmentZAG_CFAFINAL_102704.ppt*); TD Waterhouse Letter, *supra* note 113 (citing a survey conducted at the request of TD Waterhouse USA) ("TD Waterhouse Survey"). According to the CFA Survey, 53 percent of respondents indicated the primary service of stockbrokers is to offer financial advice, and 25 percent indicated advice and assistance in conducting transactions are equally important. According to the TD Waterhouse Survey, 58 percent of respondents believed stockbrokers and investment advisers both have a fiduciary responsibility to act in investors' best interests.

[213] In the TD Waterhouse Survey, 86 percent of respondents indicated it would impact their choice of financial professional if they understood the different levels of investor protection they might receive from stockbrokers and investment advisers. In the CFA Survey, 36 percent of respondents indicated they would be much less likely to use a stockbroker if subject to weaker investor protection rules than a financial planner, and 28 percent said they would be somewhat less likely. Nearly all respondents in both surveys favored identical investor protection rules for stockbrokers and investment advisers providing financial advice (90 percent in TD Waterhouse Survey; 91 percent in CFA Survey).

[214] *See* Focus Group Report, *supra* note 118. Participants in our focus groups generally indicated that the title of a financial services professional was not helpful in inferring what kind of investor protection would apply. *Id.* at 8 & 13. Nevertheless, they generally indicated that brokers executed trades and were more likely focused on providing advice on specific stocks. *Id.* at 2–3. Our focus groups differed in methodology from the CFA Survey and the TD Waterhouse Survey. One potentially significant difference is the participants to whom questions were put. The focus group

addition, other commenters argued that it would be unworkable to expand the disclosures to give additional detail about potential differences, since the duties of a broker-dealer are determined by, in large part, a customer's agreement with the broker-dealer and the circumstances of the relationship.[215]

One commenter urging withdrawal of the rule also encouraged us to assess the costs to investors that could arise if broker-dealers engage in abusive sales practices in fee-based accounts.[216] While fee-based brokerage accounts are not suitable for all broker-dealer customers, the NASD has issued a notice to members identifying potential problems and indicating that NASD members should have supervisory procedures in place to assess and monitor them.[217] Given that there are no forms of broker-dealer compensation that are immune to potential abuse, it is necessary to eliminate the costs of such abuse directly through preventative measures and remedial action against abusive market participants, rather than indirectly by banning a particular form of compensation. Importantly, the direct approach allows investors whose accounts are appropriate for fee-based treatment to obtain the benefits of it.

B. Advice That Is Not Solely Incidental to Brokerage

Rule 202(a)(11)–(b) identifies three circumstances in which the provision of advisory services by a broker-dealer is not solely incidental to brokerage, making the broker-dealer ineligible for the exception from the definition of an investment adviser in section 202(a)(11)(C) of the Advisers Act, and making such advisory services ineligible for the fee-based account exception under rule 202(a)(11)–1(a). First, a broker-dealer that charges a separate fee or separately contracts with a customer for investment advisory services may not rely on the exception in the statute or the rule. Second, a broker-dealer that holds itself out generally to the public as a financial planner or as providing financial planning services must generally register as an investment adviser under the Act, and a broker-dealer that delivers a financial plan to a customer or represents to a customer that its advice is part of a financial plan or in connection with financial planning services must also generally register under the Act and treat that customer as an advisory client. Third, a broker-dealer may not rely on the exceptions for any accounts over which it exercises investment discretion.

1. Separate Advisory Services

a. Benefits

Under rule 202(a)(11)–1(b), brokers that enter into separate contracts for, or obtain separate compensation to provide, advisory services to an account will be subject to the Advisers Act with respect to those accounts. This provision will benefit broker-dealers by creating greater transparency with regard to whether particular customer relationships are subject to the Advisers Act. As discussed above, a separate contract or fee reflects the recognition that the advisory services are independent of other brokerage services being provided to the investor.[218] By clarifying that such separate services are advisory services, the rule will provide certainty for broker-dealers as to whether the Advisers Act applies to their activities.

b. Costs

Broker-dealers entering into separate contracts for, or obtaining separate compensation to provide, advisory services will incur compliance costs under the Advisers Act with respect to the affected accounts. Commenters on the Reproposing Release confirmed, however, that broker-dealers generally treat these kinds of arrangements as advisory activities subject to the Act.[219] Accordingly, we believe few broker-dealers will incur new compliance costs in connection with this aspect of rule 202(a)(11)–1(b).

For the remaining broker-dealers that may currently be entering into these arrangements without treating them as advisory activities under the Act, compliance costs will be lower if they are dually-registered broker-dealers that have already established a compliance infrastructure under the Advisers Act (or that could shift affected accounts to an affiliated investment adviser), and will be higher for broker-dealers that will have to become newly-registered under the Advisers Act, as discussed below. Because these costs of compliance and registration will vary from firm to firm depending on its size and complexity, these costs are difficult to quantify:[220]

- Affected broker-dealers that are already dually-registered as investment advisers will incur the costs of handling these accounts through their existing Advisers Act infrastructure. For example, under the Advisers Act, they will be required to deliver brochures and make other required disclosures with respect to these accounts, and comply with principal trading restrictions. Nonetheless, we believe these costs will be mitigated because, as registered advisers, these broker-dealers already have systems in place to satisfy such requirements, and the costs are account-specific. Dually-registered broker dealers shifting these accounts over to their Advisers Act infrastructure may also incur additional documentation costs to execute new account agreements with affected clients.
- Other affected broker-dealers may not be dually-registered, but may be affiliated with investment advisers. These broker-dealers could implement the requirements of the rule by shifting the advisory activities to their advisory affiliates. In so doing, they will incur the lesser compliance costs similar to dual registrants, rather than the greater costs discussed below for new registrants.
- For affected broker-dealers that will be required to register as investment advisers for the first time, the rule will result in costs associated with registration under the Advisers Act and compliance with the Act's requirements. Although we acknowledge that the costs of registration and compliance under the Advisers Act are significant,[221] we believe that such costs will be mitigated by the fact that these firms can build upon the infrastructure they already have in place as broker-dealers, much of which overlaps with Advisers Act

participants all managed their investments primarily through a broker or investment adviser. While the surveys covered larger groups of respondents, the surveys did not assess whether the respondents had any experience with broker-dealers or investment advisers. The surveys did not exclude investors who, for example, held only mutual funds acquired directly from the fund complex (or in the case of the CFA Survey, who acquired them through an employer-sponsored 401(k) plan), acquired fund investments directly from a state 529 plan, or acquired Treasury securities through Treasury Direct.

[215] SIA Letter, *supra* note 29; Northwestern Mutual Letter, *supra* note 29. In addition, our focus group participants generally indicated that they were confused by the use of legal terms in the disclosure, such as "fiduciary," "rights," and "obligations."

[216] FPA Letter, *supra* note 27.

[217] *See supra* note 95 and accompanying text.

[218] *See supra* note 144 and accompanying text.

[219] Typically, in these arrangements, the broker-dealer is charging a separate fee for comprehensive financial planning. *See* SIA Letter, *supra note* 29; Merrill Lynch Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; UBS Letter, *supra* note 29.

[220] While several commenters argued in favor of a rule requiring separately-contracted-for advisory services to be subject to the Advisers Act (*see supra* note 145), no commenters supplied data on the costs of compliance with this approach.

