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Federal Register
Vol. 69, No. 15
Friday, January 23, 2004

DEPARTMENT OF ENERGY

10 CFR Parts 710, 711, and 712

[Docket No. SO–RM–00–HRP]

RIN 1992–AA29

Human Reliability Program

AGENCY: Office of Security, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or Department) today is publishing a final rule to establish the Human Reliability Program. This rule consolidates the Personnel Security Assurance Program (PSAP) and Personnel Assurance Program (PAP) into a single program, which incorporates all the important facets of each into a coherent, comprehensive, and concise regulation. The PSAP was an access authorization program for individuals who applied for or occupied certain positions critical to the national security. The PSAP required an initial and annual supervisory review, medical assessment, management evaluation, and DOE personnel security review of all applicants or incumbents. The PAP was a nuclear explosive safety program for individuals who occupied positions that involved hands-on work with, or access to, nuclear explosives. The PAP used many of the same evaluations as the PSAP to ensure that employees assigned to nuclear explosive duties did not have a mental/personality disorder or physical condition that could result in an accidental or unauthorized detonation of nuclear explosives.

EFFECTIVE DATE: This rule is effective April 22, 2004.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Gebrowsky, Security Policy Staff, Office of Security, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C., 20585, (301) 903–3200, or Mr. Charles Westfall, Office of Nuclear Weapons Surety, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585, (301) 903–4051.

For information concerning Subpart B, Medical Standards, contact: Mr. Kenneth O. Matthews, Office of Health, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (301) 903–6398.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Atomic Energy Act of 1954 (the AEA), the DOE owns, leases, operates or supervises activities at facilities in various locations in the United States. Many of these facilities are involved in researching, testing, producing, disassembling, or transporting nuclear explosives, which, when combined with Department of Defense delivery systems, become nuclear weapons systems. These facilities are often involved in other activities that affect the national security. Compromise of these and other DOE facilities would severely damage national security. To guard against such compromise, DOE has implemented security and safety reliability programs designed to ensure that individuals who occupy positions affording unescorted access to certain materials, facilities, and programs meet the highest standards of reliability as well as physical and mental suitability.

In 1989, as part of its ongoing efforts to protect national security, DOE established regulations at 10 CFR part 710, subpart B, "Criteria and Procedures for Establishment of the Personnel Security Assurance Program and Determinations of an Individual's Eligibility for Access to a Personnel Security Assurance Program Position." These Personnel Security Assurance Program (PSAP) regulations apply to individuals who occupy positions throughout the DOE complex that involve access to, or responsibility for, special nuclear material or who otherwise have the potential to cause unacceptable damage to national security. In 1998, DOE established regulations at 10 CFR part 711, "Personnel Assurance Program (PAP)." The PAP codified longstanding certification procedures for individuals who occupy positions that involve hands-on work with, or access to, nuclear explosives.

As the PSAP and PAP evolved, significant similarities developed in the objectives, requirements, and administration of the two programs. DOE has concluded that the monetary and time requirements of administering two very similar programs with similar goals, the protection of special nuclear material and nuclear explosives, could not be justified as consistent with good management practices when compared to the benefits of consolidation.

On July 17, 2002, DOE published a notice of proposed rulemaking (NOPR) to establish a Human Reliability Program (HRP) (67 FR 46912). Subpart A of the proposed rule contained the provisions that established the HRP and the HRP certification requirements, while Subpart B contained the medical standards provisions required for HRP certification. The NOPR proposed to establish a single unified HRP management structure that incorporated all of the important elements of the PSAP and PAP into one comprehensive regulation. By adopting a uniform set of requirements applicable to both PSAP and PAP employees, DOE has developed a stronger, more efficient, and more effective human reliability program for personnel who occupy these positions.

The HRP, published today as 10 CFR part 712, is designed to protect the national security through a system of continuous evaluation of individuals working in positions affording unescorted access to certain materials, facilities, and programs. The purpose of this continuous evaluation is to identify, in a timely manner, individuals whose judgment may be impaired by physical,

mental/personality disorders; the use of illegal drugs or the abuse of legal drugs or other substances; the abuse of alcohol; or any other condition or circumstance that may represent a reliability, safety, or security concern.

The HRP requires that all individuals who work in positions affording unescorted access to certain materials, facilities, and programs be certified as meeting the highest standards of reliability and physical, mental/personality suitability before such access may be granted. An individual's certification is subject to immediate review in the event that the individual's behavior indicates a reliability or security risk to nuclear explosive operations or national security. During the review the individual will be removed from assigned duties. This immediate removal is an interim, precautionary action and does not constitute a final determination of reliability or access authorization status. Individuals who are removed from HRP duties for reasons that are not related to security are entitled to resolve these issues through a formal procedure outlined in § 712.19 through § 712.23 of today's final rule. If the removal is based on a security concern, 10 CFR part 710, subpart A, provides procedures for resolving issues concerning eligibility for an access authorization. These regulations require that the individual be given a written statement of the issues, an opportunity to respond, including an opportunity for a hearing before a DOE Hearing Officer, and an opportunity to have the opinion of the hearing officer reviewed at a higher level before a final determination is made.

Most of the provisions of the HRP rule are taken directly from the PSAP and PAP regulations. However, the HRP rule has several new requirements applicable to all HRP positions and some new requirements for certain HRP positions. These include:

1. *Random alcohol testing for all individuals in HRP positions.* The decision by DOE to require random alcohol testing for all individuals in HRP positions is supported by scientific research that shows that cognitive and physical task performance decreases as a result of alcohol abuse (Hartwell *et al.*, "Workplace alcohol testing programs: Prevalence and trends," *Monthly Labor Review,* V121, 1998; Mangione *et al.*, "Employee drinking practices and work performance," *Journal of Studies on Alcohol,* V60, 1999; Ames *et al.*, "The relationship of drinking and hangovers to workplace problems: An empirical study," *Journal of Studies on Alcohol* V58, 1997; Yesavage and Leirer, "Hangover effects on aircraft pilots 14 hours after alcohol ingestion: A preliminary report," *American Journal of Psychiatry,* V143, 1986).

DOE believes that the misuse or abuse of alcohol represents a risk that is incompatible with the nature of work performed by individuals in HRP positions. DOE has a compelling interest in ensuring that individuals who hold HRP positions are functioning at the highest level of reliability because they have unescorted access to certain materials, facilities, and programs. This interest outweighs the diminished privacy expectations resulting from intrusions caused by a carefully tailored alcohol testing program. The government must ensure the unimpaired judgment of persons who perform hands-on work with, or have access to, nuclear explosives or have access to, or responsibility for, special nuclear material. It also must ensure that the persons charged with the security of these research and production facilities do not pose a risk to the life of the citizenry by the use of deadly force resulting from impaired perception or judgment.

The part of the HRP regulation pertaining to random alcohol testing is consistent with regulations of other Federal agencies charged with overseeing critical activities, and specifically the regulations of the Department of Transportation. On February 15, 1994, the Department of Transportation (DOT) operating agencies promulgated alcohol testing regulations for the aviation, motor carrier, rail, transit, and pipeline transportation industries. In the common preamble to those regulations, the operating agencies discussed the research regarding the effects of blood alcohol and recommendations of expert bodies, including the National Highway Traffic Safety Administration (NHTSA), the National Transportation Safety Board, the National Academy of Sciences, and the Transportation Research Board (59 FR 7302, 7318–19). DOT concluded, based on this body of research, that while impairment of performance of safety-sensitive functions clearly was increased above 0.04 percent blood alcohol concentration, there was evidence of some impairment at levels as low as 0.02, the lowest level that can be reliably measured. Alcohol affects individuals differently; indeed, even a minimal level of blood alcohol impairs some individuals. Based on this evidence, DOT adopted a standard that requires removal from a safety-sensitive position of an employee with an alcohol concentration of 0.02 percent or greater. The DOT regulations requiring random alcohol testing already apply to some DOE and contractor employees at certain sites.

The Nuclear Regulatory Commission (NRC) also considers the misuse of alcohol to be a serious and pervasive workplace problem (Barnes *et al.*, "Fitness for Duty in the Nuclear Power Industry: A Review of Technical Issues," 1988, NUREG/CR–5227, U.S. Nuclear Regulatory Commission, Washington, D.C.; Moore *et al.*, "Fitness for Duty in the Nuclear Power Industry: A Review of Technical Issues," 1989, NUREG/CR–5227, Supplement 1, U.S. Nuclear Regulatory Commission, Washington, DC). The NRC requires random alcohol testing in its fitness-for-duty program contained in 10 CFR part 26.

The job tasks performed by individuals in the HRP are equally or more sensitive than those performed by workers in the transportation and the nuclear power industries, and the HRP tasks have added security-sensitive elements. An individual in the HRP who misuses or abuses alcohol has the potential capability to (1) cause an accidental or unauthorized detonation of a nuclear explosive; (2) misuse deadly force in guarding or transporting special nuclear materials or nuclear weapons; (3) cause a criticality incident involving special nuclear material; or (4) misuse classified information. DOE believes that random alcohol testing will enhance the safety and reliability aspects of the HRP and deter the use of alcohol on the job, as well as during a period prior to reporting for work. Individuals in HRP positions also will be subject to testing if they are involved in an incident, unsafe practice, or occurrence as defined in § 712.3 of the regulation, or if there is reasonable suspicion that their judgment may be impaired.

2. *Eight-hour abstinence rule for alcohol.* In the past, individuals reporting for nuclear explosive duties under PAP have been prohibited from drinking alcohol during the eight hours before their work assignments. This eight-hour abstinence requirement is retained in the HRP for those employees and is now applicable to employees in specific positions to be designated by the National Nuclear Security Administration (NNSA) Administrator or his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee or the Manager of the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; Manager of the Rocky Flats Office; Manager of the Pittsburgh Naval Reactors Office and the

Schenectady Naval Reactors Office; Site Office Managers for Livermore, Los Alamos, Sandia, Y–12, Nevada, Pantex, Kansas City, and Savannah River; Director of the Service Center, Albuquerque; Assistant Deputy Administrator for the Office of Secure Transportation, Albuquerque; and for the Washington, DC area, the Director, Office of Security (hereinafter collectively referred to as the "Manager" in accordance with § 712.3 of the regulation). This abstinence requirement is in addition to the random alcohol testing requirement.

3. *Annual Submission of Questionnaire for National Security Positions (QNSP), Part 2.* Submission of this Questionnaire previously had been required only for participants in the PSAP DOE now has made this a requirement for all individuals in the HRP, thereby underscoring DOE's commitment to evaluating personnel security concerns. This annual requirement will assist in ensuring that HRP-certified individuals are reliable and trustworthy.

4. *Psychological evaluations.* This requirement previously was in effect only for PAP individuals and now is required for all HRP candidates and HRP-certified individuals. The psychological evaluation, as part of the overall medical assessment, addresses an individual's mental or behavioral state as it relates to security and safety concerns. This evaluation includes the completion of a psychological assessment (test) and a semi-structured interview with the Designated Psychologist, or a psychologist under his or her supervision. The psychologist conducting the semi-structured interview has the latitude to vary the focus and content of questions based on the results of the psychological test and/or the interviewee's response to certain questions. Through this evaluation process, an assessment is made of whether the individual shows at-risk behavior or conditions that raise a security concern or may impact the ability to perform his or her duties in a safe and reliable manner. Individuals will be subject to an initial psychological evaluation and annual evaluations thereafter. Every third year individuals in an HRP position will be required to take another psychological assessment (test). This process will assist medical personnel in their efforts to monitor participants and ensure that individuals in HRP positions are reliable and trustworthy.

5. *Counterintelligence polygraph examinations.* A counterintelligence-scope polygraph examination in accordance with DOE's Polygraph Examination Regulation, 10 CFR part 709, was required for individuals who occupied or applied for PAP and PSAP positions. HRP positions will continue to be subject to the requirements of 10 CFR part 709 and any subsequent revisions to that regulation. Refusal to submit to a polygraph examination will result in rejection of the initial application for, or removal from, an HRP position, consistent with procedures in 10 CFR part 709.

II. Discussion of Public Comments

DOE received a total of two hundred and twelve written comments and forty-one oral comments during public hearings held in Albuquerque, New Mexico, Livermore, California, Amarillo, Texas, and Oak Ridge, Tennessee. DOE has carefully considered all of these comments in preparing this final rule.

A. Section-by-Section Review and Discussion of Public Comments

Comments Regarding § 712.1 Purpose

A commenter questioned the use of "facilities" and "programs" without specific definitions of these terms. The Department disagrees that definitions are needed because these terms are commonly used throughout DOE.

The Department disagrees with a commenter's suggestion to replace the phrase "or any other condition or circumstance that may be of a security or safety concern" with "* * * or by their personality or behavioral tendencies." As written, the text clearly conveys the intent of the rule and allows a broader assessment of individuals.

One commenter suggested adding the term "quality" when using the terms "safety and security." The Department disagrees with this suggestion because it adds no clarity to the sentence.

Comments Regarding § 712.3 Definitions

A number of commenters raised issues pertaining to the definitions section. All definitions were reviewed and several were modified for clarification.

One commenter raised a question regarding the use of the Accelerated Access Authorization Program (AAAP) for HRP certification since it does not require a random alcohol test. The AAAP is a program for granting an interim access authorization and is not used for HRP certification purposes. Once individuals have successfully completed the AAAP, they are required to meet all of the HRP certification requirements including initial and random alcohol testing.

Several commenters suggested including the term "special assembly" in the phrase "nuclear explosive and/or Category I SNM" in paragraph (2) in the definition of *access* and throughout the text. The Department disagrees that adding this term would enhance the definition of *access*; the definition as proposed covers access to "special assembly."

A commenter indicated that the definition of *alcohol abuse* is overly broad. The Department disagrees with the commenter. The definition of alcohol abuse is derived from the scientific literature dealing with alcohol-related disorders.

Several commenters suggested changing the definition of *blood alcohol concentration* to indicate that it is measured as a percentage. The text has been modified to parallel the DOT definition of *alcohol concentration* set forth at 49 CFR 40.3.

Several other commenters noted that the definition of the *certifying official* was not consistent with the NNSA organizational structure. The Department concurs and the text has been changed to reflect the organizational structure.

One commenter suggested that as written, the definition of *Designated Psychologist* could include a licensed person with a master's or bachelor's degree. The Department concurs and has changed the text to better define the term.

Commenters suggested changing *HRP individual* to *HRP candidate.* The Department agrees this would clarify the meaning. The text has been changed.

One commenter proposed a less vague definition of *HRP management official.* The Department is not making this change because the current definition allows sites the flexibility to identify the most appropriate person to be responsible for the HRP.

Another commenter suggested revising the definition of *job task analysis* because the recommended process would be burdensome and require frequent updates. The Department has modified the text to better reflect the intent of the rule.

One commenter suggested adding additional examples for the definition of *occurrence.* The Department believes that the definition is appropriate as written and does not need additional examples.

Another commenter criticized the definition of *occurrence* claiming that it "conflicts with itself." The Department believes that the definition is correct and covers the various aspects of an occurrence at its sites.

A commenter questioned the term "national security protection significance" in the definition of *occurrence* and asked for examples of this term as well as the definition of "immediate" under occurrence testing in § 712.15(d)(1). "National security protection significance," also referred to as "National Security Assets" (*Safeguards and Security Glossary of Terms,* December 18, 1995), refers to nuclear weapons and their design, Category I quantities of special nuclear material, classified information, sensitive information, critical facilities, and valuable government property. The immediate reporting requirement is based on the criteria set forth in DOE M 232.1–1A, "Occurrence Reporting and Processing of Operations Information."

A commenter suggested adding a definition for *psychological assessment* or *test*. The Department concurs and has added new text to reflect this suggestion.

One commenter suggested, in addition to defining *random alcohol testing*, the regulations should include a definition for *annual unannounced testing*. The Department does not believe that a definition is needed. However, after reviewing the definition for *random alcohol testing* the Department has changed the text of the definition to better define the term and its requirements.

A commenter stated that the definition of *safety concern* is difficult to follow. The Department concurs and the text has been changed.

Another commenter suggested adding text to the *supervisor* definition to better define matrix management situations. The Department concurs with this suggestion and has modified the definition of *supervisor* to reflect the suggestion.

Several commenters suggested adding the word "inclination" to the definition for *reliability*. The Department disagrees with this suggestion because it does not enhance the current definition.

Comments Regarding § 712.10 Designation of HRP Positions

Several commenters contended the proposed provision on designation of HRP positions was "broad and vague." The Department disagrees and believes that the description clearly identifies the HRP population.

Several commenters questioned why individuals having "access to information/material regarding" weapons of mass destruction were not included in the HRP. While the Department recognizes the importance of programs pertaining to weapons of mass destruction, it believes that it is not appropriate to expand the HRP beyond the current PAP and PSAP populations, because the purpose of this rulemaking is to combine two programs with similar administrative requirements into one stronger, more efficient and more effective program.

One commenter suggested designating positions with specific sigma levels as HRP positions. The Department disagrees with this suggestion and believes that the current position descriptions are appropriate as listed.

Several commenters suggested that, since the HRP is a fitness for duty program, the application of procedures and requirements should be graded based on the job task analysis. The Department disagrees with this suggestion. The HRP is not a fitness for duty program. It is a security/safety program which includes some aspects of fitness for duty.

One commenter suggested changes in the NNSA organizational structure make the job titles in the proposed rule incorrect. The text has been modified to address these changes.

Comments Regarding § 712.11 General Requirements of HRP Certification

One commenter asked why only security police officers could obtain a "Q" access authorization through the AAAP. The AAAP provision was incorporated into the PSAP to allow security police officers to assume their duties as soon as possible to enhance the physical security of the various DOE sites. The Department adopted the provision because of the urgent need for additional security police officers in the aftermath of the terrorist acts of September 11, 2001.

A number of commenters questioned the requirement for a counterintelligence polygraph examination in proposed § 712.11(a)(10). This requirement was mandated by Congress in the National Defense Authorization Act of 2000. In response to that legislation, DOE issued a Polygraph Examination Regulation (10 CFR part 709); DOE's Office of Counterintelligence is responsible for administering this requirement of the HRP.

A commenter questioned the need for the requirement in proposed § 712.11(a)(2) for providing selective service registration information within Part 2 of the Questionnaire for National Security Positions. This is a standard form used throughout the government. The Department cannot modify the form.

Other commenters questioned the omission of the flashback issue in proposed § 712.37 on evaluation for hallucinogen use. A new paragraph (b) has been added to § 712.37 to reflect this issue.

Several commenters questioned whether the proposed § 712.11(a)(9) random alcohol testing element of the HRP is necessary for security-related jobs. The Department recognizes that the consumption of alcohol is legal; however, the misuse and abuse of alcohol represent a risk that is incompatible with the nature of work performed by individuals in HRP positions. The Department believes that random alcohol testing will enhance the safety and reliability aspects of the HRP and deter the use of alcohol on the job as well as during the period immediately prior to reporting to work.

Other commenters questioned the appropriateness of adopting specific components of the DOT alcohol test regulation, 49 CFR part 40, including: breath alcohol technician training requirements, the NHTSA Conforming Products List of Evidential Breath Measurement Devices, the specifications for alcohol used to calibrate the testing equipment, and the EBT manufacturer quality assurance plan. Early in the process of developing proposed 10 CFR part 712 for the HRP, the Department made the decision to use the DOT Procedures for Transportation Workplace Drug and Alcohol Testing Program set forth at 49 CFR part 40 because this regulation has established proven procedures and is cost-effective for DOE to utilize since most facilities already have the trained technicians and equipment to perform the tests. After considering the public comments, the DOE affirms its decision to follow the DOT regulations for the reasons given above.

Several commenters suggested the use of alternative alcohol screening devices for initial screening, such as a saliva test strip. The Department does not agree with this suggestion and believes that the use of an evidential-grade breath alcohol device is the appropriate and industry accepted standard for evaluating alcohol concentrations.

One commenter suggested making the proposed random alcohol testing discretionary and using a "for cause" or "reasonable suspicion" standard. The Department disagrees with the suggestion and believes the procedure outlined in the proposed rule adequately addresses the concerns regarding alcohol testing. DOE believes that job tasks performed by individuals in the HRP are equally, or more safety-sensitive than those performed by workers in the transportation industry and the nuclear power industry. Therefore, it is appropriate that the DOE

regulations for alcohol testing be at least as stringent as the DOT and NRC regulations.

A commenter suggested adding the words "safety" and "quality-reliability and assessing continuous suitability to the activity at hand" to the general requirements for HRP certification. The Department agrees in part and has added "safety" to the certification text (§ 712.11(b)(1)). DOE does not believe the remaining suggested text is necessary programmatically or to improve upon the clarity of the proposed language, which is retained in today's rule.

Another commenter raised a question concerning the use of over-the-counter medications that contain alcohol. The proposed rule, § 712.11(d), did not differentiate between alcohol purchased for consumption and alcohol contained in over-the-counter medications for purposes of testing for alcohol use by individuals reporting for unscheduled nuclear explosive duties. Both can impair an individual's judgment and reliability while performing HRP duties. For this reason, DOE has not revised the final rule to differentiate over-the-counter medications containing alcohol.

A commenter suggested changing the text in proposed § 712.11(d) for the eight-hour abstinence requirement to include text that identifies individuals who may perform nuclear explosive duties on an irregular basis. The Department disagrees with this suggestion and believes the text as written provides appropriate guidance for all individuals performing nuclear explosive duties and is sufficient in describing this requirement.

Several commenters questioned the need for the eight-hour abstinence requirement. As explained in item 2 of the Background section, this requirement has always been a part of the PAP for individuals performing nuclear explosive duties. The requirement has been expanded to also include specific positions designated by the NNSA Administrator, the appropriate Lead Program Secretarial Office, or the Manager of the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; Manager of the Rocky Flats Office; Manager of the Pittsburgh Naval Reactors Office and the Schenectady Naval Reactors Office; Site Office Managers for Livermore, Los Alamos, Sandia, Y–12, Nevada, Pantex, Kansas City, and Savannah River; Director of the Service Center, Albuquerque; Assistant Deputy Administrator for the Office of Secure Transportation, Albuquerque; and for the Washington, DC area, the Director, Office of Security. The Department believes the requirement (§ 712.11(d)), which affects only a small portion of the HRP population, is necessary to ensure the reliability of personnel in HRP position.

One commenter, who questioned the need for the eight-hour abstinence requirement, also objected to the proposed 0.02 blood alcohol levels (§ 712.11(c)). The commenter suggested DOE adopt the less stringent NRC Fitness for Duty Policy. The Department believes the HRP requirement is appropriate because HRP job requirements differ from those covered under the NRC rule.

One commenter questioned why the proposed unscheduled work and alcohol consumption provision, § 712.11(c), should apply to exempt workers attending to work responsibilities outside of normal work hours. This requirement, which was a requirement under PAP, applies to all workers performing nuclear explosive safety duties or those designated by the Manager, the NNSA Administrator, or Lead Program Secretarial Office. The sensitive nature of the work performed by individuals in these positions requires that exempt employees also be subject to the eight-hour abstinence provision.

Several commenters suggested removing the proposed unscheduled work reporting requirement in § 712.11(d). They claimed the requirement is "unenforceable, impractical to implement, and only serves to agitate interpersonal relationships." The Department disagrees with this suggestion. This is a longstanding requirement for individuals performing nuclear explosive duties, and the Department believes that it is a valuable and essential component of the HRP.

One commenter, concerned about the 12-hour abstinence requirement, suggested it should be replaced by the former eight-hour standard. The proposed HRP regulations do not have a 12-hour abstinence requirement but rather an eight-hour abstinence requirement (§ 712.11(c)) as recommended by the commenter.

Another commenter suggested that an individual be allowed to obtain a confirming blood alcohol test in addition to the current testing procedure. The Department disagrees and believes the procedures in § 712.11(e), which conform to 49 CFR part 40, are appropriate.

A number of commenters questioned the lack of guidance in proposed §§ 712.11(e) and 712.15(c) concerning an individual who has a breath alcohol concentration of 0.02 percent or greater. The Department concurs and has added specific language in § 712.15(c)(3) to address these concerns.

A number of commenters questioned the 0.02 percent blood alcohol concentration limit in proposed §§ 712.11(e) and 712.15(c), and suggested that the level be increased to at least 0.04. The Department disagrees with this change and, as discussed in the Background section, this follows the DOT regulations. The Department believes that the 0.02 level of blood alcohol is appropriate. The rule has not been changed to adopt the commenters' suggestion.

One commenter contended that § 712.11(e) and § 712.15(d)(1) pertaining to "occurrence testing," are redundant regarding testing for alcohol and/or drugs. The Department disagrees with this comment and points out that these two sections support each other regarding the procedures which would be followed and potential actions taken in occurrence testing situations.

Another commenter questioned the "must" requirement in proposed § 712.11(f) for alcohol/drug testing for any type of incident or unsafe practice. The Department concurs and has changed the text (replacing "must" with "may" in § 712.11(e)) to give greater flexibility to the sites.

A commenter asked whether individuals could be tested under the eight-hour requirement after stating they had not consumed alcohol. As § 712.11(d) makes clear, "If they answer 'no,' they may perform their assigned duties but still may be tested."

Comments Regarding § 712.12 HRP Implementation

A commenter criticized the extensive discussions of roles of numerous individuals, the lack of information for the HRP management official, and the incorrectness of the role of the Operations Office Managers. The Department has changed the text regarding Operations Office Managers to reflect the new NNSA organizational structure. In addition, the commenter noted that even if an organization performs all the tasks specified in the HRP it could still fail to identify potential security and safety risks. The commenter is correct. Even if all the HRP tasks are performed as required, the process still could fail. This is true for any program, and for this reason the Department has established specific objectives and requirements to help reduce the possibility of a failure. The key elements in the process are the individuals who work in HRP positions and their commitment to its success.

Another commenter stated that the role of the supervisor in the Supervisory Review section, proposed § 712.13, is unclear. The Department disagrees but has revised the text to describe the process more clearly.

One commenter questioned the omission of the role of the Deputy Administrator for Defense Programs, NNSA, regarding responsibility for nuclear materials at NNSA sites. The Deputy Administrator for Defense Programs has many responsibilities, which include the safety and security of nuclear materials at NNSA sites. The responsibilities identified in § 712.12, HRP Implementation, deal specifically with nuclear explosive duties and their requirements. The Department believes that text as written clearly identifies this specific requirement and does not need to be expanded.

A commenter suggested adding the term "following temporary removal" to clarify the HRP certifying official's responsibilities in § 712.12(g)(1). The Department concurs and the text has been changed.

Several comments were received regarding the requirement in proposed § 712.12(h)(2) for reporting prescription drugs and over-the-counter medication to only the Site Occupational Medical Director (SOMD). The text has been changed to allow this reporting requirement to include the Designated Physician and the Designated Psychologist. One commenter supported the proposed requirement that over-the-counter medications be reported; several others questioned the need for such a requirement. In addition, several commenters proposed that the individual's private physician provide such information. The Department does not believe that a person's private physician adequately knows and understands the individual's work requirements. Since the Designated Physician, the Designated Psychologist, or the SOMD can refer to the individual's job task analysis, a decision can be made based on a clear understanding of job requirements. Both prescription drugs and over-the-counter medications can affect an individual's judgment and reliability, and thus the Department believes this reporting is an important part of the HRP. It is not the intent of this rule to list categories or names of drugs that should be reported to the Designated Physician, the Designated Psychologist, or the SOMD. Common sense should be applied. Taking medications that can impact an individual's physical or mental capabilities (for example, those with instructions not to drive or operate motorized machinery) should be reported to the Designated Physician, the Designated Psychologist, or the SOMD. If an individual is unsure of possible side effects, he or she should consult with the Designated Physician, the Designated Psychologist, or the SOMD. Medications that do not have physical and/or mental side effects, such as medicated shampoos or dermatological ointments, would not be reportable.

One commenter objected to the proposed requirement in § 712.12(h)(4) to report another HRP-certified individual, specifically if they observe the individual purchasing, possessing, or using alcohol at any time. DOE believes that the text as written clearly indicates that this reporting requirement is based on the judgment of the individual observing the behavior. The purchase, possession, or use of alcohol is not a reportable issue. If, however, it is believed that the observed use is chronic and excessive, thereby indicating a reliability concern, then it should be reported to a supervisor and/or the Designated Physician, the Designated Psychologist, or the SOMD.

A commenter read the preamble to the notice of proposed rulemaking as not authorizing the HRP certifying official to temporarily remove an individual from an HRP position. The HRP certifying official does have this authority as stated in proposed § 712.12(g)(1). The commenter also suggested that the HRP certifying official temporarily remove individuals who have missed their recertification date. This is already addressed in proposed § 712.12(g)(4). If an individual fails to meet the 12-month recertification requirements, he or she is removed from the HRP. An exception is made if the personnel security element cannot resolve an issue within the 12-month requirement. New text has been added in § 712.11(a)(5)(i) to address this issue.

Another commenter suggested adding language that would require an individual to do a self-assessment of his or her ability to perform HRP duties. The Department agrees and has added text in § 712.12(h)(5) of this rule.

Comments Regarding § 712.13 Supervisory Review

A commenter stated that the supervisory review requirements in proposed § 712.13(b) and (c) should identify the types of security concerns the supervisor is expected to evaluate. The Department disagrees and believes the training requirement for supervisors will provide the necessary knowledge to address the security and safety issues outlined under the supervisory reviews.

One commenter suggested adding "domestic violence" and "workplace incident leading to disciplinary action" to the proposed list of reportable behaviors and conditions supervisors are required to report. The Department believes that these behaviors are covered in the existing examples listed in § 712.13(c). The list is not intended to be exhaustive or comprehensive.

Several commenters contended there was a need for greater clarity in proposed § 712.13(d)(2), authorizing "temporary removal" by the SOMD and the HRP-certifying official. The Department agrees and has added text allowing the Designated Physician and Designated Psychologist to recommend temporary removal of individuals from HRP positions. The HRP Certifying Official already has this authority so no new text was added.

A commenter questioned why § 712.13(e) applies only to Federal employees. Federal employees have a different set of rules relating to their removal or transfer. This section addresses this issue. The Department has added additional text to describe this requirement more accurately.

Another commenter stated that alcohol should be included in the list of concerns to be recognized and reported. The Department concurs and has added this language to the rule in § 712.13(f).

Comments Regarding § 712.14 Medical Assessment

A commenter noted that a Physician's Assistant (PA) and a Nurse Practitioner (NP) currently perform some medical evaluations and asked if they could conduct an HRP medical assessment. This is allowed in the HRP as long as the Designated Physician oversees the process and is responsible for signing the certification or recertification form.

One commenter questioned the utility of the job task analysis requirement in proposed § 712.14(e). The Department believes that this detailed information regarding an employee's job tasks is vital to the physician who is conducting the medical assessment, because it may have bearing on both physical and mental health status. The job task analysis also is a requirement in DOE Order 440.1A, "Worker Protection Management for DOE Federal and Contractor Employees."

One commenter raised the concern that the job task analysis does not take into consideration psychological factors such as mental stress, fatigue, or boredom. The Department disagrees and believes that the job task analysis as part of the medical assessment addresses this concern. Another commenter suggested replacing the term "condition" in

proposed § 712.14(a)(2) with "demonstrates problems with reliability or judgment." The Department disagrees with this suggestion because the term "condition" in this context refers to a factor that restricts or modifies physical health, which includes one's psychological status. In addition, the term suggested already is part of the supervisory review process.

Another commenter asked what criteria the medical staff would use in applying proposed § 712.14(c) to determine if an individual represents a security concern. The criteria in 10 CFR 710.8 identify the following: An illness or mental condition, alcohol abuse or dependency, use or experimentation with drugs or other illegal substances, or unusual conduct which raises a question about an individual's judgment, reliability, and trustworthiness. These criteria and those listed in § 712.13(c) are the basis for a medical security concern.

One commenter suggested adding the phrase "and other examiners working under the direction of the Designated Physician" in proposed § 712.14(b)(2). The Department has incorporated the language in this section even though Subpart B, § 712.32(c) specifically provides that a portion of the assessment may be performed by another physician, a physician's assistant (PA), or nurse practitioner (NP).