[221] As discussed above in Section VI.A.1.a of this Release, these costs include preparing and submitting Part 1 of Form ADV, the adviser registration form; preparing and distributing client disclosures under Part II of Form ADV; modifying their compliance programs to address the Advisers Act and its requirements, and establishing adviser codes of ethics.

requirements. For example, these broker-dealers are already subject to rules requiring designation of a chief compliance officer, establishment and maintenance of written compliance procedures, maintenance of books and records, and oversight of employee personal securities trading.[222] These broker-dealers will ordinarily also be in compliance with the adviser custody rule.[223]

2. Holding Out as a Financial Planner

a. Benefits

As a consequence of rule 202(a)(11)–1(b), a broker-dealer that holds itself out generally to the public as a financial planner or as providing financial planning services must generally register as an investment adviser under the Act, and a broker-dealer that delivers a financial plan to a customer or represents to a customer that its advice is part of a financial plan or in connection with financial planning services must also generally register under the Act and treat that customer as an advisory client. Rule 202(a)(11)–1(b) will benefit these customers by making these services subject to the protections of the Advisers Act.

b. Costs

Broker-dealers that deliver financial plans or make representations to customers causing their firms to fall within the provisions of rule 202(a)(11)–1(b) will incur costs to provide that investment advice to those customers in compliance with the Advisers Act. Commenters' descriptions of current industry practices lead us to believe this aspect of rule 202(a)(11)–1(b) will impose new costs on relatively few broker-dealers. Several commenters indicated it is existing practice in the brokerage industry to use a two-tiered approach to financial planning activities. In the first tier, broker-dealers use certain tools (often questionnaires) to analyze customer financial situations as an aid to meeting the broker-dealers' suitability obligations, and broker-dealers also provide full-service brokerage customers with basic financial assessment tools (often computer-assisted evaluations) as an integral part of the brokerage process.[224] In the second tier, broker-dealers offer comprehensive financial plans as a separate option, for a separate fee, and treat this second-tier service as an advisory activity subject to the Act.[225] So long as broker-dealers treat the first-tier activities as an integral part of the brokerage account relationship, and do not represent these activities to be financial plans, financial planning, or financial planning services, they will not be obligated to treat these first-tier activities as advisory services under the Advisers Act.

Broker-dealers whose operations vary from these industry practices will face increased costs as a result of rule 202(a)(11)–1(b), in the form of costs to comply with the Advisers Act. Similar to the costs discussed above in connection with separately-contracted-for advisory services (in Section VI.B.1.b of this Release, above), these compliance costs will be lower for dually-registered broker-dealers that have already established a compliance infrastructure under the Advisers Act (or that could shift affected accounts to an affiliated investment adviser), and will be higher for broker-dealers that will have to become newly-registered under the Advisers Act, as discussed below. Most commenters addressing the costs of treating financial planning activities as an advisory activity under the Act characterized the costs as significant,[226] while other commenters indicated they were not significant.[227] Because these costs of compliance and registration will vary from firm to firm depending on its size and complexity, these costs are difficult to quantify:[228]

- To the extent that dually-registered broker-dealers will be required to treat financial planning activities as advisory activities, they will incur costs associated with subjecting such activities to the Advisers Act and its requirements (similar to the costs to dual registrants of separately-contracted-for advisory services, as discussed in Section VI.B.1.b of this Release, above). For example, under the Advisers Act, they will be required to deliver brochures and make other required disclosures with respect to financial planning clients, and comply with principal trading restrictions. Nonetheless, we believe these costs will be mitigated because as advisers, these broker-dealers already have systems in place to satisfy such requirements, and the costs are account-specific. These dually-registered broker-dealers may also incur additional documentation costs to execute new account agreements with financial planning clients.
- Other affected broker-dealers may not be dually-registered, but may be affiliated with investment advisers. These broker-dealers could implement the requirements of the rule by shifting the financial planning activities to their advisory affiliates. In so doing, they will incur the lesser compliance costs similar to dual registrants, rather than the greater costs discussed below for new registrants.
- For broker-dealers whose financial planning activities will require them to register as investment advisers for the first time, the rule will result in costs associated with registration under the Advisers Act and compliance with the Act's requirements.[229] Although we acknowledge (as discussed above in connection with separately-contracted-for advisory services) that the costs of registration and compliance under the Advisers Act are significant,[230] we believe that such costs will be mitigated by the fact that these firms can build upon the infrastructure they already have in place as broker-dealers, much of which overlaps with Advisers Act requirements. For example, these broker-dealers are already subject to rules requiring designation of a chief compliance officer, establishment and maintenance of written compliance procedures, maintenance of books and records, and oversight of employee personal securities trading.[231] These

[222] *See, e.g.*, NASD Conduct Rule 3013 (chief compliance officer); NASD Conduct Rule 3010(b) (compliance procedures); NASD Conduct Rule 3050 (personal trading); NASD Conduct Rule 3110 (books and records). *See also* Exchange Act rule 17a–3 [17 CFR 240.17a–3] (records to be maintained by brokers and dealers); Exchange Act rule 17a–4 [17 CFR 240.17a–4] (records to be preserved by brokers and dealers); Exchange Act rule 17a–7 [17 CFR 240.17a–7] (records of non-resident brokers and dealers); New York Stock Exchange Rule 342 (personal trading).

[223] Rule 206(4)–2. *See Custody of Funds or Securities of Clients by Investment Advisers*, Investment Advisers Act Rel. No. 2176 (Sept. 25, 2003) [68 F.R. 56692 (Oct. 1, 2003)] at n.23 and n.49, and accompanying text.

[224] *See* The Consortium Letter, *supra* note 114; Morgan Stanley Letter, *supra* note 29; Merrill Lynch Letter, *supra* note 29; UBS Letter, *supra* note 29.

[225] *Id.*

[226] Morgan Stanley Letter, *supra* note 29; Letter of Steven K. McGinnis (Feb. 14, 2005); Demming Letter, *supra* note 206; Letter of Paul E. Coan (Jan. 11, 2005); Letter of Joseph F. Fessler (Jan. 18, 2005).

[227] Comment Letter of Donald S. Loveless (Jan. 20, 2005); Comment Letter of Nicholas B. Rowe (Jan. 17, 2005).

[228] Commenters did not supply any data concerning these costs.

[229] In the Reproposing Release, we estimated that approximately 100 broker-dealers will be required to register under the Advisers Act as a consequence of holding themselves out as financial planners. *See* Reproposing Release, *supra* note 6, at n. 149–151 and accompanying text. We received no comments on this estimate, and since we issued the Reproposing Release, we have encountered no other information that would cause us to re-evaluate this estimate, or the estimates we discuss in notes 239 and 240, *infra*.

[230] *See supra* note 221.

[231] *See supra* note 222. In addition, we expect these firms that will be required to register are likely to be smaller firms; larger firms are more likely to be dually-registered already or to be affiliated with registered investment advisers to which they can shift accounts, as discussed above. These smaller firms' costs to comply with the Advisers Act should be further mitigated by the fact

broker-dealers will ordinarily also be in compliance with the adviser custody rule.[232]

3. Discretionary Brokerage

a. Benefits

Rule 202(a)(11)–1(b) also requires broker-dealers to treat discretionary brokerage accounts as advisory accounts under the Advisers Act. The rule will benefit investors to the extent they are confused as to the nature of discretionary brokerage. As previously noted, in many respects discretionary brokerage relationships are difficult to distinguish from investment advisory relationships. By definitively treating such accounts as advisory accounts, the rule will promote understanding by investors of the nature of the service they are receiving. More importantly, we believe that it will ensure that accounts that have the supervisory or managerial character we have identified as warranting Advisers Act coverage are, in fact, covered.

b. Costs

Rule 202(a)(11)–1(b) will entail costs for broker-dealers that maintain discretionary accounts, in the form of Advisers Act compliance costs for these accounts. Similar to the costs discussed above in connection with separately-contracted-for advisory services and financial planning services (in Sections VI.B.1.b and VI.B.2.b of this Release, above), these costs will be lower for dually-registered broker-dealers that have already established a compliance infrastructure under the Advisers Act (or that can shift affected accounts to an affiliated investment adviser), and will be higher for broker-dealers that will be required to register under the Advisers Act.[233] Commenters addressing the costs of treating discretionary accounts as advisory accounts under the Act characterized the costs as significant.[234] Because these costs of compliance and registration vary from firm to firm depending on its size and complexity, these costs are difficult to quantify:[235]

- For broker-dealers already dually-registered as investment advisers, rule 202(a)(11)–1(b) will result in costs to treat discretionary accounts as advisory accounts. Based on staff experience, we believe that many dual registrants currently treat discretionary accounts as advisory accounts, and will be in compliance with the new rule without further action. To the extent that other dually-registered broker-dealers will be required to treat discretionary accounts as advisory accounts, they will incur costs associated with subjecting such accounts to the Advisers Act and its requirements (similar to the costs to dual registrants of separately-contracted-for advisory services and financial planning services, as discussed in Sections VI.B.1.b and VI.B.2.b of this Release, above). For example, under the Advisers Act, they will be required to deliver brochures and make other required disclosures with respect to these accounts, and observe principal trading restrictions.[236] Nonetheless, we believe these costs would be mitigated because as advisers, these broker-dealers already have systems in place to satisfy such requirements, and the costs are account-specific. Several commenters focused specifically on principal trading restrictions, urging that such restrictions would be particularly inconsistent with current practices of certain fixed income institutional investors, who grant broker-dealers discretion in view of the firm's ability to effect trades on a principal basis.[237] However, we believe the exceptions we discuss above for limited discretion will accommodate these investors, if they wish to grant their broker-dealers limited types of discretion focused on obtaining the benefits of efficient execution or access to types of securities not widely available in the market, as opposed to the kind of supervisory or managerial discretionary authority we have concluded is properly subject to the Advisers Act.[238]
- In many instances, broker-dealers that are not dually registered are affiliated with investment advisers. Based on staff experience, we believe that many of these broker-dealers have refrained from engaging in the discretionary brokerage business, and have instead looked to their advisory affiliates to provide portfolio management to investors seeking this kind of service. Other broker-dealers that have not refrained from accepting discretionary brokerage services could implement the requirements of rule 202(a)(11)–1(b) by shifting these customers to their advisory affiliates.[239] In so doing, they will incur the lesser compliance costs of the types discussed above for dual registrants, rather than the greater costs discussed below for new registrants.
- For broker-dealers whose maintenance of discretionary accounts will require them to register as investment advisers for the first time, rule 202(a)(11)–1(b) will result in costs associated with registration under the Advisers Act and compliance with the Act's requirements.[240] Although we acknowledge (as discussed above in connection with separately-contracted-for advisory services and financial planning services in Section VI.B.1.b and VI.B.2.b of this Release) that the costs of registration and compliance under the Advisers Act are significant,[241] we believe that such costs will be mitigated by the fact that these firms can build upon the infrastructure they already have in place as broker-dealers, much of which overlaps with Advisers Act requirements. For example, these broker-dealers are already subject to rules requiring designation of a chief compliance officer, establishment and maintenance

that their operations are unlikely to be complex or widespread.

[232] *See supra* note 223.

[233] Some broker-dealers have limited their acceptance of discretionary accounts in accordance with our staff's view that only broker-dealers who hold a limited number of such accounts, as opposed to those whose accounts are almost exclusively discretionary, can avoid being deemed an investment adviser. To the extent that broker-dealers have done so, there would be a correspondingly limited amount of account-specific costs for broker-dealers in complying with rule 202(a)(11)–1(b). However, one commenter indicated that the majority of accounts at his broker-dealer were discretionary accounts. Comment Letter of Arthur S. Pesner (Feb. 3, 2005) ("Pesner Letter").

[234] SIA Letter, *supra* note 29; Merrill Lynch Letter, *supra* note 29; Pesner Letter, *supra* note 233.

[235] Commenters did not supply any data concerning these costs.

[236] One commenter focused on additional recordkeeping requirements applicable under Advisers Act rule 204–2 (such as retaining copies of any written recommendations to clients). SIA Letter, *supra* note 29. Dually-registered broker dealers converting discretionary accounts may also incur additional documentation costs to execute new account agreements with clients whose accounts are affected by the new rule.

[237] These commenters noted that some market sectors, such as fixed income, are dominated by principal trading, and applying principal transaction restrictions might negatively affect liquidity in these markets. They also expressed concerns that the notice procedures applicable to principal transactions under the Advisers Act might make it impossible for them to obtain best execution for these fixed income investors. SIA Letter, *supra* note 29; Morgan Stanley Letter, *supra* note 29; UBS Letter, *supra* note 29.

[238] *See supra* notes 178–181 and accompanying text.

[239] In the Reproposing Release, we estimated that there are only 145–290 broker-dealers (approximately) that are not dually-registered as investment advisers and accept discretionary accounts. We estimated that approximately one-third of this group will transfer their discretionary accounts to their advisory affiliates. (We also estimated approximately one-fifth of this group will be able to reach agreements with their customers that allow the firms to operate their accounts on a non-discretionary basis.) *See* Reproposing Release, *supra* note 6, at n. 139–142 and accompanying text. We received no comments on these estimates.

[240] In the Reproposing Release, we estimated that approximately 95 broker-dealers will be required to register under the Advisers Act as a consequence of continuing to maintain discretionary accounts. *See* Reproposing Release, *supra* note 6, at n. 138–142 and accompanying text. We received no comments on this estimate.

[241] *See supra* note 221.

of written compliance procedures, maintenance of books and records, and oversight of employee personal securities trading.[242] These broker-dealers will ordinarily also be in compliance with the adviser custody rule.[243]

C. Wrap Fee Sponsorship

We are re-affirming our current interpretation regarding wrap program sponsorship. Since this does not change existing obligations or relationships, no new costs or benefits result.

VII. Effects of Competition, Efficiency and Capital Formation

Section 202(c) of the Advisers Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[244]

A. Fee-Based and Discount Brokerage Programs

Rule 202(11)(a)–1(a) provides that a broker-dealer providing advice that is incidental to its brokerage services can retain its exception from the Advisers Act regardless of whether it charges an asset-based or fixed fee (rather than commissions, mark-ups, or mark-downs) for its services. The rule also provides that broker-dealers are not subject to the Act solely because in addition to offering full-service brokerage they offer discount brokerage services, including execution-only brokerage, for reduced commission rates.[245]

We do not anticipate that rule 202(11)(a)–1(a) will negatively affect competition. Many commenters addressing our 1999 Proposal and our Reproposing Release raised concerns that the proposed rule would grant broker-dealers who give investment advice without registering under the Advisers Act a competitive advantage over investment advisers subject to the Advisers Act. However, as discussed in Section III.A.1 of this Release, above, broker-dealers have historically provided advisory services to their brokerage customers. As discussed in Section III.A.2 of this Release, above, broker-dealers do so subject to the cost implications of compliance with broker-dealer regulation. Because the rule does not change the types of advice broker-dealers may provide (which advice must continue to be solely incidental to brokerage) or materially change their compliance costs, we do not anticipate it will create a competitive advantage.

Rule 202(a)(11)–1(a) may increase efficiency by removing impediments to fee-based brokerage programs. Fee-based brokerage programs, as we discuss above, respond to changes in the market place for retail brokerage, and concerns that we have long held about the incentives that commission-based compensation provides for broker-dealers to churn accounts, recommend unsuitable securities, and engage in aggressive marketing.[246] The availability of fee-based brokerage programs may better align the interests of broker-dealers and their customers. The availability of fee-based and discount brokerage programs should also enable brokerage customers to choose these new programs when they represent a more efficient alternative than commission-based brokerage. One commenter agreed, arguing that pricing flexibility generally promotes economic efficiency.[247]

If rule 202(a)(11)–1(a) has any effect on capital formation, it will be indirect, and positive. By removing impediments to fee-based and discount brokerage programs which may be more desirable for customers than commission-based programs, rule 202(a)(11)–1(a) may open the door to greater investor participation in the securities markets.