A commenter suggested adding revealed substance abuse problems to the list of reasons in proposed § 712.14(b)(2) to conduct an intermediate medical evaluation. The Department believes the referral by management under § 712.14(b)(2)(ii) for a medical evaluation adequately covers this situation.

One commenter questioned the use of the term "intermediate" in proposed § 712.14(b)(2). The Department concurs and has omitted this term.

A commenter objected to the evaluation requirement in proposed § 712.14(d) of the medical assessment requirement, stating that such a requirement was in essence a "fishing expedition." The Department disagrees with this characterization of the evaluation. The medical examination requirements clearly identify the areas that require assessment. The job task analysis provided to the Designated Physician/Designated Psychologist provides the framework for determining what conditions are significant to an individual's ability to perform work in a safe and secure manner. If a medical/psychological condition is believed to be clinically insignificant, then it is not an issue and would not be identified.

Several commenters requested guidance on what specific medical tests are required for the HRP medical assessment and for a clearance. In considering this comment, the Department referred to DOE Order 440.1A, "Worker Protection Management for DOE Federal and Contractor Employees," which states under Employee Health Examinations: "Health examinations shall be conducted * * * in accordance with current sound and acceptable medical practices." The minimum elements of a comprehensive medical evaluation are further described in DOE Guide 440.1–4 as a medical/occupational history, physical examination, laboratory studies, and review and evaluation of findings. The Department reviewed what current medical tests were routinely performed at the various DOE sites. The tests that are routinely performed are: complete blood count, blood chemistry, electrocardiogram, pulmonary function tests, urinalysis, vision, and hearing acuity. These should be the minimum for an HRP medical assessment. Additional tests such as a graded stress test may be performed at the physician's discretion. The tests listed above also may indicate a problem that is or may become a security concern as described in 10 CFR 710.8, *e.g.*, alcohol abuse or dependency and illegal substance use. DOE believes that it is inappropriate to specify in the regulation which medical tests should be performed because these are decisions best left to the physician's discretion.

A commenter suggested including text in proposed § 712.14(e) that would require the Designated Physician/Designated Psychologist to use the job task analysis when performing assessments. The Department believes that no change is needed because it is implicit in § 712.14(e) that the Designated Physician and Designated Psychologist must use the job task analysis in conducting the medical assessment and psychological evaluation.

A commenter suggested that language be incorporated in proposed § 712.14(f)(3) that would allow the testing portion of the psychological evaluation to be phased in within a three-year period. The Department agrees and has added appropriate text to the rule.

Another commenter questioned whether proposed § 712.14(h) would permit another health care provider, *i.e.*, Designated Physician, PA, or NP, to temporarily remove or restrict an individual. Section 712.14(h) has been modified to allow the Designated Physician and Designated Psychologist to recommend temporary removal or restrictions on an HRP-certified individual.

One commenter suggested changing the psychological assessment test requirement in proposed § 712.14(f)(3) from every three years to every five years. The Department disagrees with this suggestion. This three-year requirement was a PAP requirement and will be continued in the HRP.

A commenter questioned the use of the term "certain circumstances" in proposed § 712.14(g) pertaining to return to work after sick leave. The Department agrees those words are unnecessary and has removed them from the text.

A commenter requested proposed § 712.14(g) be clarified to specify which official could approve "return to work." Text has been added that allows the Designated Physician, the Designated Psychologist, or the SOMD to perform this function.

Another commenter asked what other evaluations are the sole responsibility of the SOMD. The responsibilities of the SOMD are listed in subpart B, Medical Standards, § 712.34.

A commenter suggested changing the language in proposed § 712.14(j) regarding the medications and treatment section within the medical assessment to include changes in an existing medication regimen. The Department has not included the suggested language because the text as written clearly identifies the requirements.

Comments Regarding § 712.15 Management Evaluation

A commenter questioned whether the 0.02 percent or greater alcohol concentration requirement in proposed § 712.15(c) must be maintained at all times, such as "midnight on Friday." The 0.02 percent alcohol concentration requirement is for any HRP-certified individual who is performing HRP duties during any work cycle.

One commenter raised a concern regarding requirements appearing in multiple sections. The Department does not believe this is a problem since each section defines the specific requirement for that section. The Department feels that combining all the requirements under just one section would increase the possibility of error and inconsistency.

Another commenter suggested deleting the terms "incident" and "unsafe practice," in § 712.15(b), because the testing protocol in 10 CFR part 707 is referenced and those terms are not used in that part. The Department utilizes the testing protocol

set forth in 10 CFR part 707 but in proposed § 712.15(c) also requires testing when an HRP-certified individual is involved in an incident, unsafe practice, or occurrence, as defined in the regulation, or if there is a reasonable suspicion they may be impaired.

A commenter suggested adding text to proposed § 712.15(c) to indicate that the random unannounced testing would be conducted if necessary to achieve the requirement at least once in a 12-month period. The Department disagrees and believes the text as written clearly conveys the intent of the requirement.

One commenter raised a question regarding dual compliance issues between the HRP and DOT requirements. The Department does not believe a problem exists regarding dual compliance. The HRP requirements in proposed § 712.15(c)(2) regarding alcohol testing parallel the DOT requirements. In the event of a conflict between the two sets of requirements, the DOT regulation will take precedence.

A commenter questioned when the initial alcohol test is to be conducted (*e.g.*, prehire, during posthire processing, or prework). As clarified in § 712.15(c), the initial alcohol test for an individual coming into the HRP will be conducted during the individual's orientation into the HRP and prior to performing HRP duties.

Another commenter suggested requiring a preshift alcohol breath test. The Department does not agree and believes that the proposed testing requirement in § 712.15(c) allows ample latitude to address the circumstances under which testing should be conducted.

One commenter suggested that the word "annual" be included in the proposed alcohol testing requirement in § 712.15(c). The Department disagrees and notes that the requirement is once every 12 months.

A commenter suggested removing the text "if involved in an incident, unsafe practice or occurrence, or based on reasonable suspicion" from proposed § 712.15(c) and referencing sections (d) and (e) of this section. The Department disagrees with the proposed suggestion because it only identifies occurrence and reasonable suspicion and omits incident and unsafe practice, which also are reasons to test.

Several commenters questioned the two-hour time period allowed between notification and reporting for alcohol testing in proposed § 712.15(c)(3)(i) and provided information that showed if such an allowance was made, a person's blood alcohol level could fall below 0.02 percent in the interval. The commenters suggested that, for alcohol testing, the person should be required to report immediately to the testing facility. The Department is sensitive to the commenters' concern and notes that nothing prohibits a facility from having more stringent requirements. Text has been added to § 712.15(c)(3)(i) to allow facilities to establish a shorter time period from notification to testing. Such a requirement should be described in detail in the facility implementation plan.

Another commenter suggested removing the phrase "or the individual's behavior creates the basis for reasonable suspicion" from the occurrence testing provision in § 712.15(d) because this language appears in § 712.15(e) (Testing for reasonable suspicion). The Department concurs and the text has been changed.

A commenter questioned why proposed § 712.15(e)(1) required two or more supervisory or management officials for reasonable suspicion testing for alcohol when the DOT regulation requires only a single supervisor/manager. The Department is not bound to incorporate all aspects of the DOT regulation and believes that two or more supervisors/managers provide a greater degree of protection to management and even more importantly, to the individual. If an individual is subject to the DOT alcohol testing regulation, then DOT test procedures take precedence over the HRP regulation with respect to that individual.

One commenter questioned why the term "in possession of" was included in the proposed § 712.15(e)(2) reasonable suspicion text and again in the observable phenomena provision in § 712.15(e)(2)(i). The Department believes that the first part of the text identifies articulable belief, whereas the later reference identifies direct observation, which differs from beliefs that can be articulated.

Comments Regarding § 712.16 DOE Security Review

A commenter suggested adding text that would allow information from the personnel security file to be the basis for immediate removal if the information indicated a life-threatening risk. The Department believes that the proposed text in § 712.16(c) would allow the SOMD, the Designated Physician, or the Designated Psychologist to recommend removal of an individual who may pose a life-threatening risk to themselves or others as determined either through the medical assessment or on the basis of information received from DOE personnel security.

Comments Regarding § 712.17 Instructional Requirements

A commenter suggested that non-HRP-certified supervisors and managers also be required to receive appropriate training in the HRP. The Department concurs and has added appropriate text to the proposed § 712.17(a)(1).

One commenter asked if a reasonable suspicion component would be a part of the proposed behavioral training requirement in § 712.17(b)(1) as it relates to alcohol and controlled substance use. These elements will be part of the overall training requirement.

Another commenter suggested changing the text "HRP medical personnel" in proposed § 712.17(a)(2) to allow more flexibility. The Department disagrees and believes the text clearly identifies the appropriate personnel and allows flexibility in accomplishing the objective.

A commenter suggested adding additional text to the program training elements in proposed § 712.17(b) to allow for more flexibility. The Department concurs and has added text to reflect this change.

Comments Regarding § 712.18 Transferring HRP Certification

A commenter suggested changing the requirement in proposed § 712.18(b)(3) pertaining to transferring an HRP certificate requirement to allow the new site flexibility regarding the initial approval date. The Department concurs and the text has been modified.

Another commenter questioned language in proposed § 712.18(a) regarding the transfer of an HRP certification, indicating that as written it implied an individual could initiate a transfer request. The Department concurs and has modified the text.

One commenter questioned why proposed § 712.18(b) did not mention the personnel security process in connection with transferring an HRP certification. The Department did not include this in the HRP rule because transferring an HRP certification is a separate process from transferring an access authorization.

Comments Regarding § 712.19 Removal From HRP

A commenter suggested adding a new section that addresses immediate removal from HRP duties at the request of the HRP certifying official. The Department agrees that a supervisor must remove an HRP-certified individual immediately when requested by the HRP certifying official, and language has been added to § 712.19(a) to make this clear.

One commenter suggested changing the proposed text in § 712.19(a)(3) to delay the 24-hour written notification to an individual to be removed from HRP duties if the notification could have a negative impact on a psychiatric or medical condition. The Department is confident responsible officials will implement the requirements with appropriate sensitivity to the individual while simultaneously meeting DOE requirements.

Another commenter contended that the proposed provisions, §§ 712.19(a) and (c), respectively, prescribing supervisory and HRP management responsibilities in removal situations did not clearly provide for an evaluation and determination of the individual's reliability. The Department disagrees, and declines to adopt the alternative text proposed by the commenter.

Comments Regarding § 712.32 Designated Physician

Several commenters stated that it was not clear which other qualified personnel could perform parts of the medical assessment and that no clear guidelines existed for a PA and NP. The Department believes the proposed text in § 712.32(c) clearly allows the Designated Physician to utilize both PAs and NPs to conduct parts of the medical assessment. It is the responsibility of the Designated Physician to supervise the evaluation process, interpret the medical test results, and indicate if the individual is medically qualified to perform his or her HRP duties.

One commenter requested clarification of the requirement in proposed § 712.32(b)(4) regarding the Designated Physician's eligibility for a DOE access authorization. The Department does not require the Designated Physician to have an access authorization, but only to be eligible for an access authorization if one is required.

Comments Regarding § 712.34 Site Occupational Medical Director

Several commenters questioned the utility of the proposed requirement in § 712.34(b) for the SOMD to submit a renomination report biennially through the Manager to the Deputy Assistant Secretary for Health evaluating the performance of Designated Physician and Designated Psychologist and asked for more information regarding the proposed report's content. The Department believes these reports will be an important aspect of the medical assessment process and will provide needed information regarding the effectiveness of the various components of the medical assessment. The Office of Health will be responsible for detailing the specific content of these reports.

Comments Regarding § 712.35 Deputy Assistant Secretary for Health

One commenter suggested that greater detail regarding the responsibilities of the Deputy Assistant Secretary for Health be incorporated into the rule. The Department disagrees and believes the proposed rule allows the latitude needed to develop appropriate policies and standards for the medical assessment.

Comments Regarding § 712.36 Medical Assessment Process

A commenter recommended modifying proposed § 712.36(d)(4) to reference the types of behavior or conditions enumerated in proposed § 712.13(c), which a supervisor must report following the annual evaluation of an HRP-certified individual, as reasons for conducting additional psychological or psychiatric evaluations. The Department concurs and the text has been modified to reflect this change.

One commenter asked whether proposed § 712.36(e) would permit a PA or NP to recommend a return-to-work and work accommodations. The rule does not give a PA or NP this responsibility.

Several commenters requested the disqualifying conditions, including criteria necessary for judgment determinations, be listed and defined. The Department disagrees and notes that under § 712.36(h) disqualifying conditions are based on the job task, fitness-for-duty requirements, and the Designated Physician's medical judgment relating to the physical and mental capabilities necessary to successfully perform required work.

A commenter asked if the HRP certification process would be suspended under proposed § 712.36(h) if the required documentation is not provided. The Department affirms that if the required medical documentation is not provided, the HRP process will be suspended until the documentation is provided.

B. Other Public Comments

DOE also received several general comments that did not address any specific sections of the NOPR. These are discussed below.

One commenter raised a question regarding the costs involved in the additional testing requirements. The Department recognizes that these new requirements have additional costs; however these costs are minimal because many of the requirements already are in place or in some cases are currently required for other programs.

We agree with the comment expressing concerns regarding the use of the "term emotional and mental disorders" and have substituted the term "mental/personality disorder" in the final rule.

Another commenter suggested that the regulation should contain procedures similar to the PAP regulation permitting an HRP-certified individual to request a medical assessment (i.e., self-referral). Text has been added at § 712.12(h)(5) to include this requirement.

A commenter asked whether being under the influence of alcohol would be treated differently than being under the influence of an illegal drug. Being under the influence of alcohol will be treated differently than being under the influence of an illegal drug or other substance. The consequences are described in the applicable subject sections.

A commenter asked if individuals who currently are in a PAP or PSAP position will be grandfathered into the HRP. Appropriate text has been added in § 712.2 to reflect that individuals who currently are in a PAP or PSAP position will be grandfathered into the HRP.

A commenter raised the question of how to measure the effectiveness of the HRP. DOE will measure the effectiveness of the HRP through site evaluations and continuous monitoring of the program elements.

One commenter questioned the use of the term "impairment" in relation to alcohol testing. The Department believes the term "impairment," defined in § 712.3 as a decrease in functional capacity of a person, is an appropriate term.

A commenter asked what psychological and physiological indicators the medical staff would monitor. These indicators include, but are not limited to, the behaviors and conditions listed in § 712.13(c), and the psychological test and interview and the medical evaluation criteria in § 712.14(d) for determining overall health.

III. Regulatory Review

A. Executive Order 12866

Executive Order 12866, 58 FR 51735 (October 4, 1993) provides for a review by the Office of Information and Regulatory Affairs in the Office of Management and Budget of a "significant regulatory action." This rule (10 CFR part 712) has been determined not to be a significant regulatory action. Accordingly, this rule

has not been reviewed by the Office of Information and Regulatory Affairs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of an initial regulatory flexibility analysis for every rule that must be proposed for public comment, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (67 FR 53461, August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: *http://www.gc.doe.gov*. DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This rule does not directly regulate small businesses or small governmental entities. It applies principally to individuals who are employees of, or applicants for employment by, some of DOE's prime contractors, which are large businesses. There may be some affected small businesses that are subcontractors, but the rule will not impose unallowable costs. Accordingly, DOE certifies that the rule will not have a significant economic impact on a substantial number of small entities.

C. National Environmental Policy Act

The rule, which consolidates the PAP and PSAP, relates to personnel qualifications that have no impact on the environment. DOE has determined that this rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations in paragraph A.6 of Appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement has been prepared.

D. Paperwork Reduction Act

DOE has determined that the rule does not contain any new or amended record keeping, reporting or application requirements, or any other type of information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* The OMB has defined the term "information" to exclude certifications, consents, and acknowledgments that entail only minimal burden [5 CFR 1320.3 (h)(1)].

E. Executive Order 13132

Executive Order 13132, 64 FR 43255 (August 10, 1999), requires agencies to develop an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have "federalism implications." Policies that have federalism implications are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined this rule and determined that it does 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.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires a Federal agency to perform a detailed assessment of the costs and benefits of any rule imposing a Federal mandate with costs to state, local, or tribal governments, or to the private sector of $100 million or more. The rule does not impose a Federal mandate requiring preparation of an assessment under the Unfunded Mandates Reform Act of 1995.

G. Executive Order 12988

Section 3(a) of Executive Order 12988, 61 FR 4729 (February 7, 1996) imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

H. Executive Order 13084

Under Executive Order 13084, 63 FR 27655 (May 19, 1998), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This rule does not have such effects. Accordingly, Executive Order 13084 does not apply.

I. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999, (Pub. L. No. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has not prepared a Family Policymaking Assessment.

J. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) requires Federal agencies to prepare and submit to the Office of

Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

List of Subjects

10 CFR Part 710

Administrative practice and procedures, Classified information, Government contracts, Government employees, and Nuclear materials.

10 CFR Part 711

Administrative practice and procedure, Alcohol abuse, Drug abuse, Government contracts, Government employees, Nuclear safety, Occupational safety and health.

10 CFR Part 712

Administrative practice and procedure, Alcohol abuse, Drug abuse, Government contracts, Government employees, Health, National security, Nuclear safety, Occupational safety and health, Personnel security, and Security concerns.

Issued in Washington, DC, on January 13, 2004.

Spencer Abraham,

Secretary of Energy.

■ For the reasons stated in the preamble, the DOE hereby amends Chapter III of Title 10 of the Code of Federal Regulations as set forth below:

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

■ 1. The authority citation for part 710 is revised to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*; 50 U.S.C. 2401, *et seq.*; Pub. L. 83–703, sec. 141, 68 Stat 940, as amended (42 U.S.C. 2161); Pub. L. 83–703, sec. 145, 68 Stat 942, as amended (42 U.S.C. 2165); Pub. L. 83–703, sec. 161, 68 Stat 948, as amended (42 U.S.C. 2201); E.O. 10450, 3 CFR 1949–1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 12958, 3 CFR 1995, comp., p. 333; E.O. 12968, 3 CFR 1995, comp., p. 391.

Subpart B—[Removed]

■ 2. Subpart B of 10 CFR part 710, is removed.

PART 711—PERSONNEL ASSURANCE PROGRAM

■ 3. The authority citation for part 711 continues to read as follows:

Authority: 42 U.S.C. 2201(p), 7191.

■ 4. Part 711 is removed.

■ 5. Part 712, Human Reliability Program is added to read as follows:

PART 712—HUMAN RELIABILITY PROGRAM

Subpart A—Establishment of and Procedures for the Human Reliability Program

General Provisions

Sec.

Procedures

Subpart B—Medical Standards

Authority: 42 U.S.C. 2165; 42 U.S.C. 2201; 42 U.S.C. 5814–5815; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; E.O. 10450, 3 CFR 1949–1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended; 3 CFR Chap. IV.

Subpart A—Establishment of and Procedures for the Human Reliability Program

General Provisions

§ 712.1 Purpose.

This part establishes the policies and procedures for a Human Reliability Program (HRP) in the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA). The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. This objective is accomplished under this part through a system of continuous evaluation that identifies individuals whose judgment and reliability may be impaired by physical or mental/personality disorders, alcohol abuse, use of illegal drugs or the abuse of legal drugs or other substances, or any other condition or circumstance that may be of a security or safety concern.

§ 712.2 Applicability.

The HRP applies to all applicants for, or current employees of DOE or a DOE contractor or subcontractor in a position defined or designated under § 712.10 of this subpart as an HRP position. Individuals currently in a Personnel Assurance Program or Personnel Security Assurance Program position will be grandfathered into the HRP.

§ 712.3 Definitions.

The following definitions are used in this part:

Accelerated Access Authorization Program means the DOE program for granting interim access to classified matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, a counterintelligence-scope polygraph examination in accordance with 10 CFR part 709, and a review of the applicant's completed "Questionnaire for National Security Positions" (Standard Form 86).

Access means:

(1) A situation that may provide an individual proximity to or control over

Category I special nuclear material (SNM); or

(2) The proximity to a nuclear explosive and/or Category I SNM that allows the opportunity to divert, steal, tamper with, and/or damage the nuclear explosive or material in spite of any controls that have been established to prevent such unauthorized actions.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohol.

Alcohol abuse means consumption of any beverage, mixture, or preparation, including any medication containing alcohol that results in impaired social or occupational functioning.

Alcohol concentration means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

Alcohol use disorder means a maladaptive pattern in which a person's intake of alcohol is great enough to damage or adversely affect physical or mental health or personal, social, or occupational function; or when alcohol has become a prerequisite to normal function.

Certification means the formal action the HRP certifying official takes that permits an individual to perform HRP duties after it is determined that the individual meets the requirements for certification under this part.

Contractor means subcontractors at all tiers and any industrial, educational, commercial, or other entity, grantee, or licensee, including an employee that has executed an agreement with the Federal government for the purpose of performing under a contract, license, or other arrangement.

Deputy Assistant Secretary for Health means the DOE individual with responsibility for policy and quality assurance for DOE occupational medical programs.

Designated Physician means a licensed doctor of medicine or osteopathy who has been nominated by the Site Occupational Medical Director (SOMD) and approved by the Manager or designee, with the concurrence of the Deputy Assistant Secretary for Health, to provide professional expertise in occupational medicine for the HRP.

Designated Psychologist means a licensed Ph.D., or Psy.D., in clinical psychology who has been nominated by the SOMD and approved by the Manager or designee, with the concurrence of the Deputy Assistant Secretary for Health, to provide professional expertise in the area of psychological assessment for the HRP.

Diagnostic and Statistical Manual of Mental Disorders means the current version of the American Psychiatric Association's manual containing definitions of psychiatric terms and diagnostic criteria of mental disorders.

Drug abuse means use of an illegal drug or misuse of legal drugs.

Evidential-grade breath alcohol device means a device that conforms to the model standards for an evidential breath-testing device as listed on the Conforming Products List of Evidential Breath Measurement Devices published by the National Highway Traffic Safety Administration (NHTSA).

Flashback means an involuntary, spontaneous recurrence of some aspect of a hallucinatory experience or perceptual distortion that occurs long after taking the hallucinogen that produced the original effect; also referred to as hallucinogen persisting perception disorder.

Hallucinogen means a drug or substance that produces hallucinations, distortions in perception of sights and sounds, and disturbances in emotion, judgment, and memory.

HRP candidate means an individual being considered for assignment to an HRP position.

HRP-certified individual means an individual who has successfully completed the HRP requirements.

HRP certifying official means the Manager or the Manager's designee who certifies, recertifies, temporarily removes, reviews the circumstances of an individual's removal from an HRP position, and directs reinstatement.

HRP management official means an individual designated by the DOE or a DOE contractor, as appropriate, who has programmatic responsibility for HRP positions.

Illegal drug means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811 and 812; the term does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by Federal law.

Impaired or impairment means a decrease in functional capacity of a person that is caused by a physical, mental, emotional, substance abuse, or behavioral disorder.

Incident means an unplanned, undesired event that interrupts the completion of an activity and that may include property damage or injury.

Job task analysis means the formal process of defining the requirements of a position and identifying the knowledge, skills, and abilities necessary to effectively perform the duties of the position.

Manager means the Manager of the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; Manager of the Rocky Flats Office; Manager of the Pittsburgh Naval Reactors Office and the Schenectady Naval Reactors Office; Site Office Managers for Livermore, Los Alamos, Sandia, Y–12, Nevada, Pantex, Kansas City, and Savannah River; Director of the Service Center, Albuquerque; Assistant Deputy Administrator for the Office of Secure Transportation, Albuquerque; and for the Washington, DC area, the Director, Office of Security.

Material access area means a type of Security Area that is authorized to contain a Category I quantity of special nuclear material and that has specifically defined physical barriers, is located within a Protected Area, and is subject to specific access controls.

Medical assessment means an evaluation of an HRP candidate and HRP-certified individual's present health status and health risk factors by means of:

(1) Medical history review;

(2) Job task analysis;

(3) Physical examination;

(4) Appropriate laboratory tests and measurements; and

(5) Appropriate psychological and psychiatric evaluations.

Nuclear explosive means an assembly of fissionable and/or fusionable materials and main charge high explosive parts or propellants that is capable of producing a nuclear detonation.

Nuclear explosive duties means work assignments that allow custody of a nuclear explosive or access to a nuclear explosive device or area.

Occurrence means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any DOE or DOE-controlled operation if the deviation has environmental, public health and safety, or national security protection significance, including (but not limited to) incidents involving:

(1) Injury or fatality to any person involving actions of a DOE employee or contractor employee;

(2) An explosion, fire, spread of radioactive material, personal injury or death, or damage to property that involves nuclear explosives under DOE jurisdiction;

(3) Accidental release of pollutants that results from, or could result in, a significant effect on the public or environment; or

(4) Accidental release of radioactive material above regulatory limits.

Psychological assessment or test means a scientifically validated instrument designed to detect psychiatric, personality, and behavioral

tendencies that would indicate problems with reliability and judgment.

Random alcohol testing means the unscheduled, unannounced alcohol testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Random drug testing means the unscheduled, unannounced drug testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Reasonable suspicion means a suspicion based on an articulable belief that an individual uses illegal drugs or is under the influence of alcohol, drawn from reasonable inferences from particular facts, as detailed further in part 707 of this title.

Recertification means the formal action the HRP certifying official takes annually, not to exceed 12 months, that permits an employee to remain in the HRP and perform HRP duties.

Reinstatement means the action the HRP certifying official takes after it has been determined that an employee who has been temporarily removed from the HRP meets the certification requirements of this part and can be returned to HRP duties.

Reliability means an individual's ability to adhere to security and safety rules and regulations.

Safety concern means any condition, practice, or violation that causes a substantial probability of physical harm, property loss, and/or environmental impact.

Security concern means the presence of information regarding an individual applying for or holding an HRP position that may be considered derogatory under the criteria listed in 10 CFR part 710, subpart A.

Semi-structured interview means an interview by a Designated Psychologist, or a psychologist under his or her supervision, who has the latitude to vary the focus and content of the questions depending on the interviewee's responses.

Site Occupational Medical Director (SOMD) means the physician responsible for the overall direction and operation of the occupational medical program at a particular site.

Supervisor means the individual who has oversight and organizational responsibility for a person holding an HRP position, and whose duties include evaluating the behavior and performance of the HRP-certified individual.

Transfer means an HRP-certified individual moving from one site to another site.

Unacceptable damage means an incident that could result in a nuclear detonation; high-explosive detonation or deflagration from a nuclear explosive; the diversion, misuse, or removal of Category I special nuclear material; or an interruption of nuclear explosive operations with a significant impact on national security.

Unsafe practice means either a human action departing from prescribed hazard controls or job procedures or practices, or an action causing a person unnecessary exposure to a hazard.

Procedures

§ 712.10 Designation of HRP positions.

(a) HRP certification is required for each individual assigned to, or applying for, a position that:

(1) Affords access to Category I SNM or has responsibility for transportation or protection of Category I quantities of SNM;

(2) Involves nuclear explosive duties or has responsibility for working with, protecting, or transporting nuclear explosives, nuclear devices, or selected components;

(3) Affords access to information concerning vulnerabilities in protective systems when transporting nuclear explosives, nuclear devices, selected components, or Category I quantities of SNM; or

(4) Is not included in paragraphs (a)(1) through (3) of this section but affords the potential to significantly impact national security or cause unacceptable damage and is approved pursuant to paragraph (b) of this section.

(b) The Manager or the HRP management official may nominate positions for the HRP that are not specified in paragraphs (a)(1) through (3) of this section or that have not previously been designated HRP positions. All such nominations must be submitted to and approved by either the NNSA Administrator, his or her designee, the Director, Office of Security, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(c) Before nominating a position for designation as an HRP position, the Manager or the HRP management official must analyze the risks the position poses for the particular operational program. If the analysis shows that more restrictive physical, administrative, or other controls could be implemented that would prevent the position from being designated an HRP position, those controls will be implemented, if practicable.

(d) Nothing in this part prohibits contractors from establishing stricter employment standards for individuals who are nominated to DOE for certification or recertification in the HRP.

§ 712.11 General requirements for HRP certification.

(a) The following certification requirements apply to each individual applying for or in an HRP position:

(1) A DOE "Q" access authorization based on a background investigation, except for security police officers who have been granted an interim "Q" through the Accelerated Access Authorization Program;

(2) The annual submission of SF–86, OMB Control No. 3206–0007, Questionnaire for National Security Positions, Part 2, and an annual review of the personnel security file;

(3) Signed releases, acknowledgments, and waivers to participate in the HRP on forms provided by DOE;

(4) Completion of initial and annual HRP instruction as provided in § 712.17;

(5) Successful completion of an initial and annual supervisory review, medical assessment, management evaluation, and a DOE personnel security review for certification and recertification in accordance with this part. With respect to the DOE personnel security review:

(i) If the DOE personnel security review is not completed within the 12-month time period and the individual's access authorization is not suspended, the HRP certification form shall be forwarded to the HRP certifying official for recertification or temporary removal, contingent upon a favorable security review;

(ii) If a final determination has been made by DOE personnel security that is favorable, this information shall be forwarded to the HRP certifying official and so noted on the certification form; or

(iii) If the final determination has been made by DOE personnel security that the access authorization has been suspended, the individual shall be immediately removed from the HRP position, the HRP certifying official notified, the information noted on the certification form, and the procedures outlined in 10 CFR part 710, subpart A, shall be followed.

(6) No use of any hallucinogen in the preceding five years and no experience of flashback resulting from the use of any hallucinogen more than five years before applying for certification or recertification;

(7) A psychological evaluation consisting of a generally accepted psychological assessment (test) and a semi-structured interview;

(8) An initial drug test and random drug tests for the use of illegal drugs at

least once each 12 months in accordance with DOE policies implementing Executive Order 12564 or the relevant provisions of 10 CFR part 707 for DOE contractors, and DOE Order 3792.3, "Drug-Free Federal Workplace Testing Implementation Program," for DOE employees;

(9) An initial alcohol test and random alcohol tests at least once each 12 months using an evidential-grade breath alcohol device, as listed without asterisks on the Conforming Products List of Evidential Breath Measurement Devices published by the NHTSA (49 CFR part 40); and

(10) Successful completion of a counterintelligence evaluation, which includes a counterintelligence-scope polygraph examination in accordance with DOE's Polygraph Examination Regulation, 10 CFR part 709, and any subsequent revisions to that regulation.

(b) Each HRP candidate must be certified in the HRP before being assigned to HRP duties and must be recertified annually, not to exceed 12 months between recertifications. For certification:

(1) Individuals in newly identified HRP positions must immediately sign the releases, acknowledgments, and waivers to participate in the HRP and complete initial instruction on the importance of security, safety, reliability, and suitability. If these requirements are not met, the individual must be removed from the HRP position.

(2) All remaining HRP requirements listed in paragraph (a) of this section must be completed in an expedited manner.

(c) Alcohol consumption is prohibited within an eight-hour period preceding scheduled work for individuals performing nuclear explosive duties and for individuals in specific positions designated by either the Manager, the NNSA Administrator, his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(d) Individuals reporting for unscheduled nuclear explosive duties and those specific positions designated by either the Manager, the NNSA Administrator or his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee, will be asked prior to performing any type of work if they have consumed alcohol within the preceding eight-hour period. If they answer "no," they may perform their assigned duties but still may be tested.

(e) HRP-certified individuals may be tested for alcohol and/or drugs in accordance with § 712.15(b), (c), (d) and (e) if they are involved in an incident, unsafe practice, or an occurrence, or if there is reasonable suspicion that they may be impaired.

§ 712.12 HRP implementation.

(a) The implementation of the HRP is the responsibility of the appropriate Manager or his or her designee. The Manager or designee must fully implement the HRP by April 22, 2004.

(b) The HRP Management Official must:

(1) Prepare an initial HRP implementation plan and submit it by March 23, 2004, to the applicable Manager for review and site approval. The implementation plan must:

(i) Be reviewed and updated every two years;

(ii) Include the four annual components of the HRP process: supervisory review, medical assessment, management evaluation (which includes random drug and alcohol testing), and a DOE personnel security determination; and

(iii) Include the HRP instruction and education component described in § 712.17 of this part.