B. Discretionary Brokerage and Financial Planning

Rule 202(a)(11)–(1)(b) specifies three situations in which the provision of advisory services by a broker-dealer is not solely incidental to brokerage, and such advisory services are thus ineligible for the fee-based account exception under rule 202(a)(11)–1(a) or the exception from the definition of an investment adviser in section 202(a)(11)(C) of the Advisers Act. First, a broker-dealer that charges a separate fee or separately contracts with a customer for investment advisory services may not rely on the exceptions. Second, a broker-dealer that holds itself out generally to the public as a financial planner or as providing financial planning services must generally register as an investment adviser under the Act, and a broker-dealer that delivers a financial plan to a customer or represents to a customer that it is a financial planner or providing a financial plan or financial planning services must also generally register under the Act and treat that customer as an advisory client. Third, a broker-dealer may not rely on the exceptions for any accounts over which it exercises investment discretion.

Rule 202(a)(11)–1(b) will not negatively affect competition. Some broker-dealers would be required to begin treating as advisory clients those customers with whom they make separate contractual or compensation arrangements for advisory services, or to whom they provide certain financial planning or discretionary account services. However, as discussed above, we believe the majority of broker-dealers already apply the Advisers Act in the circumstances covered by rule 202(a)(11)–1(b), so we expect the effects of the rule will not be widespread.[248] As the remaining firms begin applying the Advisers Act to these relationships as a result, they will be competing on a more even footing with broker-dealers who already do so. We do not believe rule 202(a)(11)–1(b) will have any measurable effect on efficiency or capital formation.

VIII. Paperwork Reduction Act

Rule 202(a)(11)–1(a) contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[249] The title of this new collection is "Rule 202(a)(11)–1 under the Investment Advisers Act of 1940—Certain Broker-Dealers Deemed Not To Be Investment Advisers," and the Commission, at the time of its 1999 Proposal, submitted it to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has approved, and subsequently extended, this collection under control number 3235–0532 (expiring on October 31, 2006).

Rule 202(a)(11)–1(b) will have the effect of requiring certain broker-dealers to register under the Advisers Act.[250]

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[242] *See supra* note 222. In addition, (similar to the costs for broker-dealers engaged in financial planning, *supra* note 231,) we expect these firms that will be required to register are likely to be smaller firms; larger firms are more likely to be dually-registered already or to be affiliated with registered investment advisers to which they can shift accounts, as discussed above. These smaller firms' costs to comply with the Advisers Act should be further mitigated by the fact that their operations are unlikely to be complex or widespread.

[243] *See supra* note 223.

[244] 15 U.S.C. 80b–2(c).

[245] Rule 202(a)(11)–1(c) further provides that a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subjects it to the Advisers Act.

[246] *See supra* note 12 and accompanying text.

[247] Northwestern Mutual Letter, *supra* note 29.

[248] *See supra* Sections VI.B.1.b, VI.B.2.b, and VI.B.3.b of this Release.

[249] 44 U.S.C. 3501 to 3520.

[250] Rule 202(a)(11)–1(b) describes three scenarios in which a broker-dealer may not rely on the broker-dealer exception from the definition of an "investment adviser" under the Advisers Act and rule 202(a)(11)–1(a). First, a broker-dealer that

Rule 202(a)(11)–1(b) will therefore likely increase the number of respondents under several existing collections of information, and, correspondingly, increase the annual aggregate burden under those existing collections of information. The Commission has submitted to OMB, in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, the existing collections of information for which the annual aggregate burden would correspondingly increase as a result of rule 202(a)(11)–1(b). The titles of the affected collections of information are: "Form ADV," "Form ADV–W and Rule 203–2," "Rule 203–3 and Form ADV–H," "Form ADV–NR," "Rule 204–2," "Rule 204–3," "Rule 204A–1," "Rule 206(4)–3," "Rule 206(4)–4," "Rule 206(4)–6," and "Rule 206(4)–7," all under the Advisers Act. The existing rules that will be affected by rule 202(a)(11)–1(b) contain currently approved collection of information numbers under OMB control numbers 3235–0049, 3235–0313, 3235–0538, 3235–0240, 3235–0278, 3235–0047, 3235–0596, 3253–0242, 3235–0345, 3235–0571 and 3235–0585, respectively.

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.

A. Certain Broker-Dealers Deemed Not To Be Investment Advisers

Under rule 202(a)(11)–1(a), broker-dealers will be deemed not to be "investment advisers" as defined in the Advisers Act with respect to certain accounts. With respect to these accounts, such broker-dealers will not be subject to the provisions of the Advisers Act, including the various registration, disclosure and recordkeeping requirements under the Act. Under rule 202(a)(11)–1(a), a broker-dealer will not be deemed to be an investment adviser with respect to an account for which it receives special compensation, provided that the broker-dealer's investment advice is solely incidental to the brokerage services provided to the account and the broker-dealer makes certain disclosures in its advertising and agreements for such accounts.

In the Reproposing Release, we noted that broker-dealers taking advantage of the proposed exception would need to maintain certain records that establish their eligibility to do so, but that rules under the Exchange Act already require the maintenance of those records.[251] Therefore, we concluded that this facet of the proposed exception would not increase the recordkeeping burden for any broker-dealer.

To rely on the rule 202(a)(11)–1(a) with respect to a particular brokerage account, advertisements[252] and contracts or agreements for the account must contain a prominent disclosure statement. The disclosure consists of a brief plain English statement that indicates the account is a brokerage account, not an advisory account, and encourages the customer to ask questions and gain an understanding of his or her rights and the broker-dealer's obligations, including the broker-dealer's obligations to disclose conflicts of interest. The disclosure also discusses compensation issues, including the fact that the firm's profits and salespersons' compensation may depend on what the customer buys and may include compensation from other persons. The disclosure statement must also direct the customers to a contact person who can discuss with the customers the differences between brokerage and advisory accounts.[253] This information is necessary to prevent customers and prospective customers from mistakenly believing that the account is an advisory account subject to the Advisers Act, and will be used to assist customers in making an informed decision on whether to establish an account. The collection of information requirement under rule 202(a)(11)–1(a) is mandatory. In general, the information collected pursuant to the rule will be held by the broker-dealers. Staff of the Commission, self-regulatory organizations, and other securities regulatory authorities would gain access to the information only upon request. Any collected information received by the Commission will be kept confidential subject to applicable law, including the provisions of the Freedom of Information Act [5 U.S.C. 552].

The burden to comply with this provision of rule 202(a)(11)–1(a) will be insignificant. In preparing model contracts and advertisements, for example, compliance officials will be required to verify that the appropriate disclosure is made. In the Reproposing Release, we estimated that the average annual burden for ensuring compliance is five minutes per broker-dealer taking advantage of the rule.[254] We estimated that if all of the approximately 8,100 broker-dealers registered with us took advantage of the rule, the total estimated annual burden would be 673 hours.[255] In our 1999 Proposal, the rule only required a prominent statement that the account is a brokerage account. In our Reproposing Release, we proposed to add disclosures that the account is not an advisory account; that the firm's obligations with respect to such accounts may differ; and that, as a consequence, the customer's rights and the firm's duties and obligations to the customer, including the scope of the firm's fiduciary obligations, may differ. We also proposed to require the broker-dealer to identify an appropriate person at the firm with whom the customer can discuss the differences. The rule today modifies the prominent statement slightly to put the prominent disclosure statement into plain English, and to discuss broker compensation issues briefly. However, these modifications to the disclosure obligations under rule 202(a)(11)–1(a) do not increase the estimated paperwork burden for this collection.

B. Broker-Dealers Providing Discretionary Advice or Financial Plans

As discussed above, under rule 202(a)(11)–1(b), broker-dealers providing advisory services in three scenarios will be deemed advisers subject to the Advisers Act.[256] Rule 202(a)(11)–1(b) will therefore increase the number of respondents under the existing collections of information identified above, and, correspondingly, increase the annual aggregate burden under those existing collections of

charges a separate fee or separately contracts with a customer for investment advisory services may not rely on the exceptions. Second, a broker-dealer that holds itself out generally to the public as a financial planner or as providing financial planning services may not generally rely on the exceptions to avoid registration under the Act, and a broker-dealer that delivers a financial plan to a customer or represents to a customer that its advice is part of a financial plan or in connection with financial planning services must also generally register under the Act and treat that customer as an advisory client. Third, a broker-dealer may not rely on the exceptions for any accounts over which it exercises investment discretion. *See* rule 202(a)(11)–1(b).

[251] *See* Reproposing Release, *supra* note 6, at Section VII. Specifically, rule 202(a)(11)–1(a)(i) and rule 202(a)(11)–1(b)(3) have the effect of limiting the application of rule 202(a)(11)–1(a) to accounts over which a broker-dealer does not exercise investment discretion. Rule 202(a)(11)–1(a)(1)(ii) also requires a prominent statement be made in agreements governing the accounts to which the rule applies. Under Exchange Act rules, broker-dealers are already required to maintain all "evidence of the granting of discretionary authority given in any respect of any account" [17 CFR 240.17a–4(b)(6)] and all "written agreements * * * with respect to any account" [17 CFR 240.17a–4(b)(7)].

[252] As discussed in the Reproposing Release, broker-dealers already are required to maintain records regarding their advertisements under existing self-regulatory organizations' rules.

[253] Rule 202(a)(11)–1(a)(1)(ii).

[254] *See* Reproposing Release, *supra* note 6, at Section VII.

[255] 0.083 hours × 8,100 broker-dealers = 673 hours.

[256] *See supra* note 250.

information. All of these collections of information are mandatory, and respondents in each case are investment advisers registered with us, except that (i) respondents to Form ADV are also investment advisers applying for registration with us; (ii) respondents to Form ADV-NR are non-resident general partners or managing agents of registered advisers; (iii) respondents to rule 204A–1 include "access persons" of an adviser registered with us, who must submit reports of their personal trading to their advisory firms; (iv) respondents to rule 206(4)–3 are advisers who pay cash fees to persons who solicit clients for the adviser; (v) respondents to rule 206(4)–4 are advisers with certain disciplinary histories or a financial condition that is reasonably likely to affect contractual commitments; and (vi) respondents to rule 206(4)–6 are only those SEC-registered advisers that vote their clients' securities. Unless otherwise noted below, responses are not kept confidential.

We cannot quantify with precision the number of broker-dealers that will be new registrants with the Commission under the Advisers Act as a result of Rule 202(a)(11)–1(b). In the Reproposing Release, we set out our analysis that an estimated 195 broker-dealers would be required to register, and requested public comments.[257] We received no comments on this analysis, and have encountered no information since the time of the Reproposing Release that would cause us to re-evaluate it. Thus, for purposes of this analysis, we have estimated 195 new firms would be required to register with the SEC as investment advisers as a result of rule 202(a)(11)–1(b).

1. Form ADV

Form ADV is the investment adviser registration form. The collection of information under Form ADV is necessary to provide advisory clients, prospective clients, and the Commission with information about the adviser, its business, and its conflicts of interest. Rule 203–1 requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204–1 requires each SEC-registered adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through the IARD. This collection of information is found at 17 CFR 275.203–1, 275.204–1, and 279.1. The currently approved collection of information in Form ADV is 131,611 hours. We estimate that 195 new respondents will file one complete Form ADV and one amendment annually, and comply with Form ADV requirements relating to delivery of the adviser code of ethics. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under Form ADV by 5,792 hours[258] for a total of 137,403 hours.

2. Form ADV–W and Rule 203–2

Rule 203–2 requires every person withdrawing from investment adviser registration with the Commission to file Form ADV–W. The collection of information is necessary to apprise the Commission of advisers who are no longer operating as registered advisers. This collection of information is found at 17 CFR 275.203–2 and 17 CFR 279.2. The currently approved collection of information in Form ADV–W is 578 hours. We estimate that the 195 broker-dealer/advisers that will be new registrants will withdraw from SEC registration at a rate of approximately 16 percent per year, the same rate as other registered advisers, and will file for partial and full withdrawals at the same rates as other registered advisers, with approximately half of the filings being full withdrawals and half being partial withdrawals. Accordingly, we estimate the rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under Form ADV–W and rule 203–2 by 16 hours[259] for a total of 594 hours.

3. Rule 203–3 and Form ADV–H

Rule 203–3 requires that advisers requesting either a temporary or continuing hardship exemption submit the request on Form ADV–H. An adviser requesting a temporary hardship exemption is required to file Form ADV–H, providing a brief explanation of the nature and extent of the temporary technical difficulties preventing it from submitting a required filing electronically. Form ADV–H requires an adviser requesting a continuing hardship exemption to indicate the reasons the adviser is unable to submit electronic filings without undue burden and expense. Continuing hardship exemptions are available only to advisers that are small entities. The collection of information is necessary to provide the Commission with information about the basis of the adviser's hardship. This collection of information is found at 17 CFR 275.203–3, and 279.3. The currently approved collection of information in Form ADV–H is 11 hours. We estimate that approximately one broker-dealer/adviser among the new registrants will file for a temporary hardship exemption and one will file for a continuing exception. Accordingly, we estimate the rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under Form ADV–H and rule 203–3 by 2 hours[260] for a total of 13 hours.

4. Form ADV–NR

Non-resident general partners or managing agents of SEC-registered investment advisers must make a one-time filing of Form ADV–NR with the Commission. Form ADV–NR requires these non-resident general partners or managing agents to furnish us with a written irrevocable consent and power of attorney that designates the Secretary of the Commission, among others, as an agent for service of process, and that stipulates and agrees that any civil suit or action against such person may be commenced by service of process on the Secretary of the Commission. The collection of information is necessary for us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the federal securities laws. This collection of information is found at 17 CFR 279.4. The currently approved collection of information in Form ADV–NR is 17 hours. We estimate that approximately one broker-dealer/adviser among the new registrants will make this filing. Accordingly, we estimate the rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under Form ADV–NR by one hour[261] for a total of 18 hours.

5. Rule 204–2

Rule 204–2 requires SEC-registered investment advisers to maintain copies of certain books and records relating to their advisory business. The collection of information under rule 204–2 is necessary for the Commission staff to use in its examination and oversight program. Responses provided to the Commission in the context of its examination and oversight program are

[257] *See* Reproposing Release, *supra* note 6, at Section VII.

[258] 195 filings of the complete form at 22.25 hours each, plus 195 amendments at 0.75 hours each, plus 6.7 hours for each of the 195 broker-dealer/advisers to deliver copies of their codes of ethics to 10 percent of their 670 clients annually who request it, at 0.1 hours per response. (195 × 22.25) + (195 × 0.75) + (195 × (670 × 0.1) × 0.1) = 5,791.5.

[259] 32 filings (195 × 0.16), consisting of 16 full withdrawals at 0.75 hours each and 16 partial withdrawals at 0.25 hours each. (16 × 0.75) + (16 × 0.25) = 16.

[260] 2 filings at 1 hour each.

[261] 1 filing at 1 hour each.

generally kept confidential.[262] The records that an adviser must keep in accordance with rule 204–2 must generally be retained for not less than five years.[263] This collection of information is found at 17 CFR 275.204–2. The currently approved collection of information for rule 204–2 is 1,724,870 hours, or 191.78 hours per registered adviser. We estimate that all 195 broker-dealer/advisers that will be new registrants will maintain copies of records under the requirements of rule 204–2. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 204–2 by 37,397 hours[264] for a total of 1,762,267 hours.