(2) Approve the temporary removal and the reinstatement after temporary removal of an HRP-certified individual if the removal was based on a nonsecurity concern and the HRP-certified individual continues to meet the certification requirements and notify the HRP certifying official of these actions.

(c) The Deputy Administrator for Defense Programs, NNSA must:

(1) Provide advice and assistance to the Director, Office of Security, regarding policies, standards, and guidance for all nuclear explosive duty requirements; and

(2) Be responsible for implementation of all nuclear explosive duty safety requirements.

(d) The DOE Deputy Secretary, based on a recommendation of the Director, Office of Security, makes the final decision for any appeal of denial or revocation of certification or recertification from HRP.

(e) The Director, Security Policy Staff, within the Office of Security, is responsible for HRP policy and must:

(1) Ensure consistency of the HRP throughout the DOE and NNSA;

(2) Review and comment on all HRP implementation plans to ensure consistency with policy; and

(3) Provide policies and guidance, including instructional materials, to NNSA and non-NNSA field elements concerning the HRP, as appropriate.

(f) The Manager must:

(1) Review and approve the HRP implementation plan for sites/facilities under their cognizance and forward the plan to the Director, Security Policy Staff; and

(2) Ensure that the HRP is implemented at the sites/facilities under their cognizance.

(g) The HRP certifying official must:

(1) Approve placement, certification, reinstatement, and recertification of individuals into HRP positions; for unresolved temporary removals, follow the process in § 712.19(c)(5);

(2) Ensure that instructional requirements are implemented;

(3) Immediately notify (for the purpose of limiting access) the appropriate HRP management official of a personnel security action that results in the suspension of access authorization; and

(4) Ensure that the supervisory review, medical assessment, and management evaluation, including drug and alcohol testing, are conducted on an annual basis (not to exceed 12 months).

(h) Individuals assigned to HRP duties must:

(1) Execute HRP releases, acknowledgments, and waivers to facilitate the collection and dissemination of information, the performance of drug and alcohol testing, and medical examinations;

(2) Notify the Designated Physician, the Designated Psychologist, or the SOMD immediately of a physical or mental condition requiring medication or treatment;

(3) Provide full, frank, and truthful answers to relevant and material questions, and when requested, furnish, or authorize others to furnish, information that DOE deems pertinent to reach a decision regarding HRP certification or recertification;

(4) Report any observed or reported behavior or condition of another HRP-certified individual that could indicate a reliability concern, including those behaviors and conditions listed in § 712.13(c), to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official; and

(5) Report to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official, any behavior or condition, including those listed in § 712.13(c), that may affect his or her ability to perform HRP duties.

§ 712.13 Supervisory review.

(a) The supervisor must ensure that each HRP candidate and each individual occupying an HRP position but not yet HRP certified, executes the appropriate HRP releases, acknowledgments, and waivers. If these documents are not executed:

(1) The request for HRP certification may not be further processed until these requirements are completed; and

(2) The individual is immediately removed from the position.

(b) Each supervisor of HRP-certified personnel must conduct an annual review of each HRP-certified individual during which the supervisor must evaluate information (including security concerns) relevant to the individual's suitability to perform HRP tasks in a reliable and safe manner.

(c) The supervisor must report any concerns resulting from his or her review to the appropriate HRP management official. Types of behavior and conditions that would indicate a concern include, but are not limited to:

(1) Psychological or physical disorders that impair performance of assigned duties;

(2) Conduct that warrants referral for a criminal investigation or results in arrest or conviction;

(3) Indications of deceitful or delinquent behavior;

(4) Attempted or threatened destruction of property or life;

(5) Suicidal tendencies or attempted suicide;

(6) Use of illegal drugs or the abuse of legal drugs or other substances;

(7) Alcohol use disorders;

(8) Recurring financial irresponsibility;

(9) Irresponsibility in performing assigned duties;

(10) Inability to deal with stress, or the appearance of being under unusual stress;

(11) Failure to comply with work directives, hostility or aggression toward fellow workers or authority, uncontrolled anger, violation of safety or security procedures, or repeated absenteeism; and

(12) Significant behavioral changes, moodiness, depression, or other evidence of loss of emotional control.

(d) The supervisor must immediately remove an HRP-certified individual from HRP duties, pursuant to § 712.19, and temporarily reassign the individual to a non-HRP position if the supervisor believes the individual has demonstrated a security or safety concern that warrants such removal. If temporary removal is based on a security concern, the HRP management official must immediately notify the applicable DOE personnel security office and the HRP certifying official.

(1) Based on the DOE personnel security office recommendation, the HRP certifying official will make the final decision about whether to reinstate an individual into an HRP position.

(2) If temporary removal is based on a medical concern, the Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend the medical removal or medical restriction in writing to the appropriate HRP management official, who will make the final determination in temporary removal actions and immediately notify the appropriate HRP certifying official.

(e) The supervisor must immediately remove from HRP duties any Federal employee who does not obtain HRP recertification. The supervisor may reassign the individual or realign the individual's current duties. If these actions are not feasible, the supervisor must contact the appropriate personnel office for guidance.

(f) The supervisor who has been informed by the breath alcohol technician that an HRP-certified individual's confirmatory breath alcohol test result is at or above an alcohol concentration of 0.02 percent shall send the individual home and not allow that individual to perform HRP duties for 24 hours, and inform the HRP management official of this action.

§ 712.14 Medical assessment.

(a) *Purpose.* The HRP medical assessment is performed to evaluate whether an HRP candidate or an HRP-certified individual:

(1) Represents a security concern; or

(2) Has a condition that may prevent the individual from performing HRP duties in a reliable and safe manner.

(b) When performed. (1) The medical assessment is performed initially on HRP candidates and individuals occupying HRP positions who have not yet received HRP certification. The medical assessment is performed annually for HRP-certified individuals, or more often as required by the SOMD.

(2) The Designated Physician and other examiners working under the direction of the Designated Physician also will conduct an evaluation:

(i) If an HRP-certified individual requests an evaluation (*i.e.*, self-referral); or

(ii) If an HRP-certified individual is referred by management for an evaluation.

(c) *Process.* The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In performing this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, available testing results, psychological evaluations, any psychiatric evaluations, a review of current legal drug use, and any other relevant information. This information is used to determine if a reliability, safety, or security concern exists and if the individual is medically qualified for his or her assigned duties. If a security concern is identified, the Designated Physician or SOMD must immediately notify the HRP management official, who notifies the applicable DOE personnel security office and appropriate HRP certifying official.

(d) *Evaluation.* The Designated Physician, with the assistance of the Designated Psychologist, must determine the existence or nature of any of the following:

(1) Physical or medical disabilities, such as a lack of visual acuity, defective color vision, impaired hearing, musculoskeletal deformities, and neuromuscular impairment;

(2) Mental/personality disorders or behavioral problems, including alcohol and other substance use disorders, as described in the *Diagnostic and Statistical Manual of Mental Disorders;*

(3) Use of illegal drugs or the abuse of legal drugs or other substances, as identified by self-reporting or by medical or psychological evaluation or testing;

(4) Threat of suicide, homicide, or physical harm; or

(5) Medical conditions such as cardiovascular disease, endocrine disease, cerebrovascular or other neurologic disease, or the use of drugs for the treatment of conditions that may adversely affect the judgment or ability of an individual to perform assigned duties in a reliable and safe manner.

(e) *Job task analysis.* Before the initial or annual medical assessment and psychological evaluation, employers must provide, to both the Designated Physician and Designated Psychologist, a job task analysis for each HRP candidate or HRP-certified individual. Medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(f) *Psychological evaluations.* Psychological evaluations must be conducted:

(1) For initial HRP certification. This psychological evaluation consists of a psychological assessment (test), approved by the Deputy Assistant Secretary for Health or his or her designee, and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview. A psychological assessment (test) may also be conducted as warranted.

(3) Every third year. The medical assessment for recertification must include a psychological assessment (test) approved by the Deputy Assistant Secretary for Health or his or her

designee. This requirement can be implemented over a three-year period for individuals who are currently in an HRP position.

(4) When additional psychological or psychiatric evaluations are required by the SOMD to resolve any concerns.

(g) *Return to work after sick leave.* HRP-certified individuals who have been on sick leave for five or more consecutive days, or an equivalent time period for those individuals on an alternative work schedule, must report in person to the Designated Physician, the Designated Psychologist, or the SOMD before being allowed to return to normal duties. The Designated Physician, the Designated Psychologist, or the SOMD must provide a written recommendation to the appropriate HRP supervisor regarding the individual's return to work. An HRP-certified individual also may be required to report to the Designated Physician, the Designated Psychologist, or the SOMD for written recommendation to return to normal duties after any period of sick leave.

(h) *Temporary removal or restrictions.* The Designated Physician, the Designated Psychologist, or the SOMD may recommend temporary removal of an individual from an HRP position or restrictions on an individual's work in an HRP position if a medical condition or circumstance develops that affects the individual's ability to perform assigned job duties. The Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend medical removal or medical restrictions in writing to the appropriate HRP management official. If the HRP management official concurs, he or she will then notify the appropriate HRP certifying official. To reinstate or remove such restrictions, the Designated Physician, the Designated Psychologist, or the SOMD must make written recommendation to the HRP management official for concurrence. The HRP management official will then notify the appropriate HRP certifying official.

(i) *Medical evaluation after rehabilitation.* (1) Individuals who request reinstatement in the HRP following rehabilitative treatment for alcohol use disorder, use of illegal drugs, or the abuse of legal drugs or other substances, must undergo an evaluation, as prescribed by the SOMD, to ensure continued rehabilitation and adequate capability to perform their job duties.

(2) The HRP certifying official may reinstate HRP certification of an individual who successfully completes an SOMD-approved drug or alcohol rehabilitation program. Recertification is based on the SOMD's follow-up evaluation and recommendation. The individual is also subject to unannounced follow-up tests for illegal drugs or alcohol and relevant counseling for three years.

(j) *Medication and treatment.* HRP-certified individuals are required to immediately report to the Designated Physician, the Designated Psychologist, or the SOMD any physical or mental condition requiring medication or treatment. The Designated Physician, the Designated Psychologist, or the SOMD determines if temporary removal of the individual from HRP duties is required and follows the procedures pursuant to § 712.14(h).

§ 712.15 Management evaluation.

(a) *Evaluation components.* An evaluation by the HRP management official is required before an individual can be considered for initial certification or recertification in the HRP. This evaluation must be based on a careful review of the results of the supervisory review, medical assessment, and drug and alcohol testing. If a safety concern is identified, the HRP management official must require the supervisor to temporarily reassign the individual to non-HRP duties and forward this information to the HRP certifying official. If the management evaluation reveals a security concern, the HRP management official must notify the applicable DOE personnel security office.

(b) *Drug testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of illegal drugs, as required by this part. Testing must be conducted in accordance with 10 CFR part 707, the workplace substance abuse program for DOE contractor employees, and DOE Order 3792.3, "Drug-Free Federal Workplace Testing Implementation Program," for DOE employees. The program must include an initial drug test, random drug tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. Failure to appear for unannounced testing within two hours of notification constitutes a refusal to submit to a test. Sites may establish a shorter time period between notification and testing but may not exceed the two-hour requirement. An HRP-certified individual who, based on a drug test, has been determined to use illegal drugs must immediately be removed from HRP duties, and DOE personnel security must be notified immediately.

(c) *Alcohol testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of alcohol, as required by this part. The alcohol testing program must include, as a minimum, an initial alcohol test prior to performing HRP duties and random alcohol tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. An HRP-certified individual who has been determined to have an alcohol concentration of 0.02 percent or greater shall be sent home and not allowed to perform HRP duties for 24 hours.

(1) Breath alcohol testing must be conducted by a certified breath alcohol technician and conform to the DOT procedures (49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, subparts J through N) for use of an evidential-grade breath analysis device approved for 0.02/0.04 cutoff levels, which conforms to the DOT model specifications and the most recent "Conforming Products List" issued by NHTSA.

(2) An individual required to undergo DOT alcohol testing is subject to the regulations of the DOT. If such an individual's blood alcohol level exceeds DOT standards, the individual's employer may take appropriate disciplinary action.

(3) The following constitutes a refusal to submit to a test and shall be considered as a positive alcohol concentration test of 0.02 percent, which requires the individual be sent home and not allowed to perform HRP duties for 24 hours:

(i) Failure to appear for unannounced testing within two hours of notification (or established shorter time for the specific site);

(ii) Failure to provide an adequate volume of breath in two attempts without a valid medical excuse; and

(iii) Engaging in conduct that clearly obstructs the testing process, including failure to cooperate with reasonable instructions provided by the testing technician.

(d) *Occurrence testing.* (1) When an HRP-certified individual is involved in, or associated with, an occurrence requiring immediate reporting to the DOE, the following procedures must be implemented:

(i) Testing for the use of illegal drugs in accordance with the provisions of the DOE policies implementing Executive Order 12564, and 10 CFR part 707 or DOE Order 3792.3, which establish workplace substance abuse programs for

contractor and DOE employees, respectively.

(ii) Testing for use of alcohol in accordance with this section.

(2) Testing must be performed as soon as possible after an occurrence that requires immediate notification or reporting.

(3) The supervisor must remove an HRP-certified individual from HRP duties if the individual refuses to undergo the testing required by this section.

(e) *Testing for reasonable suspicion.* (1) If the behavior of an individual in an HRP position creates the basis for reasonable suspicion of the use of an illegal drug or alcohol, that individual must be tested if two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the individual or is the Designated Physician, the Designated Psychologist, or the SOMD, agree that such testing is appropriate.

(2) Reasonable suspicion must be based on an articulable belief, drawn from facts and reasonable inferences from those particular facts, that an HRP-certified individual is in possession of, or under the influence of, an illegal drug or alcohol. Such a belief may be based on, among other things:

(i) Observable phenomena, such as direct observation of the use or possession of illegal drugs or alcohol, or the physical symptoms of being under the influence of drugs or alcohol;

(ii) A pattern of abnormal conduct or erratic behavior;

(iii) Information provided by a reliable and credible source that is independently corroborated; or

(iv) Detection of alcohol odor on the breath.

(f) Counterintelligence Evaluation. HRP candidates and, when selected, HRP-certified individuals, must submit to and successfully complete a counterintelligence evaluation, which includes a polygraph examination in accordance with 10 CFR part 709, Polygraph Examination Regulations and any subsequent revisions to that regulation.

§ 712.16 DOE security review.

(a) A personnel security specialist will perform a personnel security file review of an HRP candidate and HRP-certified individual upon receiving the supervisory review, medical assessment, and management evaluation and recommendation.

(b) If the personnel security file review is favorable, this information must be forwarded to the HRP certifying official. If the review reveals a security concern, or if a security concern is identified during another component of the HRP process, the HRP certifying official must be notified and the security concern evaluated in accordance with the criteria in 10 CFR part 710, subpart A. All security concerns must be resolved according to procedures outlined in 10 CFR part 710, subpart A, rather than through the procedures in this part.

(c) Any mental/personality disorder or behavioral issues found in a personnel security file, which could impact an HRP candidate or HRP-certified individual's ability to perform HRP duties, may be provided in writing to the SOMD, Designated Physician, and Designated Psychologist previously identified for receipt of this information. Medical personnel may not share any information obtained from the personnel security file with anyone who is not an HRP certifying official.

§ 712.17 Instructional requirements.

(a) HRP management officials at each DOE site or facility with HRP positions must establish an initial and annual HRP instruction and education program. The program must provide:

(1) HRP candidates, HRP-certified individuals, supervisors, and managers, and supervisors and managers responsible for HRP positions with the knowledge described in paragraph (b)(1) of this section; and

(2) For all HRP medical personnel, a detailed explanation of HRP duties and responsibilities.

(b) The following program elements must be included in initial and annual instruction. The elements may be tailored to accommodate group differences and refresher training needs:

(1) The objectives of the HRP and the role and responsibilities of each individual in the HRP to include recognizing and responding to behavioral change and aberrant or unusual behavior that may result in a risk to national security or nuclear explosive safety; recognizing and reporting security concerns and prescription drug use; and an explanation of return-to-work requirements and continuous evaluation of HRP participants; and

(2) For those who have nuclear explosive responsibilities, a detailed explanation of duties and safety requirements.

§ 712.18 Transferring HRP certification.

(a) For HRP certification to be transferred, the individual must currently be certified in the HRP.

(b) Transferring the HRP certification from one site to another requires the following before the individual is allowed to perform HRP duties at the new site:

(1) Verify that the individual is currently certified in the HRP and is transferring into a designated HRP position;

(2) Incorporate the individual into the new site's alcohol and drug-testing program;

(3) Ensure that the 12-month time period for HRP requirements that was established at the prior site is not exceeded; and

(4) Provide site-specific instruction.

(c) Temporary assignment to HRP positions at other sites requires verification that the individual is currently enrolled in the HRP and has completed all site-specific instruction. The individual is required to return to the site that maintains his or her HRP certification for recertification.

§ 712.19 Removal from HRP.

(a) *Immediate removal.* A supervisor who has a reasonable belief that an HRP-certified individual is not reliable, based on either a safety or security concern, must immediately remove that individual from HRP duties pending a determination of the individual's reliability. A supervisor also must immediately remove an individual from HRP duties when requested to do so by the HRP certifying official. The supervisor must, at a minimum:

(1) Require the individual to stop performing HRP duties;

(2) Take action to ensure the individual is denied both escorted and unescorted access to the material access areas; and

(3) Provide, within 24 hours, to the individual and the HRP management official, a written reason for these actions.

(b) The temporary removal of an HRP-certified individual from HRP duties pending a determination of the individual's reliability is an interim, precautionary action and does not constitute a determination that the individual is not fit to perform his or her required duties. Removal is not, in itself, cause for loss of pay, benefits, or other changes in employment status.

(c) *Temporary removal.* (1) If an HRP management official receives a supervisor's written notice of the immediate removal of an HRP-certified individual, that official must direct the temporary removal of the individual pending an evaluation and determination of the individual's reliability.

(2) If removal is based on a security concern, the HRP management official must notify the HRP certifying official and the applicable DOE personnel

security office. The security concern will be resolved under the criteria and procedures in 10 CFR part 710, subpart A.

(3) If removal is based on a concern that is not security related, the HRP management official must conduct an evaluation of the circumstances or information that led the supervisor to remove the individual from HRP duties. The HRP management official must prepare a written report of the evaluation that includes a determination of the individual's reliability for continuing HRP certification.

(4) If the HRP management official determines that an individual who has been temporarily removed continues to meet the requirements for certification, the HRP management official must:

(i) Notify the individual's supervisor of the determination and direct that the individual be allowed to return to HRP duties;

(ii) Notify the individual; and

(iii) Notify the HRP certifying official.

(5) If the HRP management official determines that an individual who has been temporarily removed does not meet the HRP requirements for certification, the HRP management official must forward the written report to the HRP certifying official. If the HRP certifying official is not the Manager, the HRP certifying official must review the written report and take one of the following actions:

(i) Direct that the individual be reinstated and provide written explanation of the reasons and factual bases for the action;

(ii) Direct continuation of the temporary removal pending completion of specified actions (*e.g.*, medical assessment, treatment) to resolve the concerns about the individual's reliability; or

(iii) Recommend to the Manager the revocation of the individual's certification and provide written explanation of the reasons and factual bases for the decision.

(d) The Manager, on receiving the HRP management official's written report and the HRP certifying official's recommendation (if any), must take one of the following actions:

(1) Direct reinstatement of the individual and provide written explanation of the reasons and factual bases for the action;

(2) Direct revocation of the individual's HRP certification; or

(3) Direct continuation of the temporary removal pending completion of specified actions (*e.g.*, medical assessment, treatment) to resolve the concerns about the individual's reliability.

(e) If the action is revocation, the Manager must provide the individual a copy of the HRP management official's report. The Manager may withhold such a report, or portions thereof, to the extent that he or she determines that the report, or portions thereof, may be exempt from access by the employee under the Privacy Act or the Freedom of Information Act.

(f) If an individual is directed by the Manager to take specified actions to resolve HRP concerns, he or she must be reevaluated by the HRP management official and HRP certifying official after those actions have been completed. After considering the HRP management and HRP certifying officials' report and recommendation, the Manager must direct either:

(1) Reinstatement of the individual; or

(2) Revocation of the individual's HRP certification.

(g) *Notification of Manager's initial decision.* The Manager must send by certified mail (return receipt requested) a written decision, including rationale, to the HRP-certified individual whose certification is revoked. The Manager's decision must be accompanied by notification to the individual, in writing, of the procedures pertaining to reconsideration or a hearing on the Manager's decision.

§ 712.20 Request for reconsideration or certification review hearing.

(a) An HRP-certified individual who receives notification of the Manager's decision to revoke his or her HRP certification may choose one of the following options:

(1) Take no action;

(2) Submit a written request to the Manager for reconsideration of the decision to revoke certification. The request must include the individual's response to the information that gave rise to the concern. The request must be sent by certified mail to the Manager within 20 working days after the individual received notice of the Manager's decision; or

(3) Submit a written request to the Manager for a certification review hearing. The request for a hearing must be sent by certified mail to the Manager within 20 working days after the individual receives notice of the Manager's decision.

(b) If an individual requests reconsideration by the Manager but not a certification review hearing, the Manager must, within 20 working days after receipt of the individual's request, send by certified mail (return receipt requested) a final decision to the individual. This final decision about certification is based on the individual's response and other relevant information available to the Manager.

(c) If an individual requests a certification review hearing, the Manager must forward the request to the Office of Hearings and Appeals.

§ 712.21 Office of Hearings and Appeals.

(a) The certification review hearing is conducted by the Office of Hearings and Appeals.

(b) The hearing officer must have a DOE "Q" access authorization when hearing cases involving HRP duties.

(c) An individual who requests a certification review hearing has the right to appear personally before the hearing officer; to present evidence in his or her own behalf, through witnesses or by documents, or by both; and to be accompanied and represented at the hearing by counsel or any other person of the individual's choosing and at the individual's own expense.

(d) In conducting the proceedings, the hearing officer must:

(1) Receive all relevant and material information relating to the individual's fitness for HRP duties through witnesses or documentation;

(2) Ensure that the individual is permitted to offer information in his or her behalf; to call, examine, and cross-examine witnesses and other persons who have made written or oral statements, and to present and examine documentary evidence;

(3) Require the testimony of the individual and all witnesses be given under oath or affirmation; and

(4) Ensure that a transcript of the certification review proceedings is made.

§ 712.22 Hearing officer's report and recommendation.

Within 30 calendar days of the receipt of the hearing transcript by the hearing officer or the closing of the record, whichever is later, the hearing officer must forward written findings, a supporting statement of reasons, and recommendation regarding the individual's eligibility for recertification in the HRP position to the Director, Office of Security. The hearing officer's report and recommendation must be accompanied by a copy of the record of the proceedings. The Director, Office of Security shall forward to the DOE Deputy Secretary a recommendation to either recertify or revoke the certification of an individual in the HRP.

§ 712.23 Final decision by DOE Deputy Secretary.

Within 20 working days of the receipt of the Director, Office of Security's

recommendation, the Deputy Secretary should issue a final written decision. A copy of this decision must be sent by certified mail (return receipt requested) to the Manager and to the individual accompanied by a copy of the hearing officer's report and the transcript of the certification review proceedings.

Subpart B—Medical Standards

§ 712.30 Applicability.

This subpart establishes standards and procedures for conducting medical assessments of DOE and DOE contractor individuals in HRP positions.

§ 712.31 Purpose.

The standards and procedures set forth in this subpart are necessary for DOE to:

(a) Identify the presence of any mental/personality disorders, physical, or behavioral characteristics or conditions that present or are likely to present an unacceptable impairment in reliability;

(b) Facilitate the early diagnosis and treatment of disease or impairment and foster accommodation and rehabilitation;

(c) Determine what functions an HRP-certified individual may be able to perform and to facilitate the proper placement of individuals; and

(d) Provide for continuing monitoring of the health status of individuals to facilitate early detection and correction of adverse health effects, trends, or patterns.

§ 712.32 Designated Physician.

(a) The Designated Physician must be qualified to provide professional expertise in the area of occupational medicine as it relates to the HRP.

(b) The Designated Physician must:

(1) Be a graduate of an accredited school of medicine or osteopathy;

(2) Have a valid, unrestricted state license to practice medicine in the state where HRP medical assessments occur;

(3) Have met the applicable HRP instruction requirements; and

(4) Be eligible for the appropriate DOE access authorization.

(c) The Designated Physician is responsible for the medical assessments of HRP candidates and HRP-certified individuals, including determining which components of the medical assessments may be performed by other qualified personnel. Although a portion of the assessment may be performed by another physician, physician's assistant, or nurse practitioner, the Designated Physician remains responsible for:

(1) Supervising the evaluation process;

(2) Interpreting the results of evaluations;

(3) Documenting medical conditions or issues that may disqualify an individual from the HRP;

(4) Providing medical assessment information to the Designated Psychologist to assist in determining psychological fitness;

(5) Determining, in conjunction with DOE if appropriate, the location and date of the next required medical assessment; and

(6) Signing a recommendation about the medical fitness of an individual for certification or recertification.

(d) The Designated Physician must immediately report to the SOMD any of the following about himself or herself:

(1) Initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal regulatory board since the last designation;

(3) The withdrawal of the privilege to practice by any institution;

(4) Being named a defendant in any criminal proceedings (felony or misdemeanor) since the last designation;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse since the last designation; or

(6) Occurrence, since the last designation, of a physical, mental/personality disorder, or health condition that might affect his or her ability to perform professional duties.

§ 712.33 Designated Psychologist.

(a) The Designated Psychologist reports to the SOMD and determines the psychological fitness of an individual to participate in the HRP. The results of this evaluation may be provided only to the Designated Physician or the SOMD.

(b) The Designated Psychologist must:

(1) Hold a doctoral degree from a clinical psychology program that includes a one-year clinical internship approved by the American Psychological Association or an equivalent program;

(2) Have accumulated a minimum of three years postdoctoral clinical experience with a major emphasis in psychological assessment and testing;

(3) Have a valid, unrestricted state license to practice clinical psychology in the state where HRP medical assessments occur;

(4) Have met the applicable HRP instruction requirements; and

(5) Be eligible for the appropriate DOE access authorization.

(c) The Designated Psychologist is responsible for all psychological evaluations of HRP candidates, HRP-certified individuals, and others as directed by the SOMD. Although a portion of the psychological evaluation may be performed by another psychologist, the Designated Psychologist must:

(1) Supervise the psychological evaluation process and designate which components may be performed by other qualified personnel;

(2) Upon request of management, assess the psychological fitness of HRP candidates and HRP-certified individuals for HRP duties, including specific work settings, and recommend referrals as indicated; and

(3) Make referrals for psychiatric, psychological, substance abuse, or personal or family problems, and monitor the progress of individuals so referred.

(d) The Designated Psychologist must immediately report to the SOMD any of the following about himself or herself:

(1) Initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal regulatory board since the last designation;

(3) The withdrawal of the privilege to practice by any institution;

(4) Being named a defendant in any criminal proceeding (felony or misdemeanor) since the last designation;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse since the last designation; or

(6) Occurrence since the last designation of a physical, mental/personality disorder, or health condition that might affect his or her ability to perform professional duties.

§ 712.34 Site Occupational Medical Director.

(a) The SOMD must nominate a physician to serve as the Designated Physician and a clinical psychologist to serve as the Designated Psychologist. The nominations must be sent through the Manager to the Deputy Assistant Secretary for Health or his or her designee. Each nomination must describe the nominee's relevant training, experience, and licensure, and include a curriculum vitae and a copy of the nominee's current state or district license.

(b) The SOMD must submit a renomination report biennially through the Manager to the Deputy Assistant Secretary for Health or his or her designee. This report must be submitted at least 60 days before the second anniversary of the initial designation or

of the last redesignation, whichever applies. The report must include:

(1) A statement evaluating the performance of the Designated Physician and Designated Psychologist during the previous designation period; and

(2) A copy of the valid, unrestricted state or district license of the Designated Physician and Designated Psychologist.

(c) The SOMD must submit, annually, to the Deputy Assistant Secretary for Health or his or her designee through the Manager, a written report summarizing HRP medical activity during the previous year. The SOMD must comply with any DOE directives specifying the form or contents of the annual report.

(d) The SOMD must investigate any reports of performance issues regarding a Designated Physician or Designated Psychologist, and the SOMD may suspend either official from HRP-related duties. If the SOMD suspends either official, the SOMD must notify the Deputy Assistant Secretary for Health or his or her designee and provide supporting documentation and reasons for the action.

§ 712.35 Deputy Assistant Secretary for Health.

The Deputy Assistant Secretary for Health or his or her designee must:

(a) Develop policies, standards, and guidance for the medical aspects of the HRP, including the psychological testing inventory to be used;

(b) Review the qualifications of Designated Physicians and Designated Psychologists, and concur or nonconcur with their designations by sending a statement to the Manager and an informational copy to the SOMD; and

(c) Provide technical assistance on medical aspects of the HRP to all DOE elements and DOE contractors.

§ 712.36 Medical assessment process.

(a) The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In carrying out this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, psychological evaluations, psychiatric evaluations, and any other relevant information to determine an individual's overall medical qualification for assigned duties.

(b) Employers must provide a job task analysis for those individuals involved in HRP duties to both the Designated Physician and the Designated Psychologist before each medical assessment and psychological evaluation. HRP medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(c) The medical process by the Designated Physician includes:

(1) Medical assessments for initial certification, annual recertification, and evaluations for reinstatement following temporary removal from the HRP;

(2) Evaluations resulting from self-referrals and referrals by management;

(3) Routine medical contacts and occupational and nonoccupational health counseling sessions; and

(4) Review of current legal drug use.

(d) Psychological evaluations must be conducted:

(1) For initial certification. This psychological evaluation consists of a generally accepted psychological assessment (test) approved by the Deputy Assistant Secretary for Health or his or her designee and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview, which is conducted annually at the time of the medical examination.

(3) Every third year. The medical assessment for recertification must include a generally accepted psychological assessment (test) approved by the Deputy Assistant Secretary for Health or his or her designee.

(4) When the SOMD determines that additional psychological or psychiatric evaluations are required to resolve HRP concerns as listed in § 712.13(c).

(e) Following absences requiring return-to-work evaluations under applicable DOE directives, the Designated Physician, the Designated Psychologist, or the SOMD must determine whether a psychological evaluation is necessary.

(f) Except as provided in paragraph (g) of this section, the Designated Physician must forward the completed medical assessment of an HRP candidate and HRP-certified individual to the SOMD, who must make a recommendation, based on the assessment, to the individual's HRP management official. If the Designated Physician determines that a currently certified individual no longer meets the HRP requirements, the Designated Physician must immediately, orally, inform the HRP management official. A written explanation must follow within 24 hours.

(g) The Designated Physician, the Designated Psychologist, or the SOMD may make a medical recommendation for return to work and work accommodations for HRP-certified individuals.

(h) The following documentation is required after treatment of an individual for any disqualifying condition:

(1) A summary of the diagnosis, treatment, current status, and prognosis to be furnished by the treatment provider to the Designated Physician;

(2) The medical opinion of the Designated Physician advising the individual's supervisor whether the individual is able to return to work in either an HRP or non-HRP capacity; and

(3) Any periodic monitoring plan, approved by the Designated Physician or the Designated Psychologist and the SOMD, used to evaluate the reliability of the individual.

(i) If the disqualifying condition was of a security concern, the appropriate procedure described in 10 CFR part 710, subpart A, applies.

§ 712.37 Evaluation for hallucinogen use.

If DOE determines that an HRP candidate or HRP-certified individual has used any hallucinogen, the individual is not eligible for certification or recertification unless:

(a) Five years have passed since the last use of the hallucinogen;

(b) There is no evidence of any flashback within the last five years from the previous hallucinogen use; and

(c) The individual has a record of acceptable job performance and observed behavior.

§ 712.38 Maintenance of medical records.