6. Rule 204–3

Rule 204–3, the "brochure rule," requires an investment adviser to deliver to prospective clients a disclosure statement containing specified information as to the business practices and background of the adviser. Rule 204–3 also requires that an investment adviser deliver, or offer, its brochure on an annual basis to existing clients in order to provide them with current information about the adviser. The collection of information is necessary to assist clients in determining whether to retain, or continue employing, the adviser. This collection of information is found at 17 CFR 275.204–3. The currently approved collection of information for rule 204–3 is 6,089,293 hours, or 694 hours per registered adviser, assuming each adviser has on average 670 clients.[265] We estimate that all 195 broker-dealer/advisers that will be new registrants will provide brochures as required by rule 204–3. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 204–3 by 135,330 hours[266] for a total of 6,224,623 hours.

7. Rule 204A–1

Rule 204A–1 requires SEC-registered investment advisers to adopt codes of ethics setting forth standards of conduct expected of their advisory personnel and addressing conflicts that arise from personal securities trading by their personnel, and requiring advisers' "access persons" to report their personal securities transactions. The collection of information under rule 204A–1 is necessary to establish standards of business conduct for supervised persons of investment advisers and to facilitate investment advisers' efforts to prevent fraudulent personal trading by their supervised persons. This collection of information is found at 17 CFR 275.204A–1. The currently approved collection of information for rule 204A–1 is 1,060,842 hours, or 117.95 hours per registered adviser. We estimate that all 195 broker-dealer/advisers that will be new registrants will adopt codes of ethics under the requirements of rule 204A–1 and require personal securities transaction reporting by their "access persons." Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 204A–1 by 23,000 hours[267] for a total of 1,083,842 hours.

8. Rule 206(4)–3

Rule 206(4)–3 requires advisers who pay cash fees to persons who solicit clients for the adviser to observe certain procedures in connection with solicitation activity. The collection of information under rule 206(4)–3 is necessary to inform advisory clients about the nature of a solicitor's financial interest in the recommendation of an investment adviser, so the client may consider the solicitor's potential bias, and to protect investors against solicitation activities being carried out in a manner inconsistent with the adviser's fiduciary duties. This collection of information is found at 17 CFR 275.206(4)–3. The currently approved collection of information for rule 206(4)–3 is 12,355 hours. We estimate that approximately 20 percent of the 195 broker-dealer/advisers that will be new registrants will be subject to the cash solicitation rule, the same rate as other registered advisers. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 206(4)–3 by 275 hours[268] for a total of 12,630 hours.

9. Rule 206(4)–4

Rule 206(4)–4 requires registered investment advisers to disclose to clients and prospective clients certain disciplinary history or a financial condition that is reasonably likely to affect contractual commitments. This collection of information is necessary for clients and prospective clients in choosing an adviser or continuing to employ an adviser. This collection of information is found at 17 CFR 275.206(4)–4. The currently approved collection of information for rule 206(4)–4 is 11,383 hours. We estimate that approximately 17.3 percent of the 195 broker-dealer/advisers that will be new registrants will be subject to rule 206(4)–4, the same rate as other registered advisers. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 206(4)–4 by 255 hours[269] for a total of 11,638 hours.

10. Rule 206(4)–6

Rule 206(4)–6 requires an investment adviser that votes client securities to adopt written policies reasonably designed to ensure that the adviser votes in the best interests of clients, and requires the adviser to disclose to clients information about those policies and procedures. This collection of information is necessary to permit advisory clients to assess their adviser's voting policies and procedures and to monitor the adviser's performance of its voting responsibilities. This collection of information is found at 17 CFR 275.206(4)–6. The currently approved collection of information for rule 206(4)–6 is 119,873 hours. We estimate that all 195 broker-dealer/advisers that will be new registrants will vote their clients' securities. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 206(4)–6 by 3,257 hours[270] for a total of 123,130 hours.

11. Rule 206(4)–7

Rule 206(4)–7 requires each registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, review those policies and procedures annually, and designate an individual to serve as chief compliance officer. This collection of information under rule 206(4)–7 is necessary to ensure that investment advisers maintain comprehensive internal programs that promote the advisers' compliance with the Advisers Act. This collection of information is found at 17 CFR

[262] See section 210(b) of the Advisers Act [15 U.S.C. 80b–10(b)].

[263] See rule 204–2(e).

[264] 195 broker-dealer/advisers × 191.78 hours per adviser = 37,397 hours.

[265] We note that the average number of clients per adviser reflects a small number of advisers who have thousands of clients, while the typical SEC-registered adviser has approximately 76 clients.

[266] 195 broker-dealer/advisers × 694 hours per adviser = 135,330.

[267] 195 broker-dealer/advisers × 117.95 hours per adviser annually = 23,000.

[268] 39 respondents (195 × 0.2) × 7.04 hours annually per respondent = 275.

[269] 34 respondents (195 × 0.173) × 7.5 hours annually per respondent = 255.

[270] We estimate that 195 broker-dealer/advisers would spend 10 hours each annually documenting their voting policies and procedures, and would provide copies of those policies and procedures to 10 percent of their 670 clients annually at 0.1 hours per response. (195 × 10) + 195 × (0.1 × 67) = 3,257.

275.206(4)–7. The currently approved collection of information for rule 206(4)–7 is 701,200 hours, or 80 hours annually per registered adviser. We estimate all 195 broker-dealer/advisers that will be new registrants will be required to maintain compliance programs under rule 206(4)–7. Accordingly, we estimate rule 202(a)(11)–1(b) will increase the annual aggregate information collection burden under rule 206(4)–7 by 15,600 hours [271] for a total of 716,800 hours.

IX. Regulatory Flexibility Analysis

The Commission proposed rule 202(a)(11)–1 and related proposed interpretations of section 202(a)(11)(C) of the Advisers Act, in a release on January 6, 2005 ("Reproposing Release"). An Initial Regulatory Flexibility Analysis ("IRFA") was published in the Reproposing Release. No comments were received specifically on the IRFA. The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA") in accordance with section 3(a) of the Regulatory Flexibility Act.[272] It relates to rule 202(a)(11)–1.

A. Reasons for Action

Sections I through III of this Release describe the reasons for and objectives of rule 202(a)(11)–1. As discussed in detail above, rule 202(a)(11)–1(a) is designed to permit broker-dealers to offer new types of accounts, which charge asset-based or fixed fees for full-service brokerage services or make available discount brokerage services, without unnecessarily triggering regulation under the Advisers Act. Rule 202(a)(11)–1(b) identifies three situations in which provision of investment advisory services to broker-dealers' customers is not "solely incidental to" brokerage business within the meaning of the broker-dealer exception from the definition of an investment adviser in section 202(a)(11)(C) of the Advisers Act or within the exception provided by rule 202(a)(11)–1(a), making the broker-dealer ineligible for the exception from the definition of an investment adviser in section 202(a)(11)(C) of the Advisers Act, and making such advisory services ineligible for the fee-based account exception under rule 202(a)(11)–1(a).[273] Our objectives with rule 202(a)(11)–1 include fostering the availability of fee-based and discount brokerage programs to brokerage customers and reducing investor confusion as to whether they are receiving brokerage services or advisory services.[274]

B. Significant Issues Raised by Public Comment

We received no comments on our IRFA. We discuss comments we received on the substantive rulemaking above.[275]

C. Small Entities

Rule 202(a)(11)–1 applies to all brokers-dealers registered with the Commission, including small entities. Under Commission rules, for purposes of the Regulatory Flexibility Act, a broker-dealer generally is a small entity 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 financial statements were prepared and it is not affiliated with any person (other than a natural person) that is not a small entity.[276]