(a) The medical records of HRP candidates and HRP-certified individuals must be maintained in accordance with the Privacy Act, 5 U.S.C. 552a, and DOE implementing regulations in 10 CFR part 1008; the Department of Labor's regulations on access to individual exposure and medical records, 29 CFR 1910.1020; and applicable DOE directives. DOE contractors also may be subject to section 503 of the Rehabilitation Act, 29 U.S.C. 793, and its implementing rules, including confidentiality provisions in 41 CFR 60–741.23 (d).

(b) The psychological record of HRP candidates and HRP-certified individuals is a component of the medical record. The psychological record must:

(1) Contain any clinical reports, test protocols and data, notes of individual contacts and correspondence, and other information pertaining to an individual's contact with a psychologist;

(2) Be stored in a secure location in the custody of the Designated Psychologist; and

(3) Be kept separate from other medical record documents, with access

limited to the SOMD and the Designated Physician.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–13–AD; Amendment 39–13435; AD 2004–01–21]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc (RR) RB211–22B, RB211–524, and RB211–535 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls-Royce plc (RR) RB211–22B, RB211–524, and RB211–535 series turbofan engines. This AD requires the installation of a front engine mount housing and link support assembly that has a serialized, life limited, spherical bearing installed. This AD results from reports of corrosion and fatigue cracks in the mount pins, the spherical bearings, and the support links and their respective spherical bearings. We are issuing this AD to prevent failure of the front engine mount housing and link support assembly due to cracks that could result in loss of the engine.

DATES: This AD becomes effective February 27, 2004. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of February 27, 2004.

ADDRESSES: You can get the service information identified in this AD from Rolls-Royce plc, P.O. Box 31 Derby, DE24 8BJ, United Kingdom; telephone 011–44–1332–242424; fax 011–44–1332–249936. You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Frost, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7756; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to RR RB211–22B, RB211–524, and RB211–535 series turbofan engines was published in the **Federal Register** on February 26, 2002 (67 FR 8739). That action proposed to require disassembling and inspecting all engine mounts for cracks, refurbishing the engine mounts, and replacing the front mount thrust link spherical bearing in accordance with RR Service Bulletin (SB) No. RB.211–71–5291, Revision 14, dated March 13, 2001.

After we issued that NPRM, we became aware that the Civil Aviation Authority (CAA), which is the aviation authority for the U.K., cancelled AD 004–08–2000. CAA AD 004–08–2000 addressed disassembling and inspecting all engine mounts for cracks, refurbishing the engine mounts, and replacing the front mount thrust link spherical bearing. We were also informed that RR downgraded the category of SB No. RB.211–71–5291, Revision 14, dated March 13, 2001, which required those actions, to recommend the actions instead of requiring them. RR has since issued a mandatory SB No. RB.211–71–D437, Revision 1, dated February 28, 2003, which introduces a serialized, life-limited, spherical bearing for the engine front mount housing and link support assembly. Since RR has also introduced requirements to inspect the engine front and rear mounts into the Time Limit Manual, compliance with the requirements of SB No. RB.211–71–5291 is no longer required.The CAA has issued AD 005–04–2002, dated April 2002, to mandate compliance with the new requirements included in RR Mandatory Service Bulletin (MSB) No. RB.211–71–D437, Revision 1, dated February 28, 2003.

Since this change expands the scope of the originally proposed rule, we determined that it was necessary to reopen the comment period to provide additional opportunity for public comment. As a result, we published a supplemental proposed AD that applies to RR RB211–22B, RB211–524, and RB211–535 series turbofan engines in the **Federal Register** on July 31, 2003 (68 FR 44902). That action proposed to require the installation of a front engine mount housing and link support assembly that has a serialized, life limited spherical bearing installed in accordance with RR MSB No. RB.211–71–D437, Revision 1, dated February 28, 2003.

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.

Update Title of Table 2

One commenter requests that the FAA update the title of Table 2 from "Table 2. Module 04 Reworked part numbers (P/Ns)" to "Table 2. Module 07 Reworked P/Ns". The commenter also requests that the list of Module 07 P/Ns in Table 2 be completed. The FAA agrees. Table 2 was incomplete and has been changed.

P/Ns Not Applicable to RB211–535 Series Engines

One commenter notes that RB211–535 operators need to be informed that the "existing" and "reworked" module 07 P/Ns in Table 2 are not included in the RB211–535 Engine Manual. The FAA agrees and paragraph (b) has been changed to indicate this.

Credit for Previous Compliance

One commenter requests that the final rule allow credit for previous compliance with the initial issuance of RR No. SB RB.211–71–D437. We do not agree. Revision 1 expands the Accomplishment Instructions to include the requirement to control the spherical bush life by recording the part serial numbers as specified in the Time Limits Manual, and defines a repetitive inspection of the front mounts as specified in the Time Limits Manual.

Editorial Comment

We have corrected a minor mathematical error in the Supplemental NPRM Cost of Compliance section in the final rule.

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

Economic Analysis

There are about 2,214 RR RB211–22B, RB211–524, and RB211–535 series turbofan engines of the affected design in the worldwide fleet. We estimate that about 620 RB211–535 engines, and about 45 RB211–524 and RB211–22B engines installed on airplanes of U.S.

registry, would be affected by this AD. We also estimate that no additional labor costs would be incurred to perform the actions. We anticipate that the new hardware will be installed while the module is inducted into the shop for routine maintenance inspection before the compliance expiration date of this AD. The cost of a new serialized spherical bearing is about $592 for RB211–535 engines, $895 for RB211–524 engines, and $1,990 for RB211–22B engines. Based on these figures, the total cost of the AD to U.S. operators is estimated to be $431,952.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with State authorities prior to publication of this final rule.

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 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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2004–01–21 Rolls-Royce plc: Amendment 39–13435. Docket No. 2001–NE–13–AD.

Applicability

This AD is applicable to Rolls-Royce plc (RR) RB211–22B, RB211–524, and RB211–535 series turbofan engines. These engines are installed on, but not limited to, Boeing 747, 757, 767, Lockheed L–1011, and Tupolev Tu204–120 airplanes.

Note 1: This AD applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance

Compliance with this AD is required as indicated, unless already done. To prevent failure of the front engine mount due to cracks, that could result in loss of the engine, do the following at the next Module 07 shop visit after the effective date of this AD, but no later than April 1, 2011.

(a) Replace the existing engine front mount housing and link support assembly listed in Table 1 of this AD with new production part number (P/N) front mount housing and link support assembly, or with a reworked assembly. Use paragraph 3 of Accomplishment Instructions of Mandatory Service Bulletin (MSB) No. RB. 211–71–D437, Revision 1, dated February 28, 2003. Table 1 follows:

TABLE 1.—FRONT MOUNT HOUSING AND LINK SUPPORT ASSEMBLY EXISTING P/NS AND REWORKED P/NS

Existing P/N	New production or reworked P/N
LK83038	FW18695
LK83047	FW18686
LK83057	FW18691
LK83072	FW18696
LK83110	FW18697
LK83114	FW18698
UL10472	FW18694
UL25694	FW18688
UL27054	FW18687
UL27601	FW18693
UL27612	FW18689
UL27613	FW18684

(b) Except for RB211–535 engines, mark the Modules 07 after the rework with a new P/N as specified in the following Table 2:

TABLE 2.—MODULE 07 REWORKED P/NS

Existing P/N	Reworked P/N
MO7127	MO7159
MO7130	MO7156
MO7133	MO7153
MO7134	MO7152
MO7135	MO7154
MO7149	MO7158
MO7150	MO7155
MO7151	MO7157
MO7202	MO7214
MO7206	MO7216
MO7207	MO7215
MO7208	MO7213
MO7209	MO7212
MO7210	MO7217
MO7552AA	MO7563AC
MO7552AB	MO7563AB
MO7554AA	MO7566AB
MO7554AB	MO7566AA
MO7556AA	MO7563AA
MO7557AA	MO7563AD
MO756OAG	MO7564AB
MO756OAH	MO7564AC
MO756OAI	MO7564AD
MO7561AG	MO7565AA
MO7561AH	MO7565AB
MO7561AI	MO7565AC
MO7561AJ	MO7565AD
MO7561AK	MO7563AE

(c) Information on engine front mount housing and link support assembly disassembly, inspection, replacement of the time limited spherical bearing, and reassembly, can be found in RR Engine Manual, section 71–21–01.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office. Operators must submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

Special Flight Permits

(e) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the requirements of this AD can be done.

Documents That Have Been Incorporated by Reference

(f) The actions specified in the AD must be done in accordance with Rolls-Royce plc MSB No. RB.211–71–D437, Revision 1, dated February 28, 2003. 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 Rolls-Royce plc, P.O. Box 31, Derby, England, DE24 8BJ; telephone: 011–44–1332–242424; fax: 011–44–1332–249936. Copies may be inspected at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in CAA airworthiness directive 005–04–2002, dated April 2002.

Effective Date

(g) This amendment becomes effective on February 27, 2004.

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

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–951 Filed 1–22–04; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

RIN 2700–AC74

NASA Grant and Cooperative Agreement Handbook—Investigative Requirements

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: This final rule amends the Grant and Cooperative Agreement Handbook by revising the "Investigative Requirements" provision to require recipients of grants and cooperative agreements to ensure that individuals needing access to a NASA Center, facility, or computer system, or to NASA technical information, provide the personal background and biographical information requested by NASA.

EFFECTIVE DATE: January 23, 2004.

FOR FURTHER INFORMATION CONTACT: Paul Brundage, NASA Headquarters, Code HK, Washington, DC, (202) 358–0481, e-mail: *paul.d.brundage@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

NASA sometimes, albeit infrequently, requires information for investigations of individuals working on grants and cooperative agreements in order to determine whether to permit, deny, or restrict access to a NASA Center, facility, or computer system, or to NASA technical information. The provision at 1260.35, Investigative Requirements, is inserted in all grants and cooperative agreements to ensure recipients provide the information requested by NASA for any required investigation. This change is needed because recipients of grants and cooperative agreements, especially educational institutions, often do not maintain or have access to the types of information required by the provision at 1260.35 about their staff, faculty, and students because of policy and legal restrictions. Instead of requiring the recipient to obtain and submit personal information, this final rule makes it clear that the individuals needing access may provide the requisite information directly to NASA. This final rule also clarifies that access is to NASA Centers, facilities, computer systems, and NASA technical information.

NASA published a proposed rule in the **Federal Register** at 68 FR 48838 on August 15, 2003. One public comment was received. The commenter suggested that the provision clarify the procedure to be followed in the event that required access is denied or delayed. This commenter proposed that the following sentences be added: "Should Recipient personnel who require such access for this project be denied required access or required approvals are not provided in a timely manner, NASA and Recipient shall discuss alternatives for the conduct of the work in a manner that would eliminate the need for individual access to the NASA site. If a satisfactory resolution is not achieved, this Agreement may be terminated in accordance with termination clause in A–110."

NASA has considered the comment and takes the opinion that it is not necessary to amend the Investigative Requirements provision, as requested, because the termination provisions of the NASA Grant and Cooperative Agreement Handbook already address the procedures to be followed in the event that required access is denied or delayed.

This final rule makes an editorial change to the proposed rule by changing "will" to "may" in the last sentence of paragraph (a) of the Investigative Requirements provision.

B. Regulatory Flexibility Act

NASA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the changes will affect an insignificant number of grants and cooperative agreements.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not impose any new recordkeeping or information collection requirements, or collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in CFR Part 1260

Grant Programs—Science and Technology.

Tom Luedtke,

Assistant Administrator for Procurement.

■ Accordingly, 14 CFR part 1260 is amended as follows:

■ 1. The authority citation for 14 CFR 1260 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1), Pub. L. 97–258, and 96 Stat. 1003 (31 U.S.C. § 6301, *et seq.*).

PART 1260—GRANTS AND COOPERATIVE AGREEMENT

■ 2. Section 1260.35 is revised to read as follows:

§ 1260.35 Investigative Requirements.

INVESTIGATIVE REQUIREMENTS

January 2004

(a) NASA reserves the right to perform security checks and to deny or restrict access to a NASA Center, facility, or computer system, or to NASA technical information, as NASA deems appropriate. To the extent the Recipient needs such access for performance of the work, the Recipient shall ensure that individuals needing such access provide the personal background and biographical information requested by NASA. Individuals failing to provide the requested information may be denied such access.

(b) All requests to visit a NASA Center or facility must be submitted in a timely manner in accordance with instructions provided by that Center or facility.

[End of provision]

[FR Doc. 04–1210 Filed 1–22–04; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 155

[USCG–1998–3417]

RIN 1625–AA19 [formerly published as RIN 2115–AF60]

Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil

AGENCY: Coast Guard, DHS.

ACTION: Final rule; partial suspension of regulation.

SUMMARY: Current vessel response plan regulations require the owners or operators of vessels carrying Groups I through V petroleum oil as a primary cargo to identify in their response plans a salvage company with expertise and equipment, and a company with firefighting capability that can be deployed to a port nearest to the vessel's operating area within 24 hours of notification (Groups I–IV) or a discovery of a discharge (Group V). On January 17, 2001, a notice of suspension was published in the **Federal Register**, suspending the 24-hour requirement scheduled to become effective on February 12, 2001, until February 12, 2004 (63 FR 7069). The Coast Guard has decided to extend this suspension period for another 3 years to allow us to complete the rulemaking that proposes to revise the salvage and marine firefighting requirements.

DATES: This extension is effective as of February 12, 2004. Termination of the suspension will be on February 12, 2007.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–1998–3417 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) Web Site: *http://dms.dot.gov;*

(2) Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001;

(3) Fax: 202–493–2251;

(4) 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. The telephone number is 202–366–9329; or

(5) Federal eRulemaking Portal: *http://www.regulations.gov.*

The Docket Management Facility maintains the public docket for this rulemaking. Comments and material received from the public 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 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also access this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have question on this final rule; partial suspension of regulation, call Lieutenant Reed Kohberger, Office of Response, Response Operations Division, Coast Guard Headquarters, telephone 202–267–0448, or via e-mail: *RKohberger@comdt.uscg.mil.* For questions on viewing or submitting material to the docket, call Ms. Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Background and Regulatory History

Requirements for salvage and marine firefighting resources in vessel response plans have been in place since February 5, 1993 (58 FR 7424). The existing requirements are general. The Coast Guard did not originally develop specific requirements because each salvage and marine firefighting response for an individual vessel is unique, due to the vessel's size, construction, operating area, and other variables. The Coast Guard's intent was to rely on the planholder to prudently identify contractor resources to meet their needs. The Coast Guard anticipated that the significant benefits of a quick and effective salvage and marine firefighting response would be sufficient incentive for industry to develop salvage and marine firefighting capability parallel to the development of oil spill removal organizations.

Early in 1997, it became apparent that there was disagreement among planholders, salvage and marine firefighting contractors, maritime associations, public agencies, and other stakeholders as to what constituted adequate salvage and marine firefighting resources. There was also concern as to whether these resources could respond to the port nearest to the vessel's operating area within 24 hours.

On June 24, 1997, a notice of meeting was published in the **Federal Register** (62 FR 34105) announcing a workshop to solicit comments from the public on potential changes to the salvage and marine firefighting requirements currently found in 33 CFR part 155.

A public workshop was held on August 5, 1997, to address issues related to salvage and marine firefighting response capabilities, including the 24-hour response time requirement, which was then scheduled to become effective on February 18, 1998. The participants uniformly identified the following three issues that they felt the Coast Guard needed to address:

(1) Defining the salvage and marine firefighting capability that is necessary in the plans;

(2) Establishing how quickly these resources must be on-scene; and

(3) Determining what constitutes an adequate salvage and marine firefighting company.

Reason for Suspension

On February 12, 1998, a notice of suspension was published in the **Federal Register** suspending the 24-hour requirement scheduled to become effective on February 18, 1998, until February 12, 2001 (63 FR 7069) so that the Coast Guard could address issues identified at a public workshop through a rulemaking that would revise the existing salvage and marine firefighting requirements. On January 17, 2001, a second notice of suspension was published in the **Federal Register** suspending the 24-hour requirement scheduled to become effective on February 12, 2001, until February 12, 2004 (63 FR 7069) because the potential impact on small businesses from this new rulemaking requires the preparation of an initial regulatory flexibility analysis under the Small Business Regulatory Enforcement Fairness Act of 1996. This was not determined until a draft regulatory assessment was completed in November 2000.

The Coast Guard is extending the suspension period for an additional 3 years, to run until February 12, 2007. During the past 3 years, the Coast Guard had to redirect the majority of its regulatory resources to issue security-related regulations in response to the Maritime Transportation Security Act of 2002. As a result, we have not been able to complete our review of the comments we received in response to a Notice of Proposed Rulemaking on the proposed revisions to the existing salvage and marine firefighting requirements. Now that the security regulations have been issued, we expect to be able to redirect our resources to projects such as this one.

The extension of the suspension period will continue to relieve the affected industry from complying with the existing 24-hour requirements until this rulemaking project is complete, and amendments to the salvage and marine firefighting requirements become final.

Regulatory Evaluation

Although the final rule published in 1996 was a significant regulatory action under section 3(f) of Executive Order 12866, the Office of Management and Budget (OMB) does not consider this extension a significant action. As a result, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Small Entities

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

This extension will not have a significant economic impact on a substantial number of small entities because it reflects existing conditions and relieves planholders from certain original requirements. Any future regulatory action on this issue will address any economic impacts, including impacts on small entities. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this extension to a suspension of a final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This action does not provide for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Federalism

We have analyzed this action under E.O. 13132 and have determined that it does not have implications for federalism under that Order. Because this action extends a suspension of a final rule, it does not preempt any state action.

Unfunded Mandates Reform Act

This action will not result in an unfunded mandate under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538).

Taking of Private Property

This action will 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 action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Environment

We considered the environmental impact of this proposed rule and concluded that preparation of an Environmental Impact Statement is not necessary. An Environmental Assessment and a Finding of No Significant Impact are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 155

Hazardous substances, Incorporation by reference, Oil pollution, Reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 155 as follows:

PART 155—OIL OR HAZARDOUS MATERIAL POLLUTION PREVENTION REGULATIONS FOR VESSELS

■ 1. The authority citation for part 155 continues to read as follows:

Authority: 33 U.S.C. 1231, 1321(j); 46 U.S.C. 3715, 3719; sec. 2, E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1.

Sections 155.110–155.130, 155.350–155.400, 155.430, 155.440, 155.470, 155.1030(j) and (k), and 155.1065(g) also issued under 33 U.S.C. 1903(b); and §§ 155.1110–155.1150 also issued 33 U.S.C. 2735.

Note: Additional requirements for vessels carrying oil or hazardous materials appear in 46 CFR parts 30 through 36, 150, 151, and 153.

§ 155.1050 [Amended]

■ 2. In § 155.1050, paragraph (k)(3) is suspended until February 12, 2007.

§ 155.1052 [Amended]

■ 3. In § 155.1052, the last sentence in paragraph (f) is suspended until February 12, 2007.

Dated: January 16, 2004.

T.H. Gilmour,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Environmental Protection.

[FR Doc. 04–1440 Filed 1–22–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region 2 Docket No. NY65–270, FRL–7610–7]

Approval and Promulgation of Implementation Plans; New York State Implementation Plan Revision; 1-Hour Ozone Control Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the New York State Implementation Plan (SIP) for ozone concerning the control of volatile organic compounds. The SIP revision consists of amendments to Part 226, "Solvent Metal Cleaning", Part 228, "Surface Coating Processes", Part 235, "Consumer Products" and the adoption of new rule Part 239, "Portable Fuel Container Spillage Control" of Title 6 of the New York Codes, Rules and Regulations. This SIP revision consists of control measures needed to meet the shortfall emissions reduction identified by EPA in New York's 1-hour ozone attainment demonstration SIP. The intended effect of this action is to approve control strategies which will result in emission reductions that will help achieve attainment of the national ambient air quality standard for ozone.

EFFECTIVE DATE: This rule will be effective February 23, 2004.

ADDRESSES: A copy of the New York submittals are available at the following addresses for inspection during normal business hours: Environmental Protection Agency, Region 2 Office, Air

Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866.

New York State Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, New York 12233.

FOR FURTHER INFORMATION CONTACT: Kirk J. Wieber, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3381.

SUPPLEMENTARY INFORMATION:

I. What Is Required by the Clean Air Act and How Does It Apply to New York?

Section 182 of the Clean Air Act (Act) specifies the required State Implementation Plan (SIP) submissions and requirements for areas classified as nonattainment for ozone and when these submissions and requirements are to be submitted to EPA by the states. The specific requirements vary depending upon the severity of the ozone problem. The New York—Northern New Jersey—Long Island area is classified as a severe ozone nonattainment area. Under section 182, severe ozone nonattainment areas were required to submit demonstrations of how they would attain the 1-hour standard. On December 16, 1999 (64 FR 70364), EPA proposed approval of New York's 1-hour ozone attainment demonstration SIP for the New York—Northern New Jersey—Long Island nonattainment area. In that rulemaking, EPA identified an emission reduction shortfall associated with New York's 1-hour ozone attainment demonstration SIP, and required New York to address the shortfall. In a related matter, the Ozone Transport Commission (OTC) developed control measures into model rules for a number of source categories and estimated emission reduction benefits from implementing these model rules. These model rules were designed for use by states in developing their own regulations to achieve additional emission reductions to close emission shortfalls.

On February 4, 2002 (67 FR 5170), EPA approved New York's 1-hour ozone attainment demonstration SIP. This approval included an enforceable commitment submitted by New York to adopt additional control measures to close the shortfall identified by EPA for attainment of the 1-hour ozone standard.

II. What Was Included in New York's Submittal?

On December 30, 2002, Carl Johnson, Deputy Commissioner, New York State Department of Environmental Conservation (NYSDEC), submitted to EPA a revision to the SIP which included state adopted revisions to two regulations. The two regulations consist of New York Codes, Rules and Regulations (NYCRR), Part 235, "Consumer Products" and Part 239, "Portable Fuel Container Spillage Control." In addition, on January 17, 2003 and April 30, 2003, Deputy Commissioner Johnson submitted to EPA a revision to the SIP which included state proposed revisions to NYCRR, Part 226, "Solvent Metal Cleaning" and Part 228, "Surface Coating Processes", respectively. All of these revisions will provide volatile organic compound (VOC) emission reductions to address, in part, the shortfall identified by EPA. New York used the OTC model rules as guidelines to develop its rules.

On April 10, 2003 (68 FR 17573), EPA proposed approval of parts 226, 235 and 239, and on July 16, 2003 (68 FR 41987), EPA proposed approval of part 228. For a detailed discussion on the content and requirements of the revisions to New York's regulations, the reader is referred to EPA's proposed rulemaking actions.

In addition, the revisions to part 226, "Solvent Metal Cleaning" and part 228, "Surface Coating Processes" were proposed under a procedure called parallel processing, whereby EPA proposed rulemaking action concurrent with the State's procedures for amending its regulations. On September 17, 2003, and supplemented on October 27, 2003, New York submitted to EPA the adopted revisions to part 226 and part 228 for incorporation into the SIP. Because there were no substantial changes made to the state adopted revisions to part 226, as cited in the April 10, 2003 (68 FR 17573) proposal or part 228, as cited in the April 10, 2003 (68 FR 17573) proposal, EPA is proceeding with a final rulemaking which includes these revisions to part 226 and part 228.

III. What Comments Did EPA Receive in Response to Its Proposals?

In response to EPA's April 10, 2003 and July 16, 2003 proposed rulemaking actions, EPA received comments from one interested party. In summary, the commentor raised a concern that EPA is imposing unnecessary administrative impediments by requiring that alternate test methods, variances, innovative products exemptions and alternate compliance plans be approved by EPA on a case-by-case basis.

A. EPA's Response to Comments

While the provisions that set forth the requirements for alternate test methods, variances, innovative products and alternate compliance plans required pursuant to part 235, "Consumer Products" or part 239, "Portable Fuel Container Spillage Control" are acceptable, it is EPA policy that these types of provisions (compliance alternatives that are granted or accepted by a state) cannot be recognized, for enforcement purposes, as meeting federal requirements until they are submitted and approved by EPA as a SIP revision. It is not EPA's intention to reevaluate the technical adequacy associated with these applications granted or accepted by the State, but to ensure that the criteria in the regulation has been met. EPA in its oversight role must know exactly what emission limits a source must meet in order to meet EPA's compliance assurance responsibilities. Consequently, if EPA is unaware of an alternate compliance plan, variance or alternate test method a source has been approved to use by the State, then EPA would be holding the source to the existing requirement in the SIP-approved regulation and potentially find the source out of compliance with the applicable SIP. However, having the alternate compliance plan, variance or alternate test method incorporated into the applicable SIP increases the likelihood that the compliance determination for a source or product will be performed correctly.

The commentor is concerned about timeliness in distributing an alternate compliant product in association with EPA's review of a SIP revision for that product. EPA will make every effort to process individual SIP revisions as expeditiously as practicable, *i.e.*, via direct final rulemaking actions. Ideally, federal approval of a SIP revision concerning alternate compliance should occur soon after state approval. Another option that is available to the State, is to request parallel processing of a SIP revision. If a source were to request such processing because of time constraints, the State could request parallel processing if it believes the alternate compliance plan, variance or alternate test method is approvable. This substantially reduces the time for EPA to take rulemaking action. EPA will make efforts to expedite SIP revisions that are in accord with the appropriate criteria for the State's review of the alternate compliance plan, variance or alternate test method, and will apply enforcement discretion where appropriate.

In addition, the purpose of this SIP revision is to establish control measures needed to meet the shortfall emissions reduction identified by EPA in New York's 1-hour ozone attainment demonstration SIP. The intended effect of today's action is to approve control strategies which will result in emission reductions that will help achieve attainment of the national ambient air quality standard for ozone. With the acceptance of alternate control strategies/limits, EPA must be kept informed that the resulting emission reductions from these alternatives will not interfere with the necessary reductions associated with the previous identified shortfall.

IV. What Is EPA's Conclusion?

EPA has evaluated New York's submittal for consistency with the Act, EPA regulations, and EPA policy. EPA has determined that the revisions made to part 226, part 228, part 235 and new part 239 of Title 6 of the New York Codes, Rules and Regulations, entitled, "Solvent Metal Cleaning", "Surface Coatings Processes", "Consumer Products" and "Portable Fuel Container Spillage Control", respectively, meet the SIP revision requirements of the Act with the following exception. While the provisions related to alternate test methods, variances, innovative products and alternate compliance plans pursuant to part 235, "Consumer Products" or part 239, "Portable Fuel Container Spillage Control" are acceptable, the specific application of those provisions (those that are granted or accepted by the State) cannot be recognized as meeting federal requirements until they are submitted and approved by EPA as a SIP revision. Therefore, EPA is approving the regulations as part of the New York SIP with the exception that specific applications of provisions associated with alternate test methods, variances, innovative products and alternate compliance plans, allowed pursuant to parts 235 and 239, must be submitted to EPA as SIP revisions.

V. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 23, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 29, 2003.

Jane M. Kenny,

Regional Administrator, Region 2.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart HH—New York

■ 2. Section 52.1670 is amended by adding new paragraph (c)(103) to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

(103) Revisions to the State Implementation Plan submitted on

December 30, 2002, January 17, 2003, April 30, 2003, September 17, 2003, and October 27, 2003, by the New York State Department of Environmental Conservation, which consists of control strategies that will achieve volatile organic compound emission reductions that will help achieve attainment of the national ambient air quality standard for ozone.

(i) Incorporation by reference:

(A) Regulations Part 226, "Solvent Metal Cleaning Processes" of Title 6 of the New York Code of Rules and Regulations (NYCRR), filed on April 7, 2003, and effective on May 7, 2003, Part 228, "Surface Coating Processes" of Title 6 NYCRR, filed on June 23, 2003, and effective on July 23, 2003, Part 235, "Consumer Products" of Title 6 NYCRR, filed on October 10, 2002, and effective on November 9, 2002, and Part 239, "Portable Fuel Container Spillage Control" of Title 6 NYCRR, filed on October 4, 2002, and effective on November 4, 2002.

■ 3. In § 52.1679, the table is amended by:

■ a. revising the entries under Title 6 for Parts 226 and 228, and

■ b. adding new entry under Title 6 for Parts 235 and 239, in numerical order to read as follows:

52.1679 EPA-approved New York State regulations

New York State regulation	State effective date	Latest EPA approval date	Comments
Title 6:			
* * *	*	*	* * *
Part 226, "Solvent Metal Cleaning Processes".	5/7/03	1/23/04	
* * *	*	*	* * *
Part 228, "Surface Coating Processes".	8/23/03	1/23/04	
* * *	*	*	* * *
Part 235, "Consumer Products".	11/9/02	1/23/04	The specific application of provisions associated with alternate test methods, variances, innovative products and alternate compliance plans, must be submitted to EPA as SIP revisions.
* * *	*	*	* * *
Part 239, "Portable Fuel Container Spillage Control".	11/4/03	1/23/04	The specific application of provisions associated with alternate test methods, variances and innovative products, must be submitted to EPA as SIP revisions.
* * *	*	*	* * *

[FR Doc. 04–1446 Filed 1–22–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2003–0373; FRL–7342–1]

Sulfuryl Fluoride; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of sulfuryl fluoride and inorganic fluoride from postharvest fumigation uses of sulfuryl fluoride in or on stored commodities. Dow AgroScience LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). This action reflects the first food use on sulfuryl fluoride in the United States. Sulfuryl fluoride has been registered for fumigation of structures for termites under the brand name Vikane for many years. Sulfuryl fluoride is considered to be a methyl bromide replacement for some of these post-harvest fumigation uses. Under the Profume product label, grain processing facilities and stored cereal grains, dried fruits and tree nuts will be fumigated at a maximum use rate of 1,500 ounces/hours/1,000 ft^3 (1,500 milligrams/hours/liter (mg/hr/L) or 200 mg-hr/L under vacuum conditions. Commodities treated with Profume must be aerated for at least 24 hours before entering commerce.

DATES: This regulation is effective January 23, 2004. Objections and requests for hearings, identified by docket ID number OPP–2003–0373, must be received on or before March 23, 2004.

ADDRESSES: Written objections and hearing requests may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Dennis McNeilly, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 308–6742; e-mail address: *mcneilly.dennis@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0373. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at *http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/ 40cfr1 80_00.html/* , a beta site currently under development. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gov/opptsfrs/home/guidelin.html/*.

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

II. Background

In the **Federal Register** of February 15, 2002 (67 FR 7156) (FRL–6822–2), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, as amended by FQPA (Public Law 104–170), announcing the filing of a pesticide petition (PP 1F6312) by Dow AgroScience LLC, 9330 Zionsville Road, Indianapolis, IN 46268. That notice included a summary of the petition prepared by DowAgroScience, the registrant. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the insecticide sulfuryl fluoride and the metabolite fluoride, from sulfuryl fluoride postharvest use, in or on:

1. Fluoride in or on the following raw agricultural commodities: Date at 5 parts per million (ppm), fig at 5 ppm, plum, prune, dried at 5 ppm, grape, raisin at 5 ppm, fruit, dried at 5 ppm, almond at 10 ppm, pecan at 23 ppm, pistachio at 18 ppm, walnut at 30 ppm, beechnut; butternut; cashew; chestnut; chinquapin; filbert; nut, brazil; nut, hickory; and nut, macadamia at 30 ppm, barley, grain at 10 ppm, corn, field, grain; and corn, pop, grain at 7 ppm, oat, grain at 17 ppm, rice, grain at 10 ppm, wheat, grain at 25 ppm, millet, grain; rice, wild, grain; sorghum, grain; and triticale, grain at 25 ppm and on the processed products corn, field, flour at 26 ppm, corn, field, grits at 10 ppm, corn, field, meal at 28 ppm, corn, field, oil at 3 ppm, rice, brown at 14 ppm, rice, polished rice at 18 ppm, rice, bran at 31 ppm, rice, hulls at 35 ppm, wheat, bran at 40 ppm, wheat, flour at 10 ppm, wheat, germ at 98 ppm, wheat milled by products at 35 ppm, wheat, shorts at 38 ppm, corn, field, refined oil at 3 ppm.