The Commission estimates that as of December 31, 2003, approximately 905 Commission-registered broker-dealers were small entities.[277] The Commission assumes for purposes of this FRFA that all of these small entities could rely on the exceptions provided by rule 202(a)(11)–1(a), although it is not clear how many would actually do so. Additionally, it is not clear how many of these small entities would be affected by proposed rule 202(a)(11)–1(b), which results in certain advisory services not being exempt from the Advisers Act.[278] Therefore, for purposes of this FRFA, the Commission also assumes that all of these small entities could be affected by the new rules.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The provisions of rule 202(a)(11)–1(a), pertaining to fee-based and discount brokerage accounts, impose no new reporting or recordkeeping requirements, and will not materially alter the time required for broker-dealers to comply with the Commission's rules. Rule 202(a)(11)–1(a) is designed to prevent unnecessary regulatory burdens from being imposed on broker-dealers. Broker-dealers taking advantage of rule 202(a)(11)–1(a) with respect to fee-based brokerage accounts will be required to make certain disclosures to customers and potential customers in advertising and contractual materials. Under Exchange Act rules, however, broker-dealers are already required to maintain these documents as "written agreements * * * with respect to any account." [279]

Under rule 202(a)(11)–1(b), advisory services provided by broker-dealers will be outside the broker-dealer exception from the Advisers Act under three scenarios. Thus, broker-dealers providing advisory services as described in any of these three scenarios will be subject to the Advisers Act.[280] Although some broker-dealers providing advisory services as described in one or more of these three scenarios are already registered as investment advisers, rule 202(a)(11)–1(b) will result in other broker-dealers having to newly register as advisers, and will subject these brokers to the reporting, recordkeeping, and other compliance requirements under the Advisers Act.[281] For these broker-dealers, registration under the Advisers Act and compliance with its requirements will constitute new reporting, recordkeeping, and other compliance requirements. For broker-dealers already registered as investment advisers, rule 202(a)(11)–1(b) will require that broker-dealers treat affected accounts as advisory accounts. Thus, for these broker-dealers, rule 202(a)(11)–1(b) will impose new reporting, recordkeeping, and other compliance

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[271] 195 broker-dealer/advisers at 80 hours per adviser annually = 15,600.

[272] 5 U.S.C. 603(a).

[273] First, a broker-dealer that charges a separate fee or separately contracts with a customer for investment advisory services may not rely on the exception. Second, a broker-dealer that holds itself out generally to the public as a financial planner or as providing financial planning services may generally not rely on the exceptions to avoid registration under the Act, and a broker-dealer that delivers a financial plan to a customer or represents to a customer that its advice is part of a financial plan or in connection with financial planning services must also generally register under the Act and treat that customer as an advisory client. Third, a broker-dealer may not rely on the exceptions for any accounts over which it exercises investment discretion. *See* rule 202(a)(11)–1(b).

[274] Section X of this Release lists the statutory authority for the proposed rule and rule amendments.

[275] *See* Sections II and III of this Release, *supra*.

[276] 17 CFR 240.0–10(c).

[277] This estimate is based on the most recent data available, taken from information provided by broker-dealers in Form X–17A–5 Financial and Operational Combined Uniform Single Reports filed pursuant to section 17 of the Exchange Act and Rule 17a–5 thereunder.

[278] *See supra* note 273 for a description of these three categories of advisory services.

[279] 17 CFR 240.17a–4(b)(7). As previously discussed, although rule 202(a)(11)–1(a) would also limit its application to accounts that a broker-dealer does not exercise investment discretion over, under Exchange Act rules, broker-dealers are already currently required to maintain all "evidence of the granting of discretionary authority given in any respect of any account." 17 CFR 240.17a–4(b)(6). Thus, this provision of the rule would not create an additional recordkeeping requirement for broker-dealers.

[280] *See supra* note 273 for a description of these three scenarios.

[281] For Paperwork Reduction Act purposes, we have estimated that approximately 195 broker-dealers could be required to register as investment advisers as a result of the proposed rule and interpretation. *See supra* Section VIII.B of this Release.

requirements with respect to these accounts.

Small entities registered with the Commission as broker-dealers will be subject to these new reporting, recordkeeping, and other compliance requirements to the same extent as larger broker-dealers. In developing these requirements over the years, we have analyzed the extent to which they would have a significant impact on a substantial number of small entities, and included flexibility wherever possible in light of the requirements' objectives, to reduce the corresponding burdens imposed.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate or conflict with rule 202(a)(11)–1.

F. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objectives, while minimizing any adverse impact on small entities.[282] In connection with rule 202(a)(11)–1, 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 rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for such small entities.

With respect to the first alternative, the Commission presently believes that establishment of differing compliance or reporting requirements or timetables for small entities would be inappropriate in these circumstances. The provision rule 202(a)(11)–1(a) requiring prominent disclosures to customers and potential customers is designed to prevent investors from being confused about the nature of the services they are receiving. To specify less prominent disclosures for small entities would only serve to diminish investor protection to customers of small broker-dealers. Such a course would be inconsistent with the purposes of the Advisers Act. With respect to rule 202(a)(11)–1(b), the compliance and recordkeeping requirements are those generally applicable to any adviser registered under the Act. In developing these requirements over the years, the Commission has analyzed the extent to which they would have a significant impact on a substantial number of small entities, and included flexibility wherever possible in light of the requirements' objectives, to reduce the corresponding burdens imposed. It would be inconsistent with this design, and contrary to its purpose, to create special rules for small broker-dealers who would be subject to the Act as a result of proposed rule 202(a)(11)–1(b).

With respect to the second alternative, the Commission presently believes that clarification, consolidation, or simplification of the compliance and recordkeeping requirements under proposed rule 202(a)(11)–1(a) for small entities unacceptably compromises the investor protections of the rule. As discussed above, the rule's prominent disclosure requirement is designed to prevent investor confusion. We believe this requirement is already adequately clear and simple for those seeking to make use of the rule's exception for fee-based accounts. To further consolidate this requirement would potentially impede our objective of preventing investor confusion. With respect to rule 202(a)(11)–1(b), clarification, consolidation, or simplification would involve modification of the compliance and recordkeeping requirements generally applicable to registered investment advisers under the Act. As discussed above in connection with the first alternative, the Commission, in developing these requirements over the years, has included as much flexibility as can be introduced in light of the investor protection objectives underlying them.

With respect to the third alternative, the Commission presently believes that the compliance requirements contained in rule 202(a)(11)–1 already appropriately use performance standards instead of design standards. The rule is crafted to make regulation under the Advisers Act turn on the services offered by a broker-dealer rather than strictly on the type of compensation involved. Thus, eligibility for rule 202(a)(11)–1(a)'s exception hinges on the services offered by the broker-dealer. Likewise, under rule 202(a)(11)–1(b), the treatment of the advisory activities in question also focus on the services offered.[283] The reporting, recordkeeping, and other compliance requirements stemming from these of rule 202(a)(11)–1 are triggered by the performance of services by the entity in question, including small businesses.

Finally, with respect to the fourth alternative, the Commission presently believes that exempting small entities would be inappropriate. To the extent rule 202(a)(11)–1(a) eliminates unnecessary regulatory burdens that might otherwise be imposed on broker-dealers, small entities, as well as large entities, will benefit from the rule. Small broker-dealers should be permitted to enjoy this benefit to the same extent as larger broker-dealers. Furthermore, the Commission believes the provisions of rule 202(a)(11)–1(b) should apply to small entities to the same extent as larger ones. Rule 202(a)(11)–1(b) is grounded in the view that the advice described in the rule's three scenarios is not solely incidental to brokerage. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small advisory firms, it would be inconsistent with the purposes of the Advisers Act to exempt small entities further from the rule.

X. Statutory Authority

The Commission is adopting rule 202(a)(11)–1 pursuant to sections 202(a)(11)(F) and 211(a) of the Advisers Act.[284]

Text of Rule

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for Part 275 continues to read as follows:

[282] 5 U.S.C. 603(c).