2. Sulfuryl fluoride in or on the following raw agricultural commodities: Date at 0.03 ppm, fig at 0.05 ppm, plum, prune, dried at 0.01 ppm, grape, raisin at 0.01 ppm, fruit, dried at 0.05 ppm, almond at 0.2 ppm, pecan at 6.0 ppm, pistachio at 0.5 ppm, walnut at 6.0 ppm, beechnut; butternut; cashew; chestnut; chinquapin; filbert; nut, brazil; nut, hickory; and nut, macadamia at 6.0 ppm, barley, grain at 0.01 ppm, corn, field, grain and corn, pop, grain at 0.04 ppm, oat, grain at 0.01 ppm, rice, grain at 0.04 ppm, wheat, grain at 0.05 ppm, millet, grain; rice, wild, grain; sorghum, grain; triticale, grain at 0.05 ppm and on the processed products corn, field, flour at 0.01 ppm, corn, field, grits at 0.01 ppm, corn, field, meal at 0.01 ppm, corn, field, refined oil at 9.0 ppm, rice, brown at 0.01 ppm, rice, polished rice at 0.01 ppm, rice, bran at 0.01 ppm, rice, hulls at 0.08 ppm, wheat, bran at 0.01 ppm, wheat, flour at 0.03 ppm, wheat, germ at 0.01 ppm, wheat milled byproducts at 0.01 ppm, wheat, shorts at 0.01 ppm.

The Agency has previously established temporary tolerances for sulfuryl fluoride and fluoride on stored walnuts and raisins in connection an Experimental Use Permit (EUP) for post-harvest sulfuryl fluoride use (See 67 FR 5735, February 7, 2000) (FRL–6834–4). Sulfuryl fluoride has never been used on stored walnuts and raisins, however, because the California Department of Pesticide Regulation has not issued the necessary state authorization to allow the EUP to proceed. Because Dow Agrosciences has now requested that its EUP for sulfuryl fluoride use on walnuts and raisins be withdrawn and EPA, in today's action, is establishing permanent tolerances for sulfuryl fluoride on walnuts and raisins, these temporary tolerances are being revoked, also as a part of today's action. The Agency received a Hearing Request dated April 8, 2002 in response to the temporary tolerance final rule from Fluoride Action Network. Because the tolerances that were objected to have now been revoked, the objections are moot and are denied on that ground. EPA fully considered, however, all of the Fluoride Action Network's objections as a part of today's action and has responded to each significant objection lodged by the Fluoride Action Network.

The Agency received 17 sets of written comments (including 5 sets of late comments) on the notice of filing published on February 15, 2002 (67 FR 7156). In addition, the Agency had previously received comments on prior **Federal Register** tolerance documents related to the establishment of tolerances for sulfuryl fluoride and inorganic fluoride, including two sets of comments on the notice of filing of a pesticide petition to establish temporary tolerances for residues of fluoride and sulfuryl fluoride in or on walnuts and sulfuryl fluoride in or on raisins, and to establish an exemption from the requirement of a tolerance for inorganic fluoride in or on raisins published on June 15, 2001 (66 FR 32618) (FRL–6788–2), and 89 sets of comments (including 10 late comments) on the proposed rule to establish temporary tolerances for sulfuryl fluoride and inorganic fluoride residues resulting from application of sulfuryl fluoride in or on walnuts and raisins published on September 5, 2001 (66 FR 46415). In

addition, an objection and request for hearing was submitted in response to the establishment of temporary tolerances for sulfuryl fluoride and inorganic fluoride residues resulting from application of sulfuryl fluoride in or on walnuts and raisins published on February 7, 2002 (67 FR 5735).

The Agency has prepared a detailed response to the public comments regarding the establishment of tolerances for sulfuryl fluoride and inorganic fluoride on food including all public comments made to the documents noted above resulting from the application of sulfuryl fluoride as a post-harvest fumigant. This document has been made part of the public docket OPP–2003–0373 for this regulatory action, and is also available for review on the Internet (*http://www.epa.gov/fedrgstr/*).

In general, the comments addressed either procedural issues concerning the process of establishing tolerance levels for sulfuryl fluoride and total fluoride or substantive issues concerning the human health and other consequences that would result from the use of sulfuryl fluoride and increased human exposure to fluorides. Most of the comments relate to fluoride exposure, fluoride toxicology and issues related to the exposure to fluorides from fluoridated drinking water. The longest and most significant of these comments came from the Fluoride Action Network (FAN), which, among its comments, questioned the safety of the current Maximum Contaminant Level Goal (MCLG) and Secondary Maximum Contamination Level (SGML) for fluoride in drinking water established by the Agency's Office of Water, under the Safe Drinking Water Act. The Safe Drinking Water Act (SDWA) requires EPA to review each National Primary Drinking Water Regulation (NPDWR) at least once every 6 years and revise them, if appropriate. As part of this review process, the Office of Water, has requested the National Academy of Science (NAS) to review the current drinking water standards for fluoride. The project scope from the NAS website states:

> A subcommittee of the National Research Council's (NRC) Committee on Toxicology (COT) will review toxicologic, epidemiologic, and clinical data, particularly data published since 1993, and exposure data on orally ingested fluoride from drinking water and other sources (e.g., food, toothpaste, dental rinses). Based on those reviews the subcommittee will evaluate independently the scientific basis of the EPA's maximum contaminant level goal (MCLG) of 4 milligram per liter (mg/L) and secondary maximum contaminant level (SMCL) of 2 mg/L in drinking water. The subcommittee will advise EPA on the adequacy of its fluoride MCLG and SMCL to protect children and others from adverse effects. The subcommittee will consider the relative contribution of various fluoride sources (e.g., food, dental-hygiene products) to total exposure. The subcommittee will also identify data gaps and make recommendations for future research relevant to setting the MCLG and SMCL for fluoride. The subcommittee will not address questions of economics, risk-benefit assessment, or water-treatment technology.

A previous NAS review of fluoride was published in 1993 (NRC 1993) and served as the basis for the retention of the 4 mg/L MCLG and 2 mg/L SMCL by EPA in 1993.

The comments cited a total of 120 scientific studies and other published articles and books (see Unit VII.); these citations have all been considered by the Agency and are discussed in further detail in the assessment of the toxic effects resulting from exposure to fluoride provided in Unit III. as well as within the detailed response to public comments document. The analysis of the acceptability of fluoride exposure is based on the current MCLG and SMCL for fluoride in drinking water. The NAS is currently reviewing the adequacy of the present drinking water standards for fluoride in light of relevant scientific data that has been published subsequent to the 1993 review (National Research Council (1993). Health effects of ingested fluoride. National Academy Press, Washington, DC.). In connection with the sulfuryl fluoride tolerance petition, EPA has separately reviewed the cited studies (Dellarco 2003; Baetcke et al. 2003) and concludes that the cited scientific data that has been published since 1993 does not support adopting a reference point for evaluating the adverse health effects of fluoride than that underlying the MCLG.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for a tolerance for residues of sulfuryl fluoride and fluoride on numerous commodities at the levels specified in the tables below. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by sulfuryl fluoride are discussed in Table 1 of this unit as well as the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies reviewed.

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY

Study Type/Guideline No.	Results
2–Week inhalation study--rat	NOAEL = 83/89 (Male/Female) milligrams/kilogram/day (mg/kg/day) LOAEL = 249/267 (M/F) mg/kg/day based on slightly increased kidney weights, minimal histopathology in kidney. At 495/534 high mortality, decreased body weights, severe histopathology in the kidney, gross and histopathology in many tissues/organs (secondary to kidney effects); severe inflammation of respiratory tissues in one survivor. No treatment-related neurotoxicity).
2–Week inhalation study--dog	NOAEL = 26/27 (M/F) mg/kg/day LOAEL = 79/80 (M/F) mg/kg/day based on M&F intermittant tremors and tetany during exposure, minimal inflammatory changes in upper respiratory tract, decreased body weight (F only). Note: Increased serum fluoride at ≥ 26/27 mg/kg/day
2–Week inhalation study--rabbit	NOAEL = 30/30 (M/F) mg/kg/day LOAEL = 90/90 (M/F) mg/kg/day based on for both M&F malacia (necrosis) in cerebrum, vacuolation of cerebrum, moderate inflammation of respiratory tissues At 180/180 mg/kg/day for M&F convulsions, hyperactivity, malacia (necrosis) in cerebrum, vacuolation of cerebrum, moderate inflammation of respiratory tissues
90-Day inhalation toxicity--rat (870.3100)	NOAEL = 24/25 (M/F) mg/kg/day LOAEL = 80/83 (M/F) mg/kg/day based on dental fluorosis* At 240/250 (M/F) vacuolation of caudate-putamen nucleus and white fiber tracts of the internal capsule of the brain, decreased body weight, inflammation of nasal passages, alveolar histiocytosis; slight hyperplasia of renal collecting ducts (F only)
90-Day inhalation toxicity--mouse (870.3100)	NOAEL = 38/36 (M/F) mg/kg/day LOAEL = 125/121 (M/F) mg/kg/day based on for both M/F miscroscopic lesions in caudate-putamen nucleus and external capsule of the brain, decreased body weight, decreased body weight gain, follicular cell hypertrophy in thyroid. Note: Increased serum fluoride at ≥ 26/27 mg/kg/day
90-Day inhalation toxicity--dog (870.3150)	NOAEL = 25/26 (M/F) mg/kg/day LOAEL = 50/51 (M/F) mg/kg/day based on slight histopathology of the caudate nucleus of the basal ganglia, decreased body weight, decreased body weight gain, transient neurological signs (lateral recumbancy, tremors, incoordination, salivation, tetany, inactivity) starting at day 19 in one M
90-Day inhalation toxicity--rabbit (870.3150)	NOAEL = 8.6/8.5 (M/F) mg/kg/day LOAEL = 29/28 (M/F) mg/kg/day based on for both M&F decreased body weight, decreased liver weight, dental fluorosis*, vacuolation of white matter of the brain (F only). At 86/85 mg/kg/day for both M&F malacia (necrosis) and vacuolation of putamen, globus pallidus and internal and external capsules in the brain, decreased body weight gain, alveolar histiocytosis, histopathology in nasal epithelium.
Prenatal developmental--rat (870.3700)	*Maternal* NOAEL = 225 ppm or 243 (F) mg/kg/day LOAEL = >225 ppm or >243 (F) mg/kg/day based on no observed effects. *Developmental* NOAEL = 225 or 243 (F) mg/kg/day LOAEL = >225 ppm or 243 (F) mg/kg/day based on no observed adverse developmental effects
Prenatal developmental--rabbit (870.3700)	*Maternal* NOAEL = 75 ppm or 29 (F) mg/kg/day LOAEL = 225 ppm or 86 mg/kg/day based on decreased body weight and body weight gain during treatment *Developmental* NOAEL = 75 ppm or 29/29 (M/F) mg/kg/day LOAEL = 225 ppm or 86 (F) mg/kg/day based on decreased fetal body weight, decreased crown-rump length, possible increased fetal liver pathology (pale liver)
Reproduction and fertility effects (870.3800)	*Parental/Systemic* NOAEL = 5 ppm or 3.6/3.6 (M/F) mg/kg/day LOAEL = 20 ppm or 14/14 (M/F) mg/kg/day based on pale foci in lungs, increased alveolar macrophages in lungs *Reproductive* NOAEL = 14/14 (M/F) mg/kg/day LOAEL = >150 ppm or 108/108 (M/F) mg/kg/day based on no adverse effects up to 150 ppm *Offspring* NOAEL = 20 ppm or 14 mg/kg/day LOAEL = 150 ppm or 108 mg/kg/day based on decreased pup weight in the F1 and F2 generations (probably secondary to maternal body weight loss

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY—Continued

Study Type/Guideline No.	Results
Chronic toxicity--rodents (870.4100)	NOAEL = 3.5 for M and 16 for F mg/kg/day LOAEL = 20 ppm or 14 for M and 80 ppm or 62 for F mg/kg/day based on dental fluorosis* in males and for females greatly increased mortality (due mostly to severe kidney toxicity which led to kidney failure); and histopathology in brain (vacuolation in cerebrum and thalmus/hypothalmus), adrenal cortex, eyes, liver, nasal tissue and respiratory tract; and, dental fluorosis*. No evidence of carcinogenicity in M or F
1–Year chronic inhalation toxicity--dog (870.4100)	NOAEL = 5.0/5.1 (M/F) mg/kg/day LOAEL = 20/20 (M/F) mg/kg/day based on for both M/F decreased body weight gain, increased alveolar macrophages in lungs, dental fluorosis*. At 50/51 mg/kg/day for both M/F increased mortality, malacia (necrosis) in caudate nucleus of brain, follicular cell hypertrophy in thyroid, histopathology in lung.
18–Month carcinogenicity inhalation study--mouse (870.4200)	NOAEL = 25/25 (M/F) mg/kg/day LOAEL = 101/101 (M/F) mg/kg/day based on for both M/F cerebral vacuolation in brain, decreased body weight gain, follicular hypertrophy in thyroid (M only), increased mortality (F only), heart thrombus (F only), and lung congestion (F only) No evidence of carcinogenicity in M or F
2–Year combined chronic/carcinogenicity--rat (870.4300)	NOAEL = 3.5 for M and 16 for F mg/kg/day LOAEL = 20 ppm or 14 for M and 80 ppm or 62 for F mg/kg/day based on dental fluorosis* in males and for females greatly increased mortality (due mostly to severe kidney toxicity which led to kidney failure); and histopathology in brain (vacuolation in cerebrum and thalmus/hypothalmus), adrenal cortex, eyes, liver, nasal tissue and respiratory tract; and, dental fluorosis*. No evidence of carcinogenicity in M or F
Ames assay (870.5100)	Negative without and with S-9 activation
Cytogenetics (870.5395)	There was no significant increase in the frequency of micronucleated polychromatic erythrocytes in bone marrow at any sulfuryl fluoride concentration or treatment time used in the study (520 ppm).
UDS Assay (870.5550)	There was no evidence of unscheduled DNA synthesis over negative controls up to 1,020 ppm of sulfuryl fluoride.
Acute inhalation neurotoxicity study--rat (special design) (870.6200)	*Systemic* NOAEL = 300 ppm or 354 (F) mg/kg/day LOAEL = >300 ppm or >354 (F) mg/kg/day based on highest dose tested *Neurotoxic* NOAEL = 354 (F) mg/kg/day LOAEL = >354 (F) mg/kg/day based on highest dose tested Note: study included electrophysiological parameters, but no microscopic pathology.
90–Day inhalation neurotoxicity study-rat (special design) (870.6200)	*Systemic* NOAEL = 24/25 (M/F) mg/kg/day LOAEL = 80/83 (M/F) mg/kg/day based on for both M and F pale foci in pleura and macrophages in lungs, dental fluorosis* *Neurotoxic* NOAEL = 24/25 (M/F) mg/kg/day LOAEL = 80/83 (M/F) mg/kg/day based on for both M and F disturbances in electro-physiological parameters (slowing of VER and SER waveforms in F and ABR waveforms in M
1–Year inhalation neurotoxicity study-rat (special design) (870.6200)	NOAEL = 3.5/3.9 (M/F) mg/kg/day LOAEL = 14/16 (M/F) mg/kg/day based on dental fluorosis*. At 52/62 mg/kg/day (M/F) increased kidney and liver weights, progressive kidney disease and histopathology in lung. *Neurotoxic* NOAEL = 56/62 (M/F) mg/kg/day LOAEL = 56/62 (M/F) mg/kg/day based on highest dose tested
Developmental neurotoxicity (870.6300)	No study available. Study will be a condition of registration.
Metabolism and pharmacokinetics (870.7485)	Waived, Reregistration Eligibility Document, 1993
Dermal penetration (870.7600)	No study available. Not required for a gas.

*As discussed later in this document, dental fluorosis is not considered an adverse health effect, and the identification of that effect in any of these toxicological studies has not served to define a safe level of exposure to sulfuryl fluoride under the FFDCA.

Technical grade sulfuryl fluoride (99.8% active ingredient) is marketed as a liquified gas in pressurized steel cylinders. The acute oral LD_{50} of sulfuryl fluoride has been estimated to be approximately 100 mg/kg in rats (Toxicity Category II). The acute inhalation LC_{50} in mice (4–hour exposure) is 660 ppm (2.56 mg/L) in males and 642 ppm (2.49 mg/L) in females. The acute inhalation LC_{50} in rats (1 hour exposure) is 4,512 ppm (17.5 mg/L). Based on the use pattern for sulfuryl fluoride and several reported incidences of human poisonings in the general toxicologic literature, the Agency has classified sulfuryl fluoride as Toxicity Category I for acute inhalation toxicity. When released from pressurized steel cylinders, sulfuryl fluoride causes freezing of skin and eye tissues on contact. Therefore, no dermal studies or eye irritation studies have been required to be submitted. The acute dermal toxicity study (assumed Toxicity Category IV), the primary skin irritation study (assumed Toxicity Category IV), the primary eye irritation study (assumed Toxicity Category I), and the dermal sensitization study (assumed to be a non-sensitizer) have been waived. In a non-guideline study in which rats were dermally exposed (with no inhalation exposure) to vapors of sulfuryl fluoride gas at an exposure concentration of 9,600 ppm (40.3 mg/L) for 4 hours, no treatment-related adverse effects were observed.

In 2–week inhalation studies in rats, dogs and rabbits, different target organs were affected. In rats, the primary target organ was the kidneys, in which severe histopathological lesions were observed. These lesions included papillary necrosis, hyperplasia of the epithelial cells of the papillae, and degeneration/ regeneration of collecting tubules and proximal tubules. In dogs, the primary target organ was the upper respiratory tract, in which minimal inflammation was observed. Intermittant tremors and tetany were also noted in dogs. In rabbits, the primary target organ was the brain, in which malacia (necrosis) and vacuolation were observed in the cerebrum. Inflammation of the upper respiratory tract was also noted in rabbits.

In subchronic (90–day) inhalation studies in rats, mice, dogs and rabbits, the brain was the major target organ. Malacia and/or vacuolation were observed in the white matter of the brain in all four species. The portions of the brain most often affected were the caudate-putamen nucleus in the basal ganglia, the white fiber tracts in the internal and external capsules, and the globus pallidus of the cerebrum. In dogs and rabbits, clinical signs of neurotoxicity (including tremors, tetany, incoordination, convulsions and/or hind limb paralysis) were also observed. Inflammation of the nasal passages and histiocytosis of the lungs were observed in rats and rabbits; but not in dogs, in which species inflammation of the upper respiratory tract was more prominent in the 2–week study. In rats, kidney damage was also observed. In mice, follicular cell hypertrophy was noted in the thyroid gland. Decreased body weights and body weight gains were also observed in rats, dogs and mice.

In chronic (1–2 year) inhalation studies in rats, dogs and mice, target organs were the same as in the 90–day studies. In rats, severe kidney damage caused renal failure and mortalities in many animals. Additional gross and histopathological lesions in numerous organs and tissues were considered to be secondary to the primary effect on the kidneys. Other treatment-related effects in rats included effects in the brain (vacuolation of the cerebrum and thalamus/ hypothalamus) and respiratory tract (reactive hyperplasia and inflammation of the respiratory epithelium of the nasal turbinates, lung congestion, aggregates of alveolar macrophages). In dogs and mice, increased mortalities, malacia and/or vacuolation in the white matter in the brain, histopathology in the lungs, and follicular cell hypertrophy in the thyroid gland were observed. Decreased body weights and body weight gains were also noted in all three species. No evidence of carcinogenicity was observed in either the combined chronic toxicity/carcinogenicity study in rats or in the 18–month carcinogenicity study in mice.

In specially designed acute and subchronic inhalation neurotoxicity studies in rats, several electrophysiological parameters (EEGs) were recorded in addition to observations for clinical signs of neurotoxicity, functional observational battery (FOB) and motor activity testing, and/or neurohistopathologic examination. Following two exposures on consecutive days for 6 hours/day at 300 ppm of sulfuryl fluoride (354 mg/ kg/day), no treatment-related neurotoxic effects were noted. In a 90–day study, changes in some EEG patterns were observed at 100 ppm (80 mg/kg/day) and in several additional patterns at 300 ppm (240 mg/kg/day). Vacuolation of the white matter in the cerebrum was also observed at 300 ppm in this study. In a specially designed 1–year chronic inhalation neurotoxicity study in rats, no treatment-related neurotoxic effects were observed at 80 ppm (56 mg/kg/ day). EEGs were not recorded in this study.

In a developmental toxicity inhalation study in rats, no developmental toxicity was observed in the pups. Although no maternal toxicity was observed in this study at the highest dose tested (225 ppm), significant maternal toxicity (decreased body weight, body weight gain and food consumption; increased water consumption and kidney weights; and gross pathological changes in the kidneys and liver) was observed in a previously conducted range-finding study at a slightly higher dose level (300 ppm). In a developmental toxicity inhalation study in rabbits, decreased fetal body weights were observed in the pups. At the same dose level, decreased body weight and body weight gain were observed in the dams. In a 2-generation reproduction inhalation study in rats, vacuolation of the white matter in the brain, pathology in the lungs (pale, gray foci; increased alveolar macrophages) and decreased body weights were observed in the parental animals. Decreased pup body weights in the F1 and F2 generations were observed in the offspring. No effects on reproductive parameters were noted in this study. No quantitative or qualitative evidence of increased susceptibility of fetuses or pups was observed in the developmental toxicity or reproduction studies on sulfuryl fluoride.

A battery of mutagenicity studies was negative for genotoxic potential. The studies included a reverse gene mutation assay in *Salmonella typhimurium*, an unscheduled DNA synthesis assay in primary rat hepatocytes, and a micronucleus assay in mouse bone marrow cells.

In carcinogenicity studies in male and female rats and in male and female mice, sulfuryl fluoride did not demonstrate evidence of carcinogenic potential. Sulfuryl fluoride is classified as "not likely to be carcinogenic to humans" according to the July 2, 1999 *EPA Draft Proposed Guidelines for Carcinogen Risk Assessment.*

Poisonings and fatalities have been reported in humans following inhalation exposure to sulfuryl fluoride. The severity of these effects has depended on the concentration of sulfuryl fluoride and the duration of exposure. Short-term inhalation exposure to high concentrations has caused respiratory irritation, pulmonary edema, nausea, abdominal pain, central nervous system depression, and numbness in the extremities. In addition, there have been two reports of deaths of persons entering houses treated with sulfuryl fluoride. One

person entered the house illegally and was found dead the next morning. A second person died of cardiac arrest after sleeping in the house overnight following fumigation. A plasma fluoride level of 0.5 mg/L (10 times normal) was found in this person following exposure. Prolonged chronic inhalation exposures to concentrations of sulfuryl fluoride gas significantly above the threshold limit value (TLV) of 5 ppm have caused fluorosis in humans because sulfuryl fluoride is converted to fluoride anion in the body. Fluorosis is characterized by binding of fluoride anion to teeth (causing mottling of the teeth) and to bone. Sulfuryl fluoride and fluoride anion are the residues of concern associated with sulfuryl fluoride.

Fluoride anion. In assessing the risks associated with exposure to fluoride, the Agency has relied on the toxicological assessment and Maximum Contaminant Levels (MCLs) and Maximum Contaminant Level Goals (MCLG) established by the Agency's Office of Water. The MCGL is the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety. A MCL is an enforceable level that is set as closely as feasible to the MCLG of a contaminant. MCLGs are non-enforceable health goals. For fluoride, both the MCL and the MCLG have been set at 4.0 ppm in order to protect against crippling skeletal fluorosis. The Office of Water has also established a secondary MCL (SMCL) for fluoride at 2.0 ppm. The SMCL is a non-enforceable level established to be protective against the cosmetic and aesthetic effects of objectionable dental fluorosis.

B. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern (LOC). However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

Three other types of safety or uncertainty factors may be used: "Traditional uncertainty factors"; the "special FQPA safety factor"; and the "default FQPA safety factor." By the term "traditional uncertainty factor," EPA is referring to those additional uncertainty factors used prior to FQPA passage to account for data base deficiencies. These traditional uncertainty factors have been incorporated by the FQPA into the additional safety factor for the protection of infants and children. The term "special FQPA safety factor" refers to those safety factors that are deemed necessary for the protection of infants and children primarily as a result of the FQPA. The "default FQPA safety factor" is the additional 10X safety factor that is mandated by the statute unless it is decided that there are reliable data to choose a different additional factor (potentially a traditional uncertainty factor or a special FQPA safety factor).

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by an UF of 100 to account for interspecies and intraspecies differences and any traditional uncertainty factors deemed appropriate (RfD = NOAEL/UF). Where a special FQPA safety factor or the default FQPA safety factor is used, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of safety factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk). An example of how such a probability risk is expressed would be to describe the risk as one in one hundred thousand (1×10^{-5}), one in a million (1×10^{-6}), or one in ten million (1×10^{-7}). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a "point of departure" is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated.

A summary of the toxicological endpoints for sulfuryl fluoride used for human risk assessment is shown in Table 2 of this unit:

TABLE 2.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR SULFURYL FLUORIDE FOR USE IN HUMAN RISK ASSESSMENT

Exposure Scenario	Dose Used in Risk Assessment, Interspecies and Intraspecies and any Traditional UF	Special FQPA SF and Level of Concern for Risk Assessment	Study and Toxicological Effects
Acute dietary	None, UF = N/A	Not applicable	No toxicological endpoint attributable to a single exposure was identified in the available toxicology studies on sulfuryl fluoride
Chronic dietary (all populations)	NOAEL = 8.5 mg/kg/day UF = 3,000 Chronic RfD = 0.003 mg/kg/day	Special FQPA SF = 1X cPAD = chronic RfD/Special FQPA SF = 0.003 mg/kg/day	90–Day inhalation--rabbit LOAEL = 28 mg/kg/day based on vacuolation of white matter in the brain of females.

TABLE 2.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR SULFURYL FLUORIDE FOR USE IN HUMAN RISK ASSESSMENT—Continued

Exposure Scenario	Dose Used in Risk Assessment, Interspecies and Intraspecies and any Traditional UF	Special FQPA SF and Level of Concern for Risk Assessment	Study and Toxicological Effects
Incidental oral (all durations)	None	Not applicable	Due to sulfuryl fluoride being a gas and pattern of use, no significant incidental oral exposure is anticipated.
Dermal (all durations)	None	Not applicable	Due to sulfuryl fluoride being a gas and pattern of use, no significant incidental dermal exposure is anticipated. No hazard identified, therefore, no quantification is required.
Short-term inhalation (1 to 30 days)	Inhalation study NOAEL = 30 mg/kg/day (100 ppm; 0.42 mg/L)	Residential LOC for MOE = 1,000 Occupational LOC = 100	2-Week inhalation--rabbit LOAEL = 90 mg/kg/day (300 ppm; 1.25 mg/L) based on malacia (necrosis) and vacuolation in brain, inflammation of nasal tissue and trachea
Intermediate-term inhalation (1 to 6 months)	Inhalation study NOAEL = 8.5 mg/kg/day (100 ppm; 0.42mg/L)	Residential LOC for MOE = 1,000 Occupational LOC for MOE = 100	90–Day inhalation-rabbit LOAEL = 28 mg/kg/day (100 ppm; 0.42 mg/L) based on vacuolation of white matter in the brain of females.
Long-term inhalation (>6 months)	Inhalation study NOAEL = 8.5 mg/kg/day (30 ppm; 0.13 mg/L)	Residential LOC for MOE = 3,000 Occupational LOC for MOE = 300	90–Day inhalation--rabbit LOAEL = 28 mg/kg/day based on vacuolation of white matter in the brain of females
Cancer (oral, dermal, inhalation)	Classified as not likely to be carcinogenic to humans		

For sulfuryl fluoride, the end-point from an inhalation study is being used to calculate the chronic RfD which is used to perform risk assessments for oral exposure. In addition to being the only practical way to administer a gas test material, the Agency believes this is a very conservative methodology which is supported by the following considerations:

The absorption of test material from inhalation exposure is generally presumed to be 100%, where as absorption via oral exposure is often times determined to be less than 100%.

A higher and more persistent level of parent test material in the body may occur following inhalation exposure as compared to an oral exposure because the parent test material is immediately distributed throughout the circulatory system following inhalation, rather than the first being directly shunted to the liver (where most metabolism occurs) as in the case of oral exposure.

In addition, for sulfuryl fluoride, the NOAEL on which the chronic RfD was calculated is from a study in rabbits (which is the most sensitive species for the neurotoxic effects) and the LOAEL in this study was close to a threshold effect level (the effect was observed only in the female rabbit).

Fluoride anion. In assessing the risks associated with exposure to fluoride, the Agency relied on the toxicological assessment and MCLG established by the Agency's Office of Water for fluoride of 4.0 ppm. At this time, based on the information available to the Agency, EPA is not concluding that dental fluorosis associated with fluoride exposure is an adverse health effect under the FFDCA. The current arguments that dental fluorosis is more than a cosmetic effect are not sufficiently persuasive to warrant regulation as an adverse health effect under the FFDCA. Accordingly, consistent with the action taken by the Office of Water under the Safe Drinking Water Act, 50 FR 47142 (November 14, 1985) (WH–FRL–2913–8(b)), the Agency believes the appropriate endpoint for regulation under the FFDCA is skeletal fluorosis.

While the tolerance safety determination under the FFDCA is a health based standard, FIFRA requires the balancing of all costs, taking into account the economic, social, and environmental effects as well as health based risks, against the benefits associated with the pesticide use. Therefore, the Agency will consider dental fluorosis in determining whether sulfuryl fluoride meets the requisite standard under FIFRA.

Using body weight and water consumption estimates, the MCLG, expressed mg/kg/day, for the population groups addressed in the fluoride risk assessments are as follows:

U.S. population . . . . . 0.114 mg/kg/day

Infants (< 1 year old). . . . . 0.571 mg/kg/day

Children 1-2 years old. . . . . 0.308 mg/kg/day

Children 3-5 years old. . . . . 0.182 mg/kg/day

Children 6-12 years old . . . . . 0.100 mg/kg/day

Youth 13-19 years old . . . . . 0.133 mg/kg/day

Adults 20+ years old. . . . . 0.114 mg/kg/day

Females 13–49 years old . . . . . 0.131 mg/kg/day

For fluoride risk assessments addressed in this document, the term "% of MCLG (as mg/kg/day)" is analogous to a reference dose (RfD).

Percent of MCLG (expressed as mg/kg/day) use in acute risk assessments. None. The Agency has not identified any toxicological endpoint attributable to a single exposure of fluoride that would be applicable to females (13–50 years old) or to the general population (including infants and children).

Percent of MCLG (expressed as mg/kg/day) use in non-acute risk assessments. For all short-term, intermediate-term, and chronic assessments, the Agency

has converted the MCLG of 4.0 ppm to a mg/kg/day basis using standard water consumption estimates and body weight data from the NHANES III survey (U.S. EPA, 2000). Body weight data from the NHANES survey were matched as closely as possible to the population subgroups addressed by the DEEM-FCID dietary exposure modelling software. Use of the NHANES data, rather than the Agency default body weights, avoids setting dose levels too high due to underestimated body weights. These doses in Table 3 below were used for all risk assessment durations and pathways (oral, dermal, and inhalation) in a manner analogous to an RfD. That is, the Agency would have concerns about the level of estimated risk if the exposure estimates exceed 100% of "MCLG (as mg/kg/day)" as defined in this rule.

The Agency notes that the EPA's Integrated Risk Information System (IRIS) lists an oral RfD of 1 ppm fluoride in water for dental fluorosis (IRIS Database). That RfD is based on a NOEL of 1 ppm with an LOEL of 2 ppm and no modifying or uncertainty factors since the effect was noted in a sensitive population and the duration of exposure was appropriate for the effect and the population. The IRIS value has not been used in this action since dental fluorosis is a cosmetic effect, not a human health effect.

*Table 3.—Toxicological Doses Used in the Fluoride Risk Assessment**

Population Subgroup	Toxicological Effect	Water Conc. Protective of Effect, ppm	Water Consumption, L/day	Body Weight, kg	of MCLG (as mg/kg/day)
U.S. population (total)	Skeletal fluorosis	4	2	70	0.114
All infants (<1 year)	Skeletal fluorosis	4	1	7	0.571
Children (1–2 years)	Skeletal fluorosis	4	1	13	0.308
Children (3–5 years)	Skeletal fluorosis	4	1	22	0.182
Children (6–12 years)	Skeletal fluorosis	4	1	40	0.1
Youth (13–19 years)	Skeletal fluorosis	4	2	60	0.133
Adults (20+ years)	Skeletal fluorosis	4	2	70	0.114
Females (13–49 years)	Skeletal fluorosis	4	2	61	0.131

*Doses are used in a manner analogous to an RfD and are used for all exposure pathways

Carcinogenicity. In its assessment of the health effects of fluoride, the National Research Council (NRC) concluded that the available laboratory data are insufficient to demonstrate a carcinogenic effect of fluoride in animals. The NRC also concluded that the weight of the evidence from more than 50 epidemiological studies does not support the hypothesis of an association between fluoride exposure and increased cancer risk in humans. National Research Council, 1993.

The Agency for Toxic Substances and Disease Registry (ATSDR) and the World Health Organization have come to similar conclusions. Based on the findings of those bodies and the Agency's own review, the Agency believes fluoride poses a negligible cancer risk.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* This is the first food-use for sulfuryl fluoride. Temporary tolerances were established (40 CFR 180.575) for the residues of sulfuryl fluoride, in or on a walnuts and raisins. Tolerances already exist for fluoride residues in food in 40 CFR 180.145 to support use of cryolite in on on various raw agricultural commodities. This action involves adding a new section (1)(a)(3) to 40 CFR 180.145, i.e., an entry adding postharvest use of Profume on stored commodites. Risk assessments were conducted by EPA to assess dietary exposures from sulfuryl fluoride and inorganic fluoride in food as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No toxicological endpoint attributable to a single exposure was identified in the available toxicology studies for either sulfuryl fluoride and/or fluoride; therefore, no acute dietary exposure analysis was conducted.

ii. *Chronic exposure.* In conducting the chronic dietary risk assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID), which incorporates food consumption data as reported by respondents in the U.S. Department of Agriculture 1994-1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). The following assumptions were made for the chronic exposure assessments: The chronic analysis for sulfuryl fluoride used anticipated residues (average residue) from residue trials reflecting the maximum proposed use rate, percent market share estimates and a dilution factor for flour commodities to reflect the pre-fumigation draw down practice in grain mills. This assessment includes quantitative estimates of dietary exposure from background levels of fluoride in food, fluoride in water, and fluoride from the pesticidal food uses of cryolite and sulfuryl fluoride; non-dietary exposure from the use of fluoridated toothpaste, and non-dietary exposure from fluoride residues in air. For each of these pathways of exposure, residue estimates are conservative to moderately conservative in nature. Other potential sources of fluoride exposure have not been included in this assessment in a quantitative manner, primarily due to lack of demographic and/or exposure information. Non-quantified pathways of exposure are not expected to significantly increase exposure estimates for the various population subgroups at large.

The chronic analysis for sulfuryl fluoride used average residue values from residue trials reflecting the maximum proposed use, percent market share estimates, and a dilution factor for flour commodities to reflect the pre-fumigation draw-down practice in grain processing mills. Based on these

assumptions, the refined chronic dietary risk estimates for all population subgroups are less than 1% of the chronic population-adjusted dose (cPAD) of 0.003 mg/kg/day.

TABLE 4.—CHRONIC DIETARY EXPOSURE ASSESSMENT FOR SULFURYL FLUORIDE

Population Subgroup	Chronic PAD, mg/kg/day	Estimated Exposure, mg/kg/day	Risk, % of cPAD
U.S. population (total)	0.003	0.000003	<1
All infants (<1 year)	0.003	0.000002	<1
Children (1–2 years)	0.003	0.000004	<1
Children (3–5 years)	0.003	0.000004	<1
Children (6–12 years)	0.003	0.000003	<1
Youth (13–19 years)	0.003	0.000001	<1
Adults (20–49 yrs)	0.003	0.000003	<1
Adults (50+ years)	0.003	0.000004	<1
Females (13–49 years)	0.003	0.000003	<1

In addition to assessing the exposure to sulfuryl fluoride in food, EPA assessed fluoride exposure from residues in foods from the use of sulfuryl fluoride and/or cryolite as well as background levels in foods. Also addressed quantitatively are exposure from the use of fluoridated toothpaste, inhalation of fluoride from the atmosphere, and consumption of fluoride-containing water. Other known potential sources of fluoride exposure were not addressed quantitatively due to lack of data regarding residues and/or data regarding the demographics of exposure. Details regarding the residue profiles of the various fluoride sources are discussed below.

Background fluoride in foods. Monitoring studies indicate fluoride is ubiquitous in the food supply (e.g., World Health Organization. 2002; Rao,G. S. 1984; Sherlock, JC. 1984). The primary sources for residues used in this background food assessment were Taves, D.R. (1983) for plant-based foods, bovine and porcine commodities, and eggs; Fein, N.J. and Cerklewski F.L. (2001) for poultry; and residue trials for tree nuts and dried fruits (MRID 45510304). Average residue values were used when available. In cases were a range was listed, the maximum value in the range was used. In the 1983 study by Taves, 93 food items from a hospital in an area with fluoridated water were analyzed for fluoride content. The use of the Taves data accounts for the increase in fluoride residues that may occur when foods are processed/prepared in fluoridated water. Note that the residue estimates for dried fruits and tree nuts are at the LOQ for the residue trial method and are most likely overestimates of fluoride, based on the residue levels in other commodities. Overall, these should be considered to be conservative to slightly refined estimates of fluoride residues.

Cryolite. In evaluating the exposure to fluoride from the agricultural uses of cryolite, residue trial data were matched as closely as possible to the current maximum use patterns for this active ingredient. Empirically derived processing factors were used for processed commodities of grapes, citrus, mint, and tomato. Default processing factors from DEEM Version 7.81 were used for all other commodities. Overall, these should be considered to be moderately refined estimates of residues.

EPA has concluded that dietary exposure to fluoride will utilize 30% of the MCLG (expressed as mg/kg/day) for the U.S. population, 18% of the MCLG (expressed as mg/kg/day) for youth 13–19 years, 29% of the MCLG (expressed as mg/kg/day) for children 3-5 years, and 27% of the MCLG (expressed as mg/kg/day) for All infants less than 1 year. These risk estimates are below the Agency's level of concern.

TABLE 5.—TOTAL CHRONIC EXPOSURE AND RISK ESTIMATES FOR FLUORIDE FROM DIETARY SOURCES

Population Subgroup	Tox. Dose, mg/kg/day	Dietary Fluoride Anion Exposure Estimates, mg/kg/day					Risk, % of MCLG (as mg/kg/day)
		Sulfuryl Fluoride	Cryolite	Food	Water	Total Dietary	
U.S. population (total)	0.114	0.0004	0.0006	0.0068	0.0269	0.0347	30
All infants (<1 year)	0.571	0.0005	0.0009	0.0093	0.1424	0.1531	27
Children (1–2 years)	0.308	0.0013	0.0031	0.0175	0.0407	0.0626	20
Children (3–5 years)	0.182	0.0012	0.0020	0.0149	0.0338	0.0519	29
Children (6–12 years)	0.100	0.0007	0.0008	0.0094	0.0227	0.0336	34
Youth (13–19 years)	0.133	0.0004	0.0003	0.0062	0.0176	0.0245	18

TABLE 5.—TOTAL CHRONIC EXPOSURE AND RISK ESTIMATES FOR FLUORIDE FROM DIETARY SOURCES—Continued

Population Subgroup	Tox. Dose, mg/kg/day	Dietary Fluoride Anion Exposure Estimates, mg/kg/day					Risk, % of MCLG (as mg/kg/day)
		Sulfuryl Fluoride	Cryolite	Food	Water	Total Dietary	
Adults (20–49 years)	0.114	0.0003	0.0004	0.0057	0.0252	0.0316	28
Adults (50+ yrs)	0.114	0.0003	0.0005	0.0050	0.0256	0.0314	28
Females (13–49 years)	0.131	0.0003	0.0005	0.0054	0.0238	0.0300	23

iii. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. As required by section 408(b)(2)(E) of FFDCA, EPA will issue a data call-in for information relating to anticipated residues to be submitted no later than 5 years from the date of issuance of this tolerance.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if the Agency can make the following findings: Condition 1, that the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; Condition 2, that the exposure estimate does not underestimate exposure for any significant subpopulation group; and Condition 3, if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F) of FFDCA, EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows:

A routine chronic dietary exposure analysis for the postharvest fumigant Profume was based on 20% of the nut crop, 40% of dried fruit, 2% of the stored grain will be treated postharvest with Profume.

The Agency believes that the three conditions previously discussed have been met. With respect to Condition 1, EPA finds that the PCT information described in this document for Profume used on postharvest use on stored commodities is reliable and has a valid basis. Profume is a postharvest fumigant of stored commodities that will replace methyl bromide uses for which the Agency has good information about the actual amounts used. It is also possible that Profume could replace other fumigant products for which there are also use data available, although not as refined as for MeBr. This has been considered when making the percent crop treated estimates which are considered to be conservative, i.e., estimating the upper range of the stored commodity market that will likely be treated with Profume.

Tree nuts. Methyl bromide is used on nearly all walnuts and about 3% of almonds. Dow estimated sulfuryl fluoride use will not exceed 10% on almonds and 20% on other nuts. The Agency used a PCT of 20% for all tree nuts.

Dried fruit. Methyl bromide is used on 64% of prunes and 28% of raisins. Sulfuryl fluoride and phosphine are expected to share the market as a replacement for methyl bromide used to treat dried fruit. The Agency used a PCT of 40% for all dried fruits.

Stored grains. (1) At flour mills: Wheat flour mills are typically fumigated 2 to 3 times per year, and there is enough stored grain to support 2 days of production at a typical flour mill facility. Three fumigations per year would mean 6 days of exposed production or 6/350 = 1.7% of the grain handled by the mill would be exposed to sulfuryl fluoride, assuming that all flour mill fumigations were done with sulfuryl fluoride. (2) Other stored grains. Phosphine is used to fumigate stored grain, and 10% to 15% of stored grain is presently fumigated. It is expected that sulfuryl fluoride will replace only 10% of the phosphine usage because some phosphine products may be easier for some users than sulfuryl fluoride (one formulation of phosphine only requires that you drop pellets compared to the application and monitoring equipment required for sulfuryl fluoride), phosphine is less expensive than sulfuryl fluoride, and many grain fumigations do not require the faster fumigation of sulfuryl fluoride. Sulfuryl fluoride is likely to used for resistance management in many situations. Overall, it is expected only 1% to 1.5% of other stored grains will be treated with sulfuryl fluoride. The Agency used a PCT of 2% for all stored grains.

As to Conditions 2 and 3, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which Profume may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency has determined that because of the use pattern and physicochemical characteristics of sulfuryl fluoride, neither residues of sulfuryl fluoride nor of inorganic fluoride are expected to reach surface water or ground water due to the postharvest fumigation (an indoor use) of the commodities listed in Unit II. Residues of inorganic fluoride may be in drinking water due to intentional fluoridation.

Monitoring data based on 16 states from 1983 to 1998 that has been extrapolated to the U.S. (U.S. EPA, 2003) indicate that approximately 99% of the U.S. population is supplied with water containing, on average, less than 2 ppm fluoride anion. In the current risk

assessment, the Agency has assumed a residue level of 2 ppm for tap water and 1 ppm for water sources other than tap water. The optimal fluoridation level for water is approximately 1 ppm. This residue level is reflected in the final product (e.g., soft drinks) when production is in areas with fluoridated water. Because of the inclusion of all non-tap water at 1 ppm, these should be considered to be slightly refined overall estimates of fluoride residues. The use of 2 ppm fluoride in tap water and 1 ppm in other water sources likely results in an overestimation of exposure for the general population, especially those on public water systems (93% of the U.S. population based on 2002 Census figures). However, it may underestimate the level of residues present in drinking water for certain regional populations in the U.S. who are supplied by well water that is naturally high in fluoride. In monitoring data (1991-2002) from the National Water Quality Assessment (NAWQA) Program (*http://water.usgs.gov/nawqa/*), the concentration of fluoride in groundwater samples designated as being used for domestic purposes exceeded 2 ppm in at least one sample from 13 of 49 study units. Study units are major river basins and aquifers across the nation and typically encompass approximately 4000 square miles. Examination of data from each of those 13 study units indicates that there is a fair degree of spatial variability in fluoride levels. Similar finding regarding spatial difference in fluoride concentration have been noted in local monitoring studies. For example, data from Lakewood Township, Minnesota show a fluoride concentration of 0.4 ppm in a well located at a similar depth and only a few hundred feet from a well with a fluoride concentration of 14.0 ppm (Hastreiter, et al., 1992). Similar variations in fluoride levels over small geographic areas were noted. Data are not available describing fluoride levels for a specific source over time, and it is unclear whether or not there is temporal, as well as spatial, variability in well water fluoride concentrations. If temporal variability is similar in magnitude to the spatial variability, then the 2-ppm estimate for fluoride in tap water is conservative for even those populations living in high-fluoride areas. Overall, the conservative values used for both fluoride residues in drinking water and drinking water consumption as well as conservative assumptions on exposure to fluoride through food and other non-dietary sources should not understate exposure to the general population or any major identifiable population subgroup.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (i.e., for sulfuryl fluoride, termiticide use).

Sulfuryl fluoride is currently registered for use on the following residential non-dietary sites: fumigation of residential sites for termites. The risk assessment was conducted using the following residential exposure assumptions: Sulfuryl fluoride is registered for fumigation of domestic structures. Exposure could occur when residents re-occupy a fumigated home; however, the label restricts reentry to the residence until the measured levels of sulfuryl fluoride are very low. The Agency has determined, based the available exposure data supporting the Vikane registration and the Vikane label restriction on reentry that there is negligible exposure to sulfuryl fluoride from home fumigation (B. Daiss, May 15, 2001, DP Barcode 274960).

Fluoride exposure may occur from non-dietary sources, including incidental ingestion of toothpaste and inhalation of airborne fluoride. Other non-dietary exposures may occur; however, the Agency has included only these two in its quantitative assessment due to lack of data regarding residue levels and/or exposure demographics. In order to take into account these other sources of non-dietary exposure, the Agency has used conservative assumptions when estimating exposure from toothpaste and air in an effort to ensure that exposures are not underestimated. Exposure estimates for fluoride from toothpaste and air for all of the population subgroups (i.e., in DEEM-FCID) are addressed.

Toothpaste. A number of studies available in the open literature have been conducted to determine the exposure to fluoride from the incidental ingestion of toothpaste (e.g., Levy et al., 1995; Naccache et al., 1992, 1990; Simard et al., 1989; Bruun and Thylstrup, 1988; Barnhart et al., 1974). Due to the different techniques used to assess toothpaste ingestion and the different foci in those studies, the estimates of fluoride exposure from toothpaste are quite varied. A few common threads can be found, however: (1) incidental toothpaste ingestion decreases with age as children gain better control of the swallowing reflex; and, (2) ingestion of toothpaste can be a significant contributor to overall fluoride exposure.

Despite the variability in the estimates of ingested toothpaste, maximum exposures to fluoride observed in those studies appear to converge to approximately 3 mg/day. In assessing fluoride from toothpaste, HED has used this maximum estimate of 3 mg/day and normalized to body weight using the NHANES dody weight data for the various population subgroups. The exposure estimates range from 0.005 to 0.03 mg/kg/day and should be considered conservative in nature; especially for older population subgroups since exposure estimates were not adjusted for the age-related decrease in toothpaste ingestion.

Air. Estimates of fluoride residues in air are presented in a number of review articles (e.g., World Health Organization, 2002; Burt, 1992). In the U.S., airborne fluoride concentrations are highest around smelters and industrialized area. In such areas, the fluoride concentration does not typically exceed 3 $\mu g/m^3$. The Agency has used standard respiration rates derived from OPP/HED Science Advisory Council for Exposure Policy No. 12 (2/22/2001) and body weights to convert 3 $\mu g/m^3$ to a mg/kg/day basis. Exposure estimates range from 0.0006 to 0.0026 mg/kg/day. As with toothpaste, the risk estimates derived from these exposure estimates are below the Agency's level of concern.

TABLE 6.—ESTIMATED FLUORIDE EXPOSURE FROM NON-DIETARY SOURCES

Population Subgroup	Body Weight, kg	Standard Respiration, m^3/day	Estimated Exposure, mg/kg/day	
			Toothpaste	Air
U.S. population (total)	70	13.3	0.0043	0.0006
All infants (<1 year)	7	4.5	0.0429	0.0019
Children (1–2 years)	13	8.7	0.0231	0.0020

TABLE 6.—ESTIMATED FLUORIDE EXPOSURE FROM NON-DIETARY SOURCES—Continued

Population Subgroup	Body Weight, kg	Standard Respiration, m^3/day	Estimated Exposure, mg/kg/day	
			Toothpaste	Air
Children (3–5 years)	22	8.7	0.0136	0.0012
Children (6–12 years)	40	8.7	0.0075	0.0007
Youth (13–19 years)	60	13.3	0.0050	0.0007
Adults (20–49 years)	70	13.3	0.0043	0.0006
Adults (50+ years)	70	13.3	0.0043	0.0006
Females (13–49 years)	61	11.3	0.0049	0.0006

In response to the EUP for sulfuryl fluoride, the Agency received comments regarding, among other things, sources of fluoride that were not considered in the EUP assessment. Most of those sources have been addressed quantitatively above; however, the use of fluoride supplements and the potential for increased exposure following food preparation in Teflon-treated cookware were specific issues that were not addressed numerically. Fluoride supplements are prescribed only by a health care professional. The community of health care professionals is aware of the potential for fluorosis and the use of supplements is only advocated when aggregate exposure is insufficient to provide protection against dental caries. Because the amount of fluoride prescribed is made in consideration of other fluoride sources, the use of fluoride supplements would not result in overexposure to fluoride. With respect to increased exposure to fluoride from the use of Teflon-treated cookware, Full and Parkins (1975) report an approximately 3-fold increase in the fluoride concentration of water boiled in a Teflon-coated pan relative to that of stainless steel or Pyrex glass. Due to their experimental design and the manner in which final fluoride concentrations are expressed, it is not possible to discern whether or not the increased fluoride concentration was due to leaching of fluoride from the Teflon or differential evaporation noted for the Teflon cookware versus other materials. Given the inert nature of Teflon and the strength of the covalent C-F bonds in the tetrafluoroethylene polymer, it is unlikely that fluoride would be released in sufficient quantities to increase its concentration in the water by 3 times. Based on the uncertainties associated with the experimental data and the properties of Teflon, the Agency does not believe that Teflon-treated cookware is a significant source of fluoride exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA does not have, at this time, available data to determine whether sulfuryl fluoride or fluoride has a common mechanism of toxicity with other substances. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to sulfuryl fluoride or fluoride and any other substances. Sulfuryl fluoride does produce the metabolite fluoride also produced by the insecticide cryolite and this risk assessment has included exposure from both exposure sources. For the purposes of this tolerance action, therefore, EPA has not assumed that sulfuryl fluoride and/or fluoride has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's OPP concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's web site at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general.* Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional safety factor value based on the use of traditional uncertainty factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity.* In the sulfuryl fluoride developmental toxicity study in rats, neither quantitative nor qualitative evidence of increased susceptibility of fetuses to in utero exposure to sulfuryl fluoride was observed. In the sulfuryl fluoride developmental study in rabbits, neither quantitative nor qualitative evidence of increased susceptability of fetuses to *in utero* exposure to sulfuryl fluoride was observed. In the sulfuryl fluoride 2-generation reproductive study in rats, neither quantitative nor qualitative evidence of increased susceptability of fetuses to sulfuryl fluoride was observed.

A very large body of information regarding the toxicology of fluoride is available in the open literature. A complete review or re-presentation of that information is beyond the scope of this assessment. For a comprehensive review of the toxicology of fluoride, the reader is referred to publications by the World Health Organization (2002), the National Research Council (1993), the Medical Research Council (1992), and

the Department of Health and Human Services (Draft Document 1993). In conducting the assessment for fluoride, the Agency has used the toxicological assessment and Maximum Contaminant Level Goals (MCLGs) established by the Agency's Office of Water. The MCLG was established in 1986 and is based on an LOAEL of 20 mg/day, a safety factor of 2.5, and an adult drinking water intake of 2 L/day. The use of a safety factor of 2.5 ensures public health criteria while still allowing sufficient concentration of fluoride in water to realize its beneficial effects in protecting against dental caries.

3. *Conclusion.* There is a complete toxicity data base for sulfuryl fluoride with the exception of a developmental neurotoxicity (DNT) study in rats. The exposure data are sufficiently complete or are estimated based on data that reasonably accounts for potential exposures. Based on the available evidence, the Agency is requiring an inhalation developmental neurotoxicity (DNT) study in rats (Guideline No. 870.6300) as a condition of registration in order to more clearly and fully characterize the potential for neurotoxic effects in young animals.

The Agency has determined that a 10X FQPA safety factor in the form of a data base uncertainty factor (UFDB) is needed to account for the lack of the DNT study since the available data provide no basis to support reduction or removal of the default 10X factor. The following points were considered in this determination:

- The current regulatory dose for chronic dietary risk assessment is the NOAEL of 8.5 mg/kg/day (30 ppm; 0.13 mg/L) selected from a 90–day inhalation toxicity study in rabbits. This dose is also used for intermediate- and long-term inhalation exposure risk assessments. The current dose for the short-term inhalation exposure risk assessment is the NOAEL of 30 mg/kg/day (100 ppm; 0.42 mg/L) from a 2–week inhalation toxicity study in rabbits.
- After considering the dose levels used in the neurotoxicity studies and in the 2-generation reproduction study, it is assumed that the DNT study with sulfuryl fluoride will be conducted at dose levels similar to those used in the 2-generation reproduction study (0, 5, 20, 150 ppm; 0, 0.02, 0.08, 0.6 mg/L). It is considered possible that the results of the DNT study could impact the endpoint selection for risk assessments because the lowest dose that may be tested in the DNT (5 ppm or 0.02 mg/L), based on the Agency's dose analysis, could become an effect level which would necessitate an additional factor resulting in doses which would then be lower than the current doses used for chronic dietary (8.5 mg/kg/day), intermediate and long-term inhalation (30 ppm or 0.13 mg/L) and short term inhalation (100 ppm or 0.42 mg/L) risk assessments. Given these circumstances, the Agency does not have sufficient reliable data justifying selection of an additional safety factor for the protection of infants and children lower than the default value of 10X. Therefore, a UFDB of 10X will be applied to repeated dose exposure scenarios (i.e. chronic RfD, and residential short, intermediate and long term inhalation) to account for the lack of the DNT study with sulfuryl fluoride.

The Agency has determined that there is no need for a special FQPA safety factor (i.e., 1X) since there are no residual uncertainties for pre- and/or post-natal toxicity based on the following:

- In the developmental toxicity study in rats, neither quantitative nor qualitative evidence of increased susceptibility of fetuses to in utero exposure to sulfuryl fluoride was observed.
- In the developmental toxicity study in rabbits, neither quantitative nor qualitative evidence of increased susceptibility of fetuses to *in utero* exposure to sulfuryl fluoride was observed.
- In the 2-generation reproduction toxicity study in rats, neither quantitative nor qualitative evidence of increased susceptibility of fetuses to sulfuryl fluoride was observed.

Fluoride. Given the wealth of reliable human data on fluoride, EPA believes no additional safety factor for the protection of children is necessary (1X). Relying on the extensive data bearing on skeletal fluorosis, EPA's Office of Water reduced the traditional intraspecies safety factor to 2.5X. This is reasonable, especially given that the NAS has recommended that a safe dose for fluoride should be set using no intraspecies safety factor or any other safety factor.

E. Aggregate Risks and Determination of Safety

1. *Acute risk.* No toxicological endpoint attributable to a single exposure was identified in the available toxicology studies for either sulfuryl fluoride and/or fluoride; therefore, no acute risk is expected from exposure to these compounds.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that aggregate exposure to sulfuryl fluoride food will utilize less than 1% of the cPAD for the U.S. population, less than 1% of the cPAD for all population subgroups.

EPA has concluded that aggregate exposure to fluoride from food will utilize 35% of the MCLG (as mg/kg/day) for the U.S. population, 23% of the MCLG (as mg/kg/day) for youth 13–19 years, 37% of the MCLG (as mg/kg/day) for children 3–5 years, 35% of the MCLG (as mg/kg/day) for all infants less than 1 year, and 28% of the MCLG (as mg/kg/day) for children 1-2 years. These risk estimates are below the Agency's level of concern.

TABLE 7.—AGGREGATE EXPOSURE AND RISK ESTIMATES FOR FLUORIDE

Population Subgroup	MCL/ SMCL, mg/kg/ day	Estimated Fluoride Exposure by Source, mg/kg/day							% of MCLG
		Sulfuryl Fluoride	Cryolite	Back-ground Food	Water	Tooth-paste	Air	Total	
U.S. population (total)	0.114	0.0004	0.0006	0.0068	0.0269	0.0043	0.0006	0.0397	35
All infants (<1 year)	0.571	0.0005	0.0009	0.0093	0.1424	0.0429	0.0019	0.1980	35
Children (1–2 years)	0.308	0.0013	0.0031	0.0175	0.0407	0.0231	0.0020	0.0877	28
Children (3–5 years)	0.182	0.0012	0.0020	0.0149	0.0338	0.0136	0.0012	0.0668	37
Children (6–12 years)	0.1	0.0007	0.0008	0.0094	0.0227	0.0075	0.0007	0.0419	42

TABLE 7.—AGGREGATE EXPOSURE AND RISK ESTIMATES FOR FLUORIDE—Continued

Population Subgroup	MCL/ SMCL, mg/kg/ day	Estimated Fluoride Exposure by Source, mg/kg/day							% of MCLG
		Sulfuryl Fluoride	Cryolite	Back-ground Food	Water	Tooth-paste	Air	Total	
Youth (13–19 years)	0.133	0.0004	0.0003	0.0062	0.0176	0.0050	0.0007	0.0302	23
Adults (20–49 years)	0.114	0.0003	0.0004	0.0057	0.0252	0.0043	0.0006	0.0365	32
Adults (50+ years)	0.114	0.0003	0.0005	0.0050	0.0256	0.0043	0.0006	0.0364	32
Females (13–49 years)	0.131	0.0003	0.0005	0.0054	0.0238	0.0049	0.0006	0.0355	27

3. *Short-term risk.* Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

The Agency determined there is no need to quantify the inhalation risk resulting from a single residential or occupational inhalation exposure to sulfuryl fluoride. No treatment-related neurotoxic or other effects were observed in a specially designed acute neurotoxicity inhalation study in which rats were exposed on two consecutive days for 6 hours/day to concentrations up to 300 ppm of sulfuryl fluoride (equivalent to 1.25 mg/L). Further, no appropriate endpoints resulting from a single inhalation exposure were identified in any of the available toxicity studies on sulfuryl fluoride. Therefore, no hazard attributable to a single inhalation exposure was identified and quantification of risk for single inhalation exposures was determined to be unnecessary. The Agency notes that poisonings and fatalities have been reported in humans following inhalation exposure to sulfuryl fluoride. The severity of these effects has depended on the concentration of sulfuryl fluoride and the duration of exposure. Short-term inhalation exposure to high concentrations has caused respiratory irritation, pulmonary edema, nausea, abdominal pain, central nervous system depression, and numbness in the extremities. In addition, there have been two reports of deaths of persons entering houses treated with sulfuryl fluoride. One person entered the house illegally and was found dead the next morning. A second person died of cardiac arrest after sleeping in the house overnight following fumigation. A plasma fluoride level of 0.5 mg/L (10 times normal) was found in this person following exposure. These acute poisonings in humans, however, occurred only after label directions were grossly violated and persons were subsequently exposed to extremely high concentrations of sulfuryl fluoride. Therefore, based on the best available data and current policies, potential risks do not exceed the Agency's level of concern if label directions and precautions are followed.

Fluoride is not expected to pose a short-term risk.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Intermediate-term residential exposure is not expected to occur with the use of sulfuryl fluoride. Furthermore, sulfuryl fluoride residues will not occur in water due to its extreme volatility as a gas; and based on the toxicology of fluoride and the behaviors associated with fluoride exposure a chronic risk assessment is appropriate not an intermediate-term risk assessment. Therefore, based on the best available data and current policies, potential risks do not exceed the Agency's level of concern.

Fluoride is not expected to pose an intermediate-term risk.

5. *Aggregate cancer risk for U.S. population.* Sulfuryl fluoride and fluoride are not expected to pose a cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to sulfuryl fluoride and inorganic fluoride residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology are available to enforce the tolerance expressions. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

There are no CODEX MRLs established. These are the first food tolerances for sulfuryl fluoride in the United States.

C. Conditions

The conditions for registration are discussed in the Profume Notice of Registration. The Agency does note that the current MCLG and SMCL are under review by the National Academy of Science as requested by the Office of Water. This review is expected to be completed in 2005. Should there be a change in the MCLG and/or SMCL by the Office of Water then the registration of Profume may require revision.

V. Conclusion

Therefore, tolerances are established for sulfuryl fluoride and inorganic fluoride residues of sulfuryl fluoride, in or on various commodities at the level specified in the tables below.

VI. Objections and Hearing Requests

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to FFDCA by FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of FFDCA provides essentially the same process for persons to "object" to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of FFDCA, as was provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2003–0373 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 23, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm. 104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it "Tolerance Petition Fees."

EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.1. Mail your copies, identified by docket ID number OPP–2003–0373, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.1. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action 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 responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have

"substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 13, 2004.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—AMENDED

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346(a) and 371.

■ 2. Section 180.145 is amended by revising paragraph (a)(3) to read as follows:

§ 180.145 Flourine compounds; tolerances for residues.

(a) * * *

(3) Tolerances are established for residues of fluoride in or on the following commodities from the postharvest fumigation with sulfuryl fluoride for the control of insects:

Commodity	Parts per million
Barley, bran, postharvest	45.0
Barley, flour, postharvest	45.0
Barley, grain, postharvest	15.0
Barley, pearled, postharvest	45.0
Corn, aspirated grain fractions, postharvest	55.0
Corn, field, flour, postharvest	35.0
Corn, field, grain, postharvest	10.0
Corn, field, grits, postharvest	10.0
Corn, field, meal, postharvest	30.0
Corn pop, grain, postharvest	10.0
Fruit, dried , postharvest (other than raisin)	3.0
Grape, raisin, postharvest	7.0
Millet, grain, postharvest	40.0
Nut, tree, Group 14, postharvest	10.0
Oat, flour, postharvest	75.0
Oat, grain, postharvest	25.0
Oat, rolled, postharvest	75.0
Pistachio, postharvest	10.0
Rice, bran, postharvest	31.0
Rice, grain, postharvest	12.0
Rice, hulls, postharvest	35.0
Rice, polished, postharvest	25.0
Rice, wild, grain, postharvest	25.0
Sorghum, grain, postharvest	40.0
Triticale, grain, postharvest	40.0
Wheat, bran, postharvest	40.0
Wheat, flour, postharvest	125.0
Wheat, germ, postharvest	130.0
Wheat, grain, postharvest	40.04
Wheat, milled byproducts, postharvest	130.0
Wheat, shorts, postharvest	40.0

* * * * *

■ 3. Section 180.575 is amended by revising paragraph (a) to read as follows:

§ 180.575 Sulfuryl fluoride; tolerance for residues.