[283] Rule 202(a)(11)–1(b)(1) focuses on whether the broker-dealer separately contracts for the advisory services or charges a separate fee. Rule 202(a)(11)–1(b)(2) focuses on how the broker-dealer holds itself out generally to the public or represents its services to a customer. Rule 202(a)(11)–1(b)(3) focuses on whether the broker-dealer exercises investment discretion over customer accounts.

[284] Because we are using our authority under section 202(a)(11)(F), broker-dealers relying on the rule would not be subject to state adviser statutes. Section 203A(b)(1)(B) of the Act provides that "[n]o law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person * * * that is not registered under [the Advisers Act] *because that person is excepted from the definition of an investment adviser under section 202(a)(11).*" (emphasis added).

We also have authority under section 206A, which is available as an alternative ground, because the rule we are adopting is in the public interest and consistent with the protection of investors and the purposes intended in the Act.

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

■ 2. Section 275.202(a)(11)–1 is added to read as follows:

§ 275.202(a)(11)–1 Certain broker-dealers.

(a) *Special compensation.* A broker or dealer registered with the Commission under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) (the "Exchange Act"):

(1) Will not be deemed to be an investment adviser based solely on its receipt of special compensation (except as provided in paragraph (b)(1) of this section), provided that:

(i) Any investment advice provided by the broker or dealer with respect to accounts from which it receives special compensation is solely incidental to the brokerage services provided to those accounts (including, in particular, that the broker or dealer does not exercise investment discretion as provided in paragraphs (b)(3) and (d) of this section); and

(ii) Advertisements for, and contracts, agreements, applications and other forms governing, accounts for which the broker or dealer receives special compensation include a prominent statement that: "Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time." The prominent statement also must identify an appropriate person at the firm with whom the customer can discuss the differences.

(2) Will not be deemed to have received special compensation solely because the broker or dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater than or less than one it charges another customer.

(b) *Solely incidental to.* A broker or dealer provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act or to the brokerage services provided to accounts from which it receives special compensation within the meaning of paragraph (a)(1)(i) of this section if the broker or dealer (among other things, and without limitation):

(1) Charges a separate fee, or separately contracts, for advisory services;

(2) Provides advice as part of a financial plan or in connection with providing financial planning services and:

(i) Holds itself out generally to the public as a financial planner or as providing financial planning services;

(ii) Delivers to the customer a financial plan; or

(iii) Represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services; or

(3) Exercises investment discretion, as that term is defined in paragraph (d) of this section, over any customer accounts.

(c) *Special rule.* A broker or dealer registered with the Commission under section 15 of the Exchange Act is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker or dealer to the Advisers Act.

(d) *Investment discretion.* For purpose of this section, the term *investment discretion* has the same meaning as given in section 3(a)(35) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(35)), except that it does not include investment discretion granted by a customer on a temporary or limited basis.

Dated: April 12, 2005.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 05–7641 Filed 4–18–05; 8:45 am]

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To amend the Internal Revenue Code of 1986 to provide for the proper tax treatment of certain disaster mitigation payments. (Apr. 15, 2005; 119 Stat. 21)

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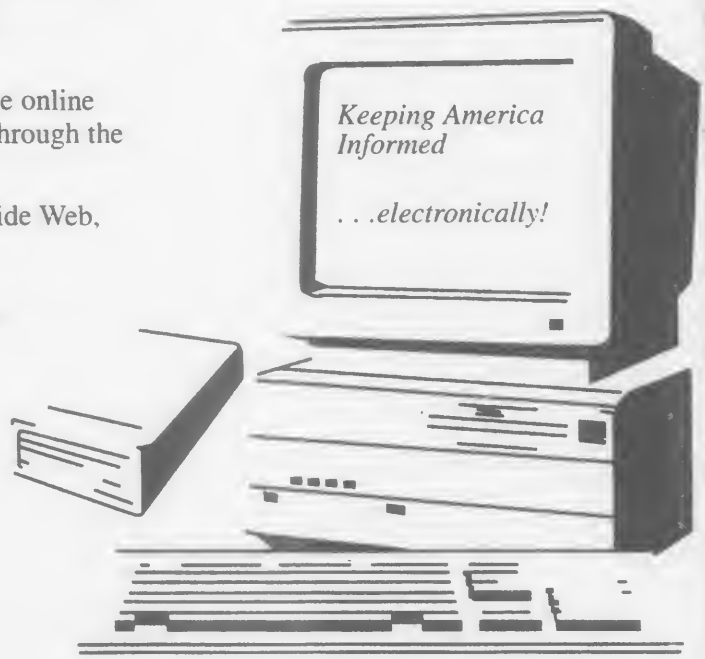

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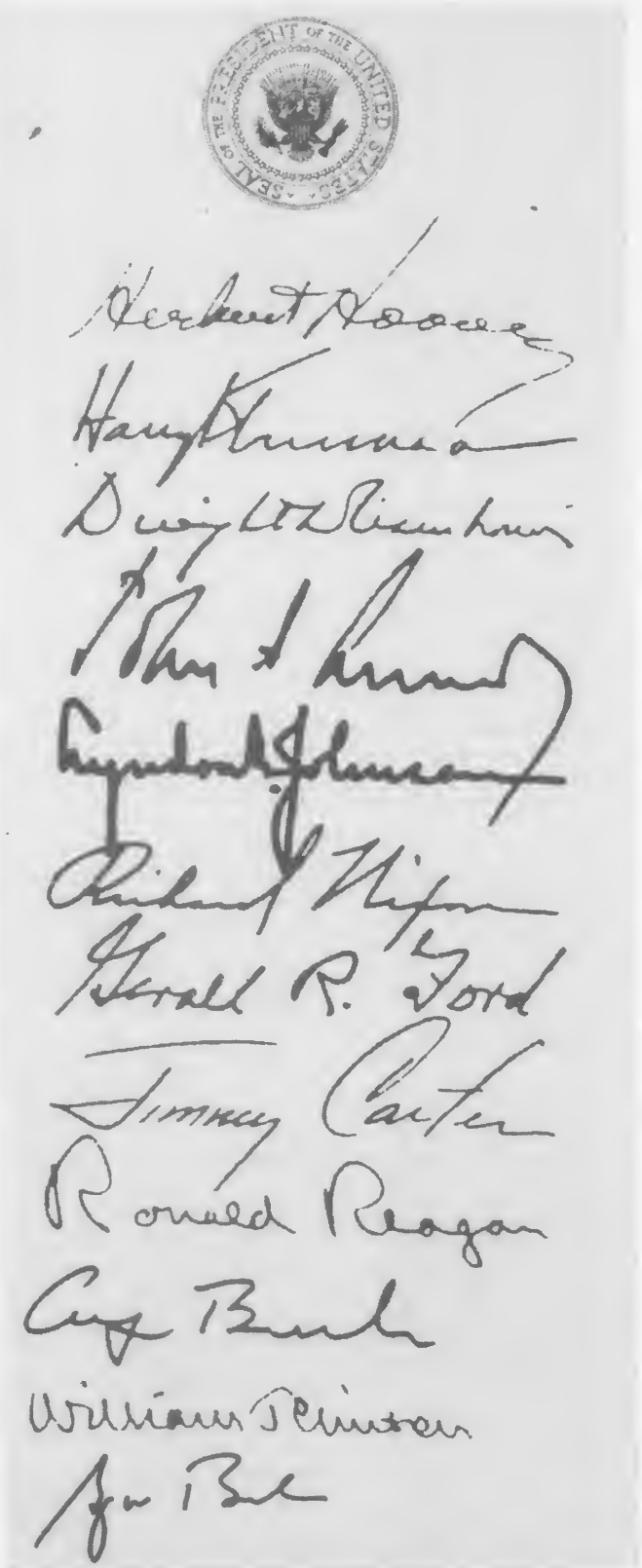

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