(a)(1) *General.* Tolerances are established for residues of sulfuryl fluoride in or on the following commodities from the postharvest fumigation with sulfuryl fluoride for the control of insects:

Commodity	Parts per million
Barley, bran, postharvest	0.05
Barley, flour, postharvest	0.05
Barley, grain, postharvest	0.1
Barley, pearled, postharvest	0.05
Corn, aspirated grain fractions, postharvest	0.05
Corn, field, flour, postharvest	0.01
Corn, field, grain, postharvest	0.05
Corn, field, grits, postharvest	15.0
Corn, field, meal, postharvest	0.01
Corn pop, grain, postharvest	0.05
Fruit, dried, postharvest	0.05
Millet, grain, postharvest	0.1
Nut, tree, Group 14, postharvest	3.0
Oat, flour, postharvest	0.05
Oat, grain, postharvest	0.1
Oat, rolled, postharvest	0.1
Pistachio, postharvest	3.0
Rice, bran, postharvest	0.01
Rice, grain, postharvest	0.04
Rice, hulls, postharvest	0.1
Rice, polished, postharvest	0.01
Rice, wild, grain, postharvest	0.05
Sorghum, grain, postharvest	0.1
Triticale, grain, postharvest	0.1
Wheat, bran, postharvest	0.05
Wheat, flour, postharvest	0.05
Wheat, germ, postharvest	0.02
Wheat, grain, postharvest	0.1
Wheat, milled byproducts, postharvest	0.05
Wheat, shorts, postharvest	0.05

(2) To assure safe use of this pesticide commodities treated with sulfuryl fluoride must be aerated for at least 24 hours prior to entering commerce.

* * * * *

[FR Doc. 04–1540 Filed 1–22–04; 8:45 am]
BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 15, 97, and 101

[WT Docket No. 02–146; RM–10288; FCC 03–248]

Allocations and Service Rules for the 71–76 GHz, 81–86 GHz, and 92–95 GHz Bands; Loea Communications Corporation Petition for Rule Making

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts service rules to promote the private sector development and use of the "millimeter wave" spectrum in the 71–76 GHz, 81–86 GHz and 92–95 GHz bands pursuant to parts 15 and 101 of our rules. This action follows an initiative by the Commission's Office of Engineering and Technology to spawn possible commercial development of these bands under the Communications Act of 1934, as amended.

DATES: Effective February 23, 2004.

FOR FURTHER INFORMATION CONTACT: Jennifer Burton regarding legal matters, and/or Gerardo Mejia regarding engineering matters via phone at (202) 418–0680, via TTY (202) 418–7233, via e-mail at *Jennifer.Burton@fcc.gov*; *Gerardo.Mejia@fcc.gov*, respectively, or via regular mail at Federal Communications Commission, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, DC 20554.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Report and Order*, FCC 03–248, adopted on October 16, 2003, and released on November 4, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

Report and Order: In this *Report and Order*, the Commission makes the following major decisions:

- It will reallocate the 71–76 GHz, 81–86 GHz and 92–95 GHz bands to update the current allocations, which were established at the World Administrative Radio Conference in 1992 (WARC–92, Malaga-Torremolinos) and the World Radiocommunication Conference in 1997 and 2000 (WRC–97, Geneva, and WRC–2000, Istanbul).
- It will divide the 71–76 GHz and 81–86 GHz bands into four unpaired 1.25 GHz segments each (eight total), without mandating specific channels within the segment. The segments may be aggregated without limit. In order to maximize the number of possible users in a given location, the Commission will divide the 71–76 GHz and 81–86 GHz bands into unpaired 1.25 GHz segments (without mandating specific channels within the segment) with no aggregation limit. It will permit pairing, but only in a standardized manner (*e.g.*, 71–72.25

GHz may be paired only with 81–82.25 GHz, and so on).

• Non-Federal Government licensees will receive non-exclusive nationwide licenses authorizing operation on all 12.9 GHz of co-primary spectrum. Rights with regard to specific links will be established based upon the date and time of link registration. Initially, coordination of non-Federal Government links with Federal Government operations will be accomplished under the existing coordination process, and non-Federal Government links will be recorded in the Commission's Universal Licensing System database. On a permanent basis, such coordination will be accomplished within a new process for coordination of non-Federal Government links with Federal Government users. The Commission envisions that coordination will be accomplished via an automated mechanism administered by the National Telecommunications and Information Administration (NTIA), for which the framework will be jointly agreed by the FCC and NTIA. Within four months of the publication of this *Report and Order* in the **Federal Register**, Commission staff, in conjunction with the NTIA, will release a *public notice* setting out the implementation of a new process for coordination of non-Federal Government links with Federal Government users. NTIA has indicated that it believes that it can make the initial version of the mechanism available within 4 months of the *public notice*. In addition, at that time, Commission staff will announce via *public notice* the start-date for the new procedure that we adopt herein for mitigating interference among non-Federal Government links.

• The Commission will permit unlicensed non-Federal Government indoor use of the 92–95 GHz band, to be governed by rules based on existing regulations for the 57–64 GHz band.

• It declines to adopt eligibility restrictions for the 71–76 GHz, 81–86 GHz, and 92–95 GHz bands.

Final Regulatory Flexibility Certification (Report and Order)

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), (see 5 U.S.C. 603. The RFA, see 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law No. 104–121, Title II, 110 Stat. 847 (1996)) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making (NPRM), 67 FR 59036–01, September 19, 2002, in this proceeding in WT Docket No. 02–146. The Commission sought public comment on the proposals in the NPRM, including on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

a. Need for, and Purpose of This Action

In this *Report and Order*, the Commission adopts rules for the licensing and operation of the 71–76 GHz, 81–86 GHz and 92–95 GHz (70–80–90 GHz) spectrum bands. Currently, there are no rules in place for these bands. The rules we adopt implement non-exclusive, nationwide licensing with site-by-site registration for these bands. It believes that this approach will also stimulate investment in new technologies, provide a critical means of achieving greater spectrum efficiency and promote research and development.

b. Issues Raised in Response to the IRFA

No comments were filed in response to the IRFA.

c. Description and Estimate of the Small Entities To Which Rules Will Apply

The Commission will apply the definition of small entities developed for licensees in the 39 GHz band to licensees in the 70–80–90 GHz bands, as follows:

The SBA has developed a small business size standard for Cellular and Other Wireless telecommunication, which consists of all such firms having 1,500 or fewer employees. 13 CFR 121.201, NAICS code 517212 (changed from 513322 in October 2002). According to Census Bureau data for 1997, in this category there was a total of 977 firms that operated for the entire year. U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5. Of this total, 965 firms had employment of 999 or fewer employees, and an additional twelve firms had employment of 1,000 employees or more. *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more." Thus, under this size standard, the majority of firms can be considered small.

The applicable definition of small entity is the definition under the SBA rules applicable to manufacturers of "Radio and Television Broadcasting and Communications Equipment." According to the SBA's regulation, an RF manufacturer must have 750 or fewer employees in order to qualify as a small business. *See* 13 CFR 121.201, NAICS Code 334220. Census Bureau data indicates that there are 858 companies in the United States that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would be classified as small entities. *See* U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities (issued May 1995), NAICS category 334220. Therefore, the Commission believes that no more than 778 of the companies that manufacture RF equipment qualify as small entities.

d. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

This *Report and Order* modifies the reporting, recordkeeping or other compliance requirements previously proposed in this proceeding. All applicants who are approved will each be granted a single, non-exclusive nationwide license. There is no limit to the number of non-exclusive nationwide licenses that may be granted for these bands, and these licenses will serve as a prerequisite for registering individual links. At the outset, the Commission will continue to coordinate each link under our existing coordination process, which is set forth in § 101.103 of our rules. Each link must be registered in the Commission's ULS and also requires IRAC coordination. On a going-forward basis, it will be working cooperatively with NTIA to facilitate an innovative, streamlined link registration process that will enable licensees to expedite service to the public. The licensing and registration process is the same for all interested parties.

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

The required single, non-exclusive nationwide license with site-based registration serves the public interest by simplifying the licensing process and enabling all who are interested to obtain a license to provide service where their targeted market is located. There is no limit to the number of non-exclusive nationwide licenses that may be granted for these bands, so all who qualify as licensees will receive a license. This licensing scheme will allow small businesses the flexibility to provide a variety of services in their chosen markets, because links may be registered anywhere in the United States.

f. Federal Rules That Overlap, Duplicate, or Conflict With These Proposed Rules

None.

g. Report to Congress

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

Ordering Clauses

Accordingly, it is ordered that, pursuant to sections 1, 4(i), 301, 302, 303(f) and (r), 309(j) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 1, 154(i), 301, 302, 303(f) and (r), 309(j) and 332, this *Report and Order* is adopted.

It is further ordered that the Commission's Consumer Information and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 1, 2, 15, 97, and 101

Communications common carriers, Communications equipment, Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Parts 1, 2, 15, 97, and 101 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 2. Section 1.1307(b)(1) is amended by adding entries to the end of Table 1 as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (Eas) must be prepared.

* * * * *

(b)(1) * * *

Service (title 47 CFR rule part)	Evaluation required if:
* * * * * * *	
70/80/90 GHz Bands (subpart Q of part 101)	Non-building-mounted antennas: height above ground level to lowest point of antenna < 10 m and power > 1640 W EIRP. Building-mounted antennas: power > 1640 W EIRP, licensees are required to attach a label to transceiver antennas that (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310.

* * * * *

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

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

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

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

■ a. Revise pages 81 through 83.

■ b. In the list of United States (US) Footnotes, revise footnotes US211, US297, and US342; remove footnotes US270 and US377; and add footnotes US387, US388, and US389.

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65-92 GHz (EHF)					Page 81
International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
65-66 EARTH EXPLORATION-SATELLITE FIXED INTER-SATELLITE MOBILE except aeronautical mobile SPACE RESEARCH 5.547			65-66 EARTH EXPLORATION-SATELLITE FIXED MOBILE except aeronautical mobile SPACE RESEARCH	65-66 EARTH EXPLORATION-SATELLITE FIXED INTER-SATELLITE MOBILE except aeronautical mobile SPACE RESEARCH	
66-71 INTER-SATELLITE MOBILE 5.553 5.558 MOBILE-SATELLITE RADIONAVIGATION RADIONAVIGATION-SATELLITE 5.554			66-71 MOBILE 5.553 5.558 MOBILE-SATELLITE RADIONAVIGATION RADIONAVIGATION-SATELLITE 5.554	66-71 INTER-SATELLITE MOBILE 5.553 5.558 MOBILE-SATELLITE RADIONAVIGATION RADIONAVIGATION-SATELLITE 5.554	
71-74 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE MOBILE-SATELLITE (space-to-Earth)			71-74 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE MOBILE-SATELLITE (space-to-Earth) US389		Fixed Microwave (101)
74-76 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE BROADCASTING BROADCASTING-SATELLITE Space research (space-to-Earth) 5.559A 5.561			74-76 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE Space research (space-to-Earth) US387 US389	74-76 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE BROADCASTING BROADCASTING-SATELLITE Space research (space-to-Earth) US387 US389	
76-77.5 RADIO ASTRONOMY RADIOLOCATION Amateur Amateur-satellite Space research (space-to-Earth) 5.149			76-81 RADIOLOCATION	76-77 RADIOLOCATION Amateur	RF Devices (15)
				77-77.5 RADIOLOCATION Amateur Amateur-satellite	Amateur (97)

77.5-78 AMATEUR AMATEUR-SATELLITE Radio astronomy Space research (space-to-Earth) 5.149		77.5-78 RADIOLOCATION AMATEUR AMATEUR-SATELLITE	
78-79 RADIOLOCATION Amateur Amateur-satellite Radio astronomy Space research (space-to-Earth) 5.149 5.560		78-81 RADIOLOCATION Amateur Amateur-satellite	
79-81 RADIO ASTRONOMY RADIOLOCATION Amateur Amateur-satellite Space research (space-to-Earth) 5.149	5.560	5.560	
81-84 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE MOBILE-SATELLITE (Earth-to-space) RADIO ASTRONOMY Space research (space-to-Earth) 5.149 5.561A	81-84 FIXED FIXED-SATELLITE (Earth-to-space) US297 MOBILE MOBILE-SATELLITE (Earth-to-space) RADIO ASTRONOMY Space research (space-to-Earth) US342 US388 US389		Fixed Microwave (101)
84-86 FIXED FIXED SATELLITE (Earth-to-space) 5.561B MOBILE RADIO ASTRONOMY 5.149	84-86 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE RADIO ASTRONOMY US342 US388 US389		
86-92 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340	86-92 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246		

92-119.98 GHz (EHF)					Page 83
International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
92-94 FIXED MOBILE RADIO ASTRONOMY RADIOLOCATION 5.149			92-94 FIXED MOBILE RADIO ASTRONOMY RADIOLOCATION US342 US388		RF Devices (15) Fixed Microwave (101)
94-94.1 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) Radio astronomy 5.562 5.562A			94-94.1 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) Radio astronomy 5.562 5.562A	94-94.1 RADIOLOCATION Radio astronomy 5.562A	RF Devices (15)
94.1-95 FIXED MOBILE RADIO ASTRONOMY RADIOLOCATION 5.149			94.1-95 FIXED MOBILE RADIO ASTRONOMY RADIOLOCATION US342 US388		RF Devices (15) Fixed Microwave (101)
95-100 FIXED MOBILE RADIO ASTRONOMY RADIOLOCATION RADIONAVIGATION RADIONAVIGATION-SATELLITE 5.149 5.554			95-100 MOBILE US376 MOBILE-SATELLITE RADIONAVIGATION RADIONAVIGATION-SATELLITE Radiolocation 5.149 5.554		
100-102 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.341			100-102 EARTH EXPLORATION-SATELLITE (passive) SPACE RESEARCH (passive) 5.341 US246		
102-105 FIXED MOBILE RADIO ASTRONOMY 5.149 5.341			102-105 FIXED FIXED-SATELLITE (space-to-Earth) 5.341 US211		

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United States (US) Footnotes

* * * * *

US211 In the bands 1670–1690, 5000–5250 MHz and 10.7–11.7, 15.1365–15.35,

15.4–15.7, 22.5–22.55, 24–24.05, 31.0–31.3, 31.8–32.0, 40.5–42.5, 102–105, 116–126, 151–164, 176.5–182, 185–190, 231–235, 252–265 GHz, applicants for airborne or space station assignments are urged to take all practicable steps to protect radio astronomy observations in the adjacent bands from harmful interference; however, US74 applies.

* * * * *

US297 The bands 47.2–49.2 GHz and 81–82.5 GHz are also available for feeder links for the broadcasting-satellite service.

* * * * *

US342 In making assignments to stations of other services to which the following bands:

13360–13410 kHz	22.81–22.86 GHz*	150–151 GHz*
25550–25670 kHz	23.07–23.12 GHz*	174.42–175.02 GHz*
37.5–38.25 MHz	31.2–31.3 GHz	177–177.4 GHz*
322–328.6 MHz*	36.43–36.5 GHz*	178.2–178.6 GHz*
1330–1400 MHz*	42.5–43.5 GHz	181–181.46 GHz*
1610.6–1613.8 MHz*	48.94–49.04 GHz*	186.2–186.6 GHz*
1660–1670 MHz	81–86 GHz	250–251 GHz*
3260–3267 MHz*	92–94 GHz	257.5–258 GHz*
3332–3339 MHz*	94.1–95 GHz	261–265 GHz
3345.8–3352.5 MHz*	97.88–98.08 GHz*	262.24–262.76 GHz*
4825–4835 MHz*	140.69–140.98 GHz*	265–275 GHz
14.47–14.5 GHz*	144.68–144.98 GHz*	265.64–266.16 GHz*
22.01–22.21 GHz*	145.45–145.75 GHz*	267.34–267.86 GHz*
22.21–22.5 GHz	146.82–147.12 GHz*	271.74–272.26 GHz*

are allocated (* indicates radio astronomy use for spectral line observations) all practicable steps shall be taken to protect the radio astronomy service from harmful interference. Emissions from spaceborne or airborne stations can be particularly serious sources of interference to the radio astronomy service (see Nos. 4.5 and 4.6 and Article 29 of the ITU Radio Regulations).

* * * * *

US387 The band 75.5–76 GHz is also allocated to the amateur and amateur-satellite services on a secondary basis until January 1, 2006. After that date, the band 75.5–76 GHz shall no longer be available for use by the amateur service or the amateur-satellite service.

US388 In the bands 81–86 GHz, 92–94 GHz, and 94.1–95 GHz and within the coordination distances indicated below, assignments to allocated services shall be coordinated with the following radio astronomy observatories. New observatories shall not receive protection from fixed stations that are licensed to operate in the one hundred most populous urbanized areas as defined by the U.S. Census Bureau for the year 2000. The coordinates listed below are specified in terms of the North American Datum of 1983.

Note: Satisfactory completion of the coordination procedure utilizing the automated mechanism, *see* § 101.1523, will be deemed to establish sufficient separation from radio astronomy observatories, regardless of whether the distances set forth above are met.

Telescope and site	150 kilometer (93 mile) radius centered on:	
	North latitude	West longitude
National Radio Astronomy Observatory (NRAO), Robert C. Byrd Telescope, Green Bank, WV	38° 25′ 59″	79° 50′ 24″
NRAO, Very Large Array, Socorro, NM	34° 04′ 44″	107° 37′ 06″
University of Arizona 12-m Telescope, Kitt Peak, AZ	31° 57′ 10″	111° 36′ 50″
BIMA Telescope, Hat Creek, CA	40° 49′ 04″	121° 28′ 24″
Caltech Telescope, Owens Valley, CA	37° 13′ 54″	118° 17′ 36″
Five Colleges Observatory, Amherst, MA	42° 23′ 33″	72° 20′ 40″
Haystack Observatory, Westford, MA	42° 37′ 23″	71° 29′ 19″
James Clerk Maxwell Telescope, Mauna Kea, HI	19° 49′ 33″	155° 28′ 20″
Combined Array for Research in Millimeter-wave Astronomy (CARMA), CA	(1) CARMA will be located at a new, high-altitude site in eastern California, expected to be operational in 2004.	

NRAO, very long baseline array stations	25 kilometer (15.5 mile) radius centered on:	
	North latitude	West longitude
Brewster, WA	48° 07′ 52″	119° 41′ 00″
Fort Davis, TX	30° 38′ 06″	103° 56′ 41″
Hancock, NH	42° 56′ 01″	71° 59′ 12″
Kitt Peak, AZ	31° 57′ 23″	111° 36′ 45″
Los Alamos, NM	35° 46′ 31″	106° 14′ 44″
Mauna Kea, HI	19° 48′ 05″	155° 27′ 19″
North Liberty, IA	41° 46′ 17″	91° 34′ 27″
Owens Valley, CA	37° 13′ 54″	118° 16′ 37″
Pie Town, NM	34° 18′ 04″	108° 07′ 09″
Saint Croix, VI	17° 45′ 24″	64° 35′ 01″

US389 In the bands 71–76 GHz and 81–86 GHz, stations in the fixed, mobile, and broadcasting services shall not cause harmful interference to, nor claim protection from, Federal Government stations in the fixed-satellite service at any of the following 28 military installations:

Military installation	State	Nearby city
Redstone Arsenal	AL	Huntsville.
Fort Huachuca	AZ	Sierra Vista.
Yuma Proving Ground	AZ	Yuma.
Beale AFB	CA	Marysville.
Camp Parks Reserve Forces Training Area	CA	Dublin.
China Lake Naval Air Weapons Station	CA	Ridgecrest.
Edwards AFB	CA	Rosamond.
Fort Irwin	CA	Barstow.
Marine Corps Air Ground Combat Center	CA	Twentynine Palms.
Buckley AFB	CO	Aurora (Denver).
Schriever AFB	CO	Colorado Springs.
Fort Gordon	GA	Augusta.
Naval Satellite Operations Center	GU	Finegayan (Territory of Guam).
Naval Computer and Telecommunications Area Master Station, Pacific	HI	Wahiawa (Oahu Is.).
Fort Detrick	MD	Frederick.
Nellis AFB	NV	Las Vegas.
Nevada Test Site	NV	Amargosa Valley.
Tonapah Test Range Airfield	NV	Tonapah.
Cannon AFB	NM	Clovis.
White Sands Missile Range	NM	White Sands.
Dyess AFB	TX	Abilene.
Fort Bliss	TX	El Paso.
Fort Sam Houston	TX	San Antonio.
Goodfellow AFB	TX	San Angelo.
Kelly AFB	TX	San Antonio.
Utah Test and Training Range	UT	
Fort Belvoir	VA	Alexandria.
Naval Satellite Operations Center	VA	Chesapeake.

* * * * *

■ 5. Section 2.1091 is amended by revising paragraph (c) to read as follows:

§ 2.1091 Radiofrequency radiation exposure evaluation: mobile devices.

* * * * *

(c) Mobile devices that operate in the Cellular Radiotelephone Service, the Personal Communications Services, the Satellite Communications Services, the General Wireless Communications Service, the Wireless Communications Service, the Maritime Services and the Specialized Mobile Radio Service authorized under subpart H of part 22 of this chapter, parts 24, 25, 26 and 27 of this chapter, part 80 of this chapter (ship earth stations devices only) and part 90 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use if they operate at frequencies of 1.5 GHz or below and their effective radiated power (ERP) is 1.5 watts or more, or if they operate at frequencies above 1.5 GHz and their ERP is 3 watts or more. Unlicensed personal communications service devices, unlicensed millimeter wave devices and unlicensed NII devices authorized under §§ 15.253, 15.255, and 15.257, and subparts D and E of part 15 of this chapter are also subject to routine environmental evaluation for RF exposure prior to equipment authorization or use if their ERP is 3 watts or more or if they meet the definition of a portable device as specified in § 2.1093(b) requiring evaluation under the provisions of that section. All other mobile and unlicensed transmitting devices are categorically excluded from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter. Applications for equipment authorization of mobile and unlicensed transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in paragraph (d) of this section as part of their application. Technical information showing the basis for this statement must be submitted to the Commission upon request.

* * * * *

■ 6. Section 2.1093 is amended by revising paragraph (c) to read as follows:

§ 2.1093 Radiofrequency radiation exposure evaluation: portable devices.

* * * * *

(c) Portable devices that operate in the Cellular Radiotelephone Service, the Personal Communications Service (PCS), the Satellite Communications Services, the General Wireless Communications Service, the Wireless Communications Service, the Maritime Services, the Specialized Mobile Radio Service, the 4.9 GHz Band Service, the Wireless Medical Telemetry Service (WMTS) and the Medical Implant Communications Service (MICS), authorized under subpart H of part 22 of this chapter, parts 24, 25, 26, 27, 80 and 90 of this chapter, subparts H and I of part 95 of this chapter, and unlicensed personal communication service, unlicensed NII devices and millimeter wave devices authorized under subparts D and E, §§ 15.253, 15.255 and 15.257 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use. All other portable transmitting devices are categorically excluded from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter. Applications for equipment authorization of portable transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in paragraph (d) of this section as part of their application. Technical information showing the basis for this statement must be submitted to the Commission upon request.

* * * * *

PART 15—RADIO FREQUENCY DEVICES

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

Authority: 47 U.S.C. 154, 302, 303, 304, 307, 336 and 544A.

■ 8. Section 15.205 is amended by revising paragraph (d)(4) to read as follows:

§ 15.205 Restricted bands of operation.

* * * * *

(d) * * *

(4) Any equipment operated under the provisions of §§ 15.253, 15.255 or 15.257.

* * * * *

■ 9. Section 15.215 is amended by revising paragraphs (a) and (c) to read as follows:

§ 15.215 Additional provisions to the general radiated emission limitations.

(a) The regulations in §§ 15.217 through 15.257 provide alternatives to the general radiated emission limits for intentional radiators operating in specified frequency bands. Unless otherwise stated, there are no restrictions as to the types of operation permitted under these sections.

* * * * *

(c) Intentional radiators operating under the alternative provisions to the general emission limits, as contained in §§ 15.217 through 15.257 and in subpart E of this part, must be designed to ensure that the 20 dB bandwidth of the emission is contained within the frequency band designated in the rule section under which the equipment is operated. The requirement to contain the 20 dB bandwidth of the emission within the specified frequency band includes the effects from frequency sweeping, frequency hopping and other modulation techniques that may be employed as well as the frequency stability of the transmitter over expected variations in temperature and supply voltage. If a frequency stability is not specified in the regulations, it is recommended that the fundamental emission be kept within at least the central 80% of the permitted band in order to minimize the possibility of out-of-band operation.

■ 10. Section 15.257 is added to subpart C to read as follows:

§ 15.257 Operation within the band 92–95 GHz.

(a) Operation of devices under the provisions of this section is limited to indoor use;

(1) Devices operating under the provisions of this section, by the nature of their design, must be capable of operation only indoors. The necessity to operate with a fixed indoor infrastructure, *e.g.*, a transmitter that must be connected to the AC power lines, may be considered sufficient to demonstrate this.

(2) The use of outdoor mounted antennas, *e.g.*, antennas mounted on the outside of a building or on a telephone pole, or any other outdoors infrastructure is prohibited.

(3) The emissions from equipment operated under this section shall not be intentionally directed outside of the building in which the equipment is located, such as through a window or a doorway.

(4) Devices operating under the provisions of this section shall bear the following or similar statement in a conspicuous location on the device or in the instruction manual supplied with the device: "This equipment may only be operated indoors. Operation outdoors is in violation of 47 U.S.C. 301 and could subject the operator to serious legal penalties."

(b) Operation under the provisions of this section is not permitted on aircraft or satellites.

(c) Within the 92–95 GHz bands, the emission levels shall not exceed the following:

(1) The average power density of any emission, measured during the transmit interval, shall not exceed 9 uW/sq. cm, as measured at 3 meters from the radiating structure, and the peak power density of any emission shall not exceed 18 uW/sq. cm, as measured 3 meters from the radiating structure.

(2) Peak power density shall be measured with an RF detector that has a detection bandwidth that encompasses the band being used and has a video bandwidth of at least 10 MHz, or uses an equivalent measurement method.

(3) The average emission limits shall be calculated based on the measured peak levels, over the actual time period during which transmission occurs.

(d) Limits on spurious emissions:

(1) The power density of any emissions outside the band being used shall consist solely of spurious emissions.

(2) Radiated emissions below 40 GHz shall not exceed the general limits in § 15.209.

(3) Between 40 GHz and 200 GHz, the level of these emissions shall not exceed 90 pW/cm^2 at a distance of 3 meters.

(4) The levels of the spurious emissions shall not exceed the level of the fundamental emission.

(e) The total peak transmitter output power shall not exceed 500 mW.

(f) Fundamental emissions must be contained within the frequency bands specified in this section during all conditions of operation. Equipment is presumed to operate over the temperature range −20 to +50 degrees Celsius with an input voltage variation of 85% to 115% of rated input voltage, unless justification is presented to demonstrate otherwise.

(g) Regardless of the maximum EIRP and maximum power density levels permitted under this section, devices operating under the provisions of this section are subject to the radiofrequency radiation exposure requirements specified in 47 CFR 1.1307(b), 2.1091, and 2.1093, as appropriate. Applications for equipment authorization of devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(h) Any transmitter that has received the necessary FCC equipment authorization under the rules of this chapter may be mounted in a group installation for simultaneous operation with one or more other transmitter(s) that have received the necessary FCC equipment authorization, without any additional equipment authorization. However, no transmitter operating under the provisions of this section may be equipped with external phase-locking inputs that permit beam-forming arrays to be realized.

PART 97—AMATEUR RADIO SERVICE

■ 11. The authority citation for part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 12. Section 97.303 is amended by adding paragraph (r)(3) to read as follows:

§ 97.303 Frequency sharing requirements.

* * * * *

(r) * * *

* * * * *

(3) No amateur or amateur-satellite station transmitting in the 75.5–76 GHz segment shall cause interference to, nor is protected from, interference due to the operation of stations in the fixed service. After January 1, 2006, the 75.5–76 GHz segment is no longer allocated to the amateur service or to the amateur-satellite service.

* * * * *

PART 101—FIXED MICROWAVE SERVICES

■ 13. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

■ 14. Section 101.63 is amended by revising paragraphs (a) and (b) to read as follows:

§ 101.63 Period of construction; certification of completion of construction.

(a) Each Station, except in Multichannel Video Distribution and Data Service, Local Multipoint Distribution Services, 24 GHz Service, and the 38.6–40.0 GHz band, authorized under this part must be in operation within 18 months from the initial date of grant.

(b) For the 70 GHz, 80 GHz, and 90 GHz bands, the 12-month construction period will commence on the date of each registration of each individual link; adding links will not change the overall renewal period of the license.

* * * * *

■ 15. Section 101.101 is amended by adding three entries to the table in numerical order to read as follows:

§ 101.101 Frequency availability.

	Radio service				
	Common carrier (Part 101)	Private radio (Part 101)	Broadcast auxiliary (Part 74)	Other Parts 15, 21, 22, 24, 25, 74, 78 & 100)	Notes
* * *	*	*	*		*
71,000–76,000	CC	OFS		25	F/M/TF
81,000–86,000	CC	OFS		25	F/M/TF
92,000–95,000	CC	OFS		15	F/M/TF

* * * * *

■ 16. Section 101.107(a) is amended by adding three entries to the table in numerical order and adding note 9 to read as follows:

§ 101.107 Frequency tolerance.

(a) * * *

Frequency (MHz)	Frequency tolerance (percent)		
	All fixed base stations	Mobile stations over 3 watts	Mobile stations 3 watts or less
* * * * *	*	*	*
71,000 to 76,000[9]			
81,000 to 86,000[9]			
92,000 to 95,000[9]			

[9] Equipment authorized to be operated in the 38,600–40,000 MHz, 71,000–76,000 MHz, 81,000–86,000 MHz, 92,000–94,000 MHz and 94,100–95,000 MHz bands are exempt from the frequency tolerance requirement noted in the table of paragraph (a) of this section.

* * * * *

■ 17. Section 101.109(c) is amended by removing the last entry in the table "Above 40,000" and adding three entries to the table in numerical order and revising note 3 to read as follows:

§ 101.109 Bandwidth

* * * * *

(c) * * *

* * * * *

Frequency band (MHz)	Maximum authorized bandwidth
* * * *	*
71,000 to 76,000	[3]
81,000 to 86,000	[3]
92,000 to 95,000	[3]

[3] To be specified in authorization. For the bands of: 71 to 76 GHz, 81 to 86 GHz, and 92 to 95 GHz, maximum bandwidth is licensed in segments of 1.25 GHz for the 71–76 and 81–86 GHz bands, one segment of 2 GHz from 92–94 GHz, and one 0.9 GHz segment from 94.1 to 95 GHz, up to a total of 12.9 GHz, or the total of the loaded band if smaller than the assigned bandwidth.

* * * * *

■ 18. Section 101.111 is amended by adding paragraph (a)(2)(v) to read as follows:

§ 101.111 Emission limitations.

(a) * * *

(2) * * *

(v) The emission mask for the 71–76 GHz, 81–86 GHz, 92–94 GHz, and 94.1–95 GHz bands used in the equation in paragraph (a)(2)(ii) of this section applies only to the edge of each channel, but not to sub-channels established by licensees. The value of P in the equation is for the percentage removed from the carrier frequency and assumes that the carrier frequency is the center of the actual bandwidth used. The value of B will always be 500 MHz. In the case where a narrower sub-channel is used within the assigned bandwidth, such sub-carrier will be located sufficiently far from the channel edges to satisfy the emission levels of the mask. The mean output power used in the calculation is the sum of the output power of a fully populated channel.

* * * * *

■ 19. Section 101.113(a) is amended by adding three entries to the table in numerical order to read as follows:

§ 101.113 Transmitter power limitations.

(a) * * *

Frequency band (MHz)	Maximum allowable EIRP [1, 2]	
	Fixed [1, 2] (dBW)	Mobile (dBW)
* * * * *		
71,000–76,000	+55	+55
81,000–86,000	+55	+55
92,000–95,000	+55	+55
* * * * *		

■ 20. Section 101.115 is amended by adding three entries to the table, in numerical order, following paragraph (b)(2) to read as follows:

§ 101.115 Directional antennas.

(b) * * *

(2) * * *

ANTENNA STANDARDS

Frequency (MHz)	Category	Maximum beam width to 3 dB points [1] (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
*	*		*	*		*	*		*	
71,000 to 76,000	N/A	0.6	50.0	36	40	45	50	55	55	55
81,000 to 86,000	N/A	0.6	50.0	36	40	45	50	55	55	55
92,000 to 95,000	N/A	0.6	50.0	36	40	45	50	55	55	55

* * * * *

■ 21. Section 101.147(a) is amended by removing the entry for "Bands Above 40,000 MHz" and adding four frequencies in numerical order and adding paragraph (z) to read as follows:

§ 101.147 Frequency assignments.

(a) * * *

71,000–76,000 MHz (5) (17)
81,000–86,000 MHz (5) (17)
92,000–94,000 MHz (17)
94,100–95,000 MHz (17)

* * * * *

(z) *71,000–76,000 MHz; 81,000–86,000 MHz; 92,000–94,000 MHz; 94,100–95,000 MHz.* (1) Those applicants who are approved in accordance with FCC Form 601 will each be granted a single, non-exclusive nationwide license. Site-by-site registration is on a first-come, first-served basis. Registration will be in the Universal Licensing System until the Wireless Telecommunications Bureau announces by public notice, the implementation of a third-party database. *See* 47 CFR 101.1523. The sites are currently coordinated on the basis of 47 CFR 101.103, and may not operate until NTIA approval is received. Licensees may use these bands for any point-to-point non-broadcast service.

(2) Prior links shall be protected to a threshold-to-interference ratio (T/I) level of 1.0 dB of degradation to the static threshold of the protected receiver. Any new link shall not decrease a previous link's desired-to-undesired (D/U) signal ratio below a minimum of 36 dB, unless the earlier link's licensee agrees to accept a lower D/U.

(3) Entities must meet the loading requirements of 47 CFR 101.141. If it is determined that a licensee has not met the loading requirements, then the database will be modified to limit coordination rights to the spectrum that is loaded and the licensee will lose protection rights on spectrum that has not been loaded.

■ 22. Add subpart Q to part 101 to read as follows:

Subpart Q—Service and Technical Rules for the 70/80/90 GHz Bands

Sec.

§ 101.1501 Service areas.

The 70/80/90 GHz bands are licensed on the basis of non-exclusive nationwide licenses. There is no limit to the number of non-exclusive nationwide licenses that may be granted for these bands, and these licenses will serve as a prerequisite for registering individual links.

§ 101.1505 Segmentation plan.

(a) The 71–76 GHz and 81–86 GHz bands are divided into four unpaired 1.25 GHz segments each (8 total), without assignment of specific channels within the segment. An entity may request any portion of this spectrum, up to 10 GHz (1.25, 2.5, 3.75, 5, 6.25, 7.75 or 10 GHz). The segments may be aggregated without limit. Pairing is permitted, but only in a standardized manner (*e.g.*, 71–72.25 GHz may be paired only with 81–82.25 GHz, and so on). Licensees are also permitted to register segments less than 1.25 GHz.

(b) The 92–95 GHz band is divided into three segments: 92.0–94.0 GHz and 94.1–95.0 GHz for non-government and government users, and 94.0–94.1 GHz for Federal Government use. Pairing is allowed and segments may be aggregated without limit. The bands in paragraph (a) of this section can be included for a possible 12.9 GHz maximum aggregation. Licensees are also permitted to register smaller segments than provided here.

§ 101.1507 Permissible operations.

Licensees may use the 70 GHz, 80 GHz and 90 GHz bands for any point-to-point, non-broadcast service. The segments may be unpaired or paired, but paring will be permitted only in a standardized manner (*e.g.*, 71–72.25 GHz may be paired only with 81–82.25 GHz, and so on). The segments may be aggregated without limit.

§ 101.1511 Regulatory status and eligibility.

(a) Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis.

(b) Licensees are subject to the requirements set forth in § 101.7.

(c) Any entity, other than one precluded by § 101.7, is eligible for authorization to provide service under this part. Authorization will be granted upon proper application filing and link coordination in accordance with the Commission's rules.

§ 101.1513 License term and renewal expectancy.

Because the licensee will obtain a single license for all of its facilities, the license renewal period will be ten years from the registration of the first link. Adding links will not change the overall renewal period of the license.

§ 101.1523 Sharing and coordination among non-government licensees and between non-government and government services.

(a) Registration of each link in the 71–76 GHz, 81–86 GHz, and 92–95 GHz bands will be in the Universal Licensing System until the Wireless Telecommunications Bureau announces by public notice the implementation of a third-party database.

(b) Sharing and coordination among non-Federal Government links and between non-Federal Government and Federal Government links, shall occur according to the registration and coordination standards and procedures adopted in Report & Order, FCC 03–248, and as further detailed in subsequent implementation public notices issued consistent with that order. Protection of individual links against harmful interference from other links shall generally be granted to first-in-time registered links. Successful completion of coordination via the NTIA automated mechanism shall constitute successful non-Federal Government to Federal Government coordination for that individual link.

(c) In addition, the following types of non-Federal Government links require the filing with the Commission an FCC Form 601 for each link for the purpose of coordination and registration, in addition to registering each link in the third-party database:

(1) Facilities requiring the submission of an Environmental Assessment,

(2) Facilities requiring international coordination, and

(3) Operation in quiet zones.

(d) The Commission believes the licensee is in the best position to determine the nature of its operations and whether those operations impact these settings, and is required to submit to a database manager, as part of the registration package, documentation that an FCC Form 601 has been filed.

§ 101.1525 RF safety.

Licensees in the 70–80–90 GHz bands are subject to the exposure requirements found in §§ 1.1307(b), 2.1091 and 2.1093 of this chapter, and will use the parameters found therein.

§ 101.1527 Canadian and Mexican coordination.

(a) A licensee of bands 71.0–76.0, 81.0–86.0, 92–94 GHz and 94.1–95 GHz must comply with § 1.928(f) of this chapter, which pertains to coordination with Canada.

(b) A licensee of bands 71.0–76.0, 81.0–86.0, 92–94 GHz and 94.1–95 GHz must coordinate with Mexico in the following situations:

(1) For a station the antenna of which looks within the 200 deg. sector toward the Mexico-United States borders, that area in each country within 35 miles of the borders; and

(2) For a station the antenna of which looks within the 160 deg. sector away from the Canada-United States borders, that area in each country within 5 miles of the borders.

[FR Doc. 04–1246 Filed 1–22–04; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket Nos. 02–34, 00–248, and 96–111; FCC 03–128]

Satellite Licensing Procedure

AGENCY: Federal Communications Commission.

ACTION: Final rule, announcement of effective date.

SUMMARY: The Commission adopted rule revisions to create a streamlined procedure for certain space station modification requests related to fleet management. Certain rules contained new and modified information requirements and were published in the **Federal Register** on November 3, 2003. This document announces the effective date of these published rules. 47 CFR 25.117, 25.118, 25.131, 25.137.

DATES: The amendments to §§ 25.117, 25.118, 25.131, and 25.137, published at 68 FR 62247, November 3, 2003, became effective January 8, 2004.

FOR FURTHER INFORMATION CONTACT: Steven Spaeth, International Bureau, Satellite Policy Branch, (202) 418–1539.

SUPPLEMENTARY INFORMATION: On January 8, 2004, the Office of Management and Budget (OMB) approved the information collection requirement contained in Sections 25.117, 25.118, 25.131, and 25.137, pursuant to OMB Control No. 3060–1007.

Accordingly, the information collection requirement contained in these rules became effective on January 8, 2004.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–1416 Filed 1–22–04; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket 00–1; DA 00–1337]

Amendment of List of Major Television Markets Designated Communities

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's rules to add the communities of Merced and Porterville, California to the Fresno-Visalia-Hanford-Clovis hyphenated television market ("Fresno-Visalia" market). The Communications Act requires that the Commission make revisions needed to update the list of top 100 television markets and their designated communities. The Commission's rules enumerates the top 100 television markets and the designated communities within those markets. In addition to permitting broadcast territorial exclusivity, television stations that are part of a hyphenated market may assert network non-duplication rights and syndicated programming exclusivity against other television stations throughout the hyphenated market. Market hyphenation helps equalize competition among stations in a market. This document concludes that there is sufficient evidence demonstrating commonality between the two communities to be added to the Fresno-Visalia hyphenated market.

DATES: Effective February 23, 2004.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Sonia Greenaway-Mickle, Media Bureau, 202–418–1419.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O) in CS Docket No. 00–1, DA 00–1337, adopted June 14, 2000 and released June 20, 2000. The complete text of the R&O is available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC. The text may also be purchased from the Commission's copy contractor, Qualex

International, Portals II, 445 12th Street, SW., CY–B4202, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

Synopsis of the Report and Order

Introduction

1. Before the Commission is the Notice of Proposed Rule Making ("Notice") in the captioned proceeding, issued in response to a joint petition filed by Pappas Telecasting Incorporated ("Pappas"), licensee of television station KMPH(TV), Visalia, California, Retlaw Enterprises, Inc. ("Retlaw"), licensee of television station KJEO(TV), Fresno, California, and San Joaquin Communications Corp. ("San Joaquin"), licensee of television station KSEE(TV), Fresno, California (collectively, the "Joint Petitioners"). The Notice proposed to amend § 76.51 of the Commission's rules to add the communities of Merced and Porterville, California to the Fresno-Visalia-Hanford-Clovis hyphenated television market ("Fresno-Visalia" market). The Notice also sought comment on the petition for amendment or waiver of section 76.51 with respect to the community of Merced that was filed by Capital Cities/ABC, Inc. ("CC/ABC"). In response to the Notice, three comments were filed with the Commission, all of which were in favor of the action requested by the petitioners.

Background

2. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act") added section 614 to the Communications Act of 1934. Section 614 requires that the Commission make revisions needed to update the list of top 100 television markets and their designated communities. Section 76.51 of the Commission's rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, the top 100 market list is used to determine territorial exclusivity rights under § 73.658(m) of the Commission's rules and helps define the scope of compulsory copyright license liability for cable operators. In addition to broadcast territorial exclusivity, television stations that are part of a hyphenated market may assert network non-duplication rights and syndicated programming exclusivity against other television stations throughout the hyphenated market. A hyphenated television market, a television market that consists of more than one named community, is based upon the premise that stations licensed to any of the named communities therein compete with all stations licensed to such communities. Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (i) The distance between the existing designated communities and the community or communities proposed to be added to the designation; (ii) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (iii) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (iv) an indication of benefit to the public from the proposed change. These factors help the Commission evaluate the individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule" which is to delineate areas where stations compete.

Discussion

4. A "hyphenated market" has been described by the Commission as a television market that contains more than one major population center supporting all stations in the market, with competing stations licensed to different cities within the market area. Market hyphenation helps to equalize competition among stations in a market where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. Pappas and Fisher Broadcasting Incorporated ("Fisher") state that the factors indicating that the communities of Merced and Porterville should be added to the Fresno-Visalia market that are cited in the original joint petition are even more true today. At the time that the joint petition was filed, there were applications on file with the Commission to commence television service in the communities of Merced and Porterville. Subsequent to the filing of the joint petition, television station KNSO, Channel 51, was licensed to Merced and television station KPXF, Channel 61, was licensed to Porterville. Pappas and Fischer maintain that the new stations licensed to Merced and to Porterville compete with other television stations licensed to communities in the Fresno-Visalia market. In addition, the commenters argue that advancements in technology and in alternate delivery systems make the grant of syndicated exclusivity and network non-duplication rights imperative to stations licensed to those communities.

5. With regard to the distance between communities in the Fresno-Visalia market and the communities of Merced and Porterville, the first factor for evaluating market hyphenation requests, commenters Gary M. Cocola ("Cocola"), licensee of KGMC(TV), and Paxson Communications License Company, LLC ("Paxson"), licensee of television station KPXF, state that the communities of Merced and Porterville have long been an integral part of the Fresno-Visalia market. Specifically, Cocola and Paxson state that the City of Fresno lies at the geographic center of the Fresno-Visalia market and that Merced is approximately 50 miles north of Fresno and that Porterville is approximately 70 miles south of Fresno. Cocola and Paxson note that, in similar proceedings, the Commission has concluded that communities separated by greater distances can form the same television market. The commenters argue that, because of their geographic proximity, Merced and Porterville share a common social, cultural, and economic bond with communities in the Fresno-Visalia market that is based on the local agribusiness economy. Cocola and Paxson further note that Merced and Porterville are included in Nielsen's Fresno-Visalia "designated market area" or DMA and, prior to that designation, were included in Arbitron's Fresno-Visalia "area of dominant influence" or ADI.

6. We find that the distance between the existing designated communities and the communities of Merced and Porterville, 50 miles and 70 miles respectively, indicates that the communities are sufficiently proximate to be deemed part of the Fresno-Visalia hyphenated market. In the Notice, the Commission noted the well-defined topography of the Fresno-Visalia market including the Coast Ranges Mountains marking its western border and the Sierra Nevada Mountains marking the eastern border. In addition, we note that the Fresno-Visalia market is bounded by the Sacramento-Stockton-Modesto television market to the north and the Bakersfield television market to the south. Thus, the Fresno-Visalia market consists predominately of farming communities located within the central San Joaquin Valley floor which indicates commonality among the communities.

7. With regard to the second factor for evaluating market hyphenation requests, we find that cable carriage, if afforded

to television station KNSO on a hyphenated market basis, would extend beyond its Grade B signal coverage area. Merced station KNSO does not provide Grade B coverage over the communities in the Fresno-Visalia market. In contrast, Porterville station KPXF does place a Grade B contour over the communities in the Fresno-Visalia market. However, Joint Petitioners point out that all of the stations currently in the Fresno-Visalia market, with the exception of KMPH, place a predicted Grade B contour over Merced. Joint Petitioners further maintain that KMPH has a significant viewership in Merced County and that KMPH, as well as the other television stations in the market, are carried on the cable system serving Merced. TCI Cablevision of California, which provides cable service to communities in the Fresno-Visalia market and to Merced, carries independent television station KMPH as well as the network affiliates KFSN, KJEO, and KSEE.

8. Commenters maintain that the Joint Petitioners have shown a particularized need to be added to the Fresno-Visalia market because incumbent Fresno-Visalia market stations actually compete with new stations KNSO and KPXF. Cocola and Paxson state that Merced station KNSO and Porterville station KPXF compete with stations in the Fresno-Visalia market such as KGMC(TV), a station licensed to Fresno. The commenters further state that residents of Merced and of Porterville are served by the same television stations as residents of the named communities in the Fresno-Visalia market, namely, KFSN-TV (ABC affiliate), KJEO(TV) (CBS affiliate), and KSEE (NBC affiliate). In addition, Cocola and Paxson state that viewers in the Fresno-Visalia market receive WB programming from Merced station KNSO and PAXTV programming from Porterville station KPXF. Thus, commenters maintain that "for many years, television stations throughout the Fresno-Visalia Market have acquired programming with the expectation that they would serve the market that has been defined consistently by Arbitron, Nielsen, and actual viewing patterns of residents in the area." The addition of the communities of Merced and Porterville to the Fresno-Visalia market would permit incumbent stations to protect their investments in programming and promotion through the assertion of network non-duplication and syndicated exclusivity rights. Thus, commenters argue that the Commission's rules should reflect market reality.

9. It appears from the record that television stations licensed to Merced and to Porterville compete for programming, audience, and advertisers in the proposed combined market area, and that sufficient evidence has been presented to demonstrate commonality between the two communities to be added and the market as a whole. In addition, the record indicates that the addition of the two communities to the Fresno-Visalia market will benefit the public by equalizing competition among stations, which will improve advertising revenues for those stations and programming options for residents. Thus, the Commission finds that a particularized need has been demonstrated to support the unopposed addition of Merced and Porterville to the Fresno-Visalia market. Based on the facts presented here, we believe that a case for redesignation of the subject market has been set forth and that the request to add Merced and Porterville to the Fresno-Visalia market should be granted.

10. This proceeding is not intended to address the specific mandatory cable carriage, syndicated exclusivity or network non-duplication obligations of individual cable systems. Redesignation of the television market reflects in the Commission's rules the general competitive situation that exists in the local area, allowing the application of the more specific rules, including those governing market modification, to be addressed from the perspective of a properly defined market.

Ordering Clauses

11. Pursuant to section 614 of the Communications Act of 1934, as amended, 47 U.S.C. 614, § 76.51 of the Commission's rules, 47 CFR 76.51, *is amended,* effective thirty (30) days after publication in the **Federal Register**, to include Merced and Porterville, California.

12. This proceeding *is terminated.*

Paperwork Reduction Act

The requirements in this Report and Order have been analyzed with respect to the Paperwork Reduction Act of 1995 and do not impose new or modified information collection requirements on the public.

OMB Approval: None.

Regulatory Flexibility Analysis: We certify that the Regulatory Flexibility Act of 1980 does not apply to this proceeding because there will not be a significant economic impact on a substantial number of small business entities, as defined by section 603 of the Regulatory Flexibility Act. A few cable television system operators will be affected by the rule amendment.

A. *Need for, and Objectives of, the Order:* We undertake this proceeding to add the communities of Merced and Porterville, California to the Fresno-Visalia-Hanford-Clovis television market.

The addition will help equalize competition in that hyphenated market.

B. *Description and Estimate of the Number of Small Entities Impacted:* None.

C. *Reporting, Recordkeeping, and Other Compliance Requirements:* There are no additional reporting and recordkeeping requirements.

D. *Significant Alternatives Which Minimize the Impact on Small Entities and Are Consistent with Stated Objectives:* There is no significant impact on small entities.

E. *Report to Congress:* The Commission will send a copy of the R&O in a report to be sent to Congress pursuant to the Congressional Review Act. A copy of the R&O will also be published in the **Federal Register.**

List of Subjects in 47 CFR Part 76

Cable Television Service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, and 573.

■ 2. Section 76.51 is amended by revising paragraph (a)(72) to read as follows:

§ 76.51 Major television markets.

* * * * *

(a) * * *

(72) Fresno-Visalia-Hanford-Clovis-Merced-Porterville, California.

* * * * *

[FR Doc. 04–1408 Filed 1–22–04; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 69, No. 15
Friday, January 23, 2004

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 340

[Docket No. 03–031–2]

Environmental Impact Statement; Introduction of Genetically Engineered Organisms

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement and proposed scope of study.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service intends to prepare an environmental impact statement in connection with potential changes to the regulations regarding the importation, interstate movement, and environmental release of certain genetically engineered organisms. This notice identifies potential issues and alternatives that will be studied in the environmental impact statement and requests public comment to further delineate the scope of the issues and alternatives.

DATES: We will consider all comments that we receive on or before March 23, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–031–2, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–031–2. If you use e-mail, address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 03–031–2" on the subject line.

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

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

FOR FURTHER INFORMATION CONTACT: Ms. Stephanie Stephens, Environmental Services, PPD, APHIS, 4700 River Road Unit 149, Riverdale, MD 20737–1238; (301) 734–4836.

SUPPLEMENTARY INFORMATION: The Animal and Plant Health Inspection Service (APHIS) currently regulates the introduction (movement into the United States or interstate, or release into the environment) of genetically engineered organisms that may present a plant pest risk under 7 CFR part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests." The Agency is considering amending the regulations pertaining to introductions of genetically engineered plants and other genetically engineered organisms to, among other things, include genetically engineered organisms that may pose a noxious weed risk and genetically engineered biological control agents.

As used in this document, the term genetically engineered organisms means organisms that have been "genetically engineered" as defined in 7 CFR part 340 (*i.e.*, modified by recombinant DNA techniques).

Also, as used in this document, the following terms have the definitions given to them by the Plant Protection Act (7 U.S.C. 7701–7772):

Biological control organism: Any enemy, antagonist, or competitor used to control a plant pest or noxious weed.

Noxious weed: Any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.

Plant pest: Any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product:

(A) A protozoan.
(B) A nonhuman animal.
(C) A parasitic plant.
(D) A bacterium.
(E) A fungus.
(F) A virus or viroid.
(G) An infectious agent or other pathogen.
(H) Any article similar to or allied with any of the articles specified in the preceding subparagraphs.

APHIS recognizes that other Federal agencies also have authority to regulate genetically engineered organisms. For example, the Environmental Protection Agency (EPA) has authority over certain biological control agents. This notice only addresses changes to APHIS regulations. It is not intended to circumscribe, restrict, or otherwise preclude future actions taken under other Federal authorities.

Under the provisions of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), agencies must examine the potential environmental effects of proposed Federal actions and alternatives. We intend to prepare an environmental impact statement (EIS) in connection with the amendments being considered. This notice identifies potential issues and alternatives that we will study in the environmental impact statement and requests public comment to further delineate the issues and the scope of the alternatives.

We have identified two broad alternatives for study in the EIS.

- Take no action. This alternative contemplates no change in the existing regulations for genetically engineered organisms that pose a potential plant pest risk. It represents a baseline against which proposed revisions may be compared.
- Revise the regulations for introduction of genetically engineered organisms. This alternative contemplates revision of the current regulations to address issues related to scientific advances and new trends in

biotechnology (*e.g.*, increasing use of genetically engineered plants to produce pharmaceutical and industrial compounds) and changes in the scope of the Agency's authority under the Plant Protection Act (7 U.S.C. 7701 *et seq.*). The proposed revisions would be based in part upon environmental and pest risk criteria identified and analyzed in the EIS.

APHIS will reexamine the current regulations for the purpose of updating those regulations with due regard for the types of products being tested, and that may be tested in the future; the potential risks involved; and the quality of the human environment. Issues regarding possible regulatory changes with the potential to affect the quality of the human environment include the following:

1. APHIS is considering broadening its regulatory scope beyond genetically engineered organisms that may pose a plant pest risk to include genetically engineered plants that may pose a noxious weed risk and genetically engineered organisms that may be used as biological control agents. Do regulatory requirements for these organisms need to be established? What environmental considerations should influence this change in regulatory scope?

2. APHIS is considering revisions to the regulations that would define specific risk-based categories for field testing, including (a) product types shown to pose low pest and environmental risks; (b) product types considered to pose a noxious weed risk, of unknown plant pest or noxious weed risk, containing sequences of unknown phenotypic function, and involving new plant-incorporated protectants that have not completed applicable review at EPA; and (c) pharmaceutical or industrial crops not intended for food or feed. What environmental factors should be considered in further delineating such requirements? What criteria should be used to establish the risk-based categories? Should certain low-risk categories be considered for exemption from permitting requirements? If so, what criteria should apply?

3. APHIS is considering ways to provide regulatory flexibility for future decisions by allowing for commercialization of certain genetically engineered organisms while continuing, in some cases, to regulate the organisms based on minor unresolved risks. Other regulated articles could be treated as they have been under the current system, in which all regulatory restrictions are removed. What environmental factors should be considered in distinguishing between these kinds of decisions?

4. Are there changes that should be considered relative to environmental review of, and permit conditions for, genetically engineered plants that produce pharmaceutical and industrial compounds? Should the review process, permit conditions, and other requirements for non-food crops used for production of pharmaceutical and industrial compounds differ from those for food crops? How should results of a food safety evaluation affect the review, permit conditions, and other requirements for these types of plants? How should the lack of a completed food safety review affect the requirements for these types of plants?

5. *Noxious weed*, as defined in the Plant Protection Act, includes not only plants, but also plant products. Based on that authority, APHIS is considering the regulation of nonviable plant material. Is the regulation of nonviable material appropriate and, if so, in what cases should we regulate?

6. APHIS is considering establishing a new mechanism involving APHIS, the States, and the producer for commercial production of plants not intended for food or feed in cases where the producer would prefer to develop and extract pharmaceutical and industrial compounds under confinement conditions with governmental oversight, rather than use the approval process for unconfined releases. What should be the characteristics of this mechanism? To what extent should this mechanism be employed for commercial production of plants not intended for food or feed? What environmental considerations should influence the development of this mechanism?

7. The current regulations have no provision for adventitious presence—intermittent and low-level presence in commercial crops, food, feed, or seed of genetically engineered plant material that has not completed the required regulatory processes. Should APHIS establish a separate component within a revised regulatory system to address adventitious presence? Should the low-level occurrence be exempt from APHIS regulation? If so, what are the conditions under which the low level occurrence should be allowed? What environmental considerations would apply to establishment of such allowances?

8. Should APHIS provide for expedited review or exemption from review of certain low-risk genetically engineered commodities intended for importation that have received all necessary regulatory approvals in their country of origin and are not intended for propagation in the United States? What environmental considerations should be applied to determination of any such allowances?

9. Currently, genetically engineered *Arabidopsis* spp. are exempt from interstate movement restrictions under part 340 because they are well understood and extensively used in research. Should the regulation of other similar genetically engineered plants be consistent with the regulation of genetically engineered *Arabidopsis* spp.? Should the exemption from interstate movement restrictions apply only to those products that meet specific risk-based criteria? What should these criteria be? What species and/or traits should be considered for this exemption? What environmental factors should be considered?

10. What are other areas where APHIS might consider relieving regulatory requirements based on the low level of risk?

11. What environmental considerations should be evaluated if APHIS were to move from prescriptive container requirements for shipment of genetically engineered organisms to performance-based container requirements, supplemented with guidance on ways to meet the performance standards?

Comments that identify other issues or alternatives that should be examined in the EIS would be especially helpful. All comments will be considered fully in developing a final scope of study. When the draft EIS is completed, a notice announcing its availability and an invitation to comment on it will be published in the **Federal Register**.

Done in Washington, DC, this 16th day of January, 2004.

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–1411 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 985

[Docket No. FV04–985–1 PR]

Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 2004–2005 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would establish the quantity of spearmint oil produced in the Far West, by class, that handlers may purchase from, or handle for, producers during the 2004–2005 marketing year, which begins on June 1, 2004. This rule invites comments on the establishment of salable quantities and allotment percentages for Class 1 (Scotch) spearmint oil of 766,880 pounds and 40 percent, respectively, and for Class 3 (Native) spearmint oil of 773,474 pounds and 36 percent, respectively. The Spearmint Oil Administrative Committee (Committee), the agency responsible for local administration of the marketing order for spearmint oil produced in the Far West, recommended this rule for the purpose of avoiding extreme fluctuations in supplies and prices to help maintain stability in the spearmint oil market.

DATES: Comments must be received by February 23, 2004.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or E-mail: *moab.docketclerk@usda.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Susan M. Hiller, Northwest Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, suite 385, Portland, Oregon 97204; telephone: (503) 326–2724; Fax: (503) 326–7440; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491; Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 985 (7 CFR part 985), as amended, regulating the handling of spearmint oil produced in the Far West (Washington, Idaho, Oregon, and designated parts of Nevada and Utah), hereinafter referred to as the "order." This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, salable quantities and allotment percentages may be established for classes of spearmint oil produced in the Far West. This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, which may be purchased from or handled for producers by handlers during the 2004–2005 marketing year, which begins on June 1, 2004. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to authority in §§ 985.50, 985.51, and 985.52 of the order, the Committee, with all of its eight members present, met on October 8, 2003, and recommended salable quantities and allotment percentages for both classes of oil for the 2004–2005 marketing year. The Committee unanimously recommended the establishment of a salable quantity and allotment percentage for Scotch spearmint oil of 766,880 pounds and 40 percent, respectively. For Native spearmint oil, with six members in favor, one opposed, and one abstention, the Committee recommended the establishment of a salable quantity and allotment percentage of 773,474 pounds and 36 percent, respectively.

This rule would limit the amount of spearmint oil that handlers may purchase from, or handle for, producers during the 2004–2005 marketing year, which begins on June 1, 2004. Salable quantities and allotment percentages have been placed into effect each season since the order's inception in 1980.

The U.S. production of Scotch spearmint oil is concentrated in the Far West, which includes Washington, Idaho, and Oregon and a portion of Nevada and Utah. Scotch spearmint oil is also produced in the Midwest states of Indiana, Michigan, and Wisconsin, as well as in the states of Montana, South Dakota, North Dakota, and Minnesota. The production area covered by the marketing order currently accounts for approximately 65 percent of the annual U.S. sales of Scotch spearmint oil.

When the order became effective in 1980, the United States produced nearly 100 percent of the world's supply of Scotch spearmint oil, of which approximately 72 percent was sales from the regulated production area in the Far West. During the period from 1981 to 1990 the Far West sales declined to an average of 67 percent of the world's Scotch spearmint oil. Sales from the Far West continued to decline during the period from 1991 to 2000 to an average of 44 percent of the world's Scotch spearmint oil. It is estimated for 2003 that the Far West will decline to 30 percent of the world's Scotch spearmint oil sales.

The steady decline in world sales for the Far West region is directly attributed to the increase in global production. Other factors that have played a significant role include the overall quality of the imported oil and technological advances that allow for more blending of lower quality oils. Such factors have provided the Committee with challenges in accurately predicting trade demand for Scotch oil. This, in turn, has made it difficult to balance available supplies with needs and to achieve the Committee's overall goal of stabilizing producer and market prices.

The marketing order has continued to contribute to price and general market stabilization for Far West producers. The Committee, as well as spearmint oil producers and handlers attending the October 8, 2003, meeting estimated that the 2003 producer price of Scotch oil would average $9.50 per pound, which represents the fourth price increase since 1999. However, this producer price is below the cost of production for

most producers as indicated in a study from the Washington State University Cooperative Extension Service (WSU), which estimates production costs to be between $13.50 and $15.00 per pound.

This low level of producer returns has caused a reduction in acreage. The Committee estimates that the acreage of Scotch spearmint has declined from about 10,000 acres in 1998 to about 4,372 acres currently. Based on the reduced Scotch spearmint acreage, the Committee estimates that production for the current season (the 2003–2004 marketing season) will be about 565,261 pounds.

The Committee recommended the 2004–2005 Scotch spearmint oil salable quantity (766,880 pounds) and allotment percentage (40 percent) utilizing sales estimates for 2004–2005 Scotch oil as provided by several of the industry's handlers, as well as historical and current Scotch oil sales levels. Between June 1, 2003, and September 30, 2003, 143,124 pounds of Scotch oil were sold, a level dramatically below the most recent five-year average for this four-month period of 448,084 pounds. Handlers are estimating that sales for the 2003–2004 marketing year may range from a low of 600,000 pounds to a high of 750,000 pounds. With 354,053 pounds carried in to the current marketing year and an estimated 565,261 pounds being produced, the total available supply for 2003–2004, including the 650,000 pounds already sold, is 919,314 pounds.

The recommendation for the 2004–2005 Scotch spearmint oil volume regulation is consistent with the Committee's stated intent of keeping adequate supplies available at all times, while attempting to stabilize prices at a level adequate to sustain the producers. Furthermore, the recommendation takes into consideration the industry's desire to compete with less expensive oil produced outside the regulated area.

Although Native spearmint oil producers are facing market conditions similar to those affecting the Scotch spearmint oil market, unlike Scotch, over 90 percent of the U.S. production of Native spearmint is produced within the Far West production area. Also, unlike Scotch, most of the world's supply of Native spearmint is produced in the U.S.

The current, flat market contributed to the Committee's recommendation for a salable quantity of 773,474 pounds and an allotment percentage of 36 percent for Native spearmint oil for the 2004–2005 marketing year. The supply and demand characteristics of the current Native spearmint oil market are keeping the price relatively steady at about $9.50 per pound—a level the Committee considers too low for the majority of producers to maintain viability. The WSU study referenced earlier indicates that the cost of producing Native spearmint oil ranges from $10.26 to $10.92 per pound.

The Committee estimates that 853,820 pounds of Native oil is expected to be produced this year. With current sales approximating the five-year average of about 1,021,702 pounds, the current season's salable quantity of 808,993 pounds coupled with the June 1, 2003, carry-in of 163,617 pounds will likely produce a surplus of oil, adding to the nearly 1.4 million pounds already in reserve. The Committee is estimating that about 865,000 pounds of Native spearmint oil, on average, may be sold during the 2004–2005 marketing year. This estimate, combined with the information available regarding current supply and price, helped lead the Committee to its recommendation for a 2004–2005 salable quantity of 773,474 pounds. When considered in conjunction with the estimated carry-in of 130,610 pounds of oil on June 1, 2004, the recommended salable quantity results in a total available supply of Native spearmint oil next year of about 904,084 pounds.

The Committee's method of calculating the Native spearmint oil salable quantity and allotment percentage continues to primarily utilize information on price and available supply as they are affected by the estimated trade demand. The Committee's stated intent is to make adequate supplies available to meet market needs and improve producer prices.

The Committee believes that the order has contributed extensively to the stabilization of producer prices, which prior to 1980 experienced wide fluctuations from year to year. According to the National Agricultural Statistics Service, for example, the average price paid for both classes of spearmint oil ranged from $4.00 per pound to $11.10 per pound during the period between 1968 and 1980. Prices since the order's inception have generally stabilized at about $9.88 per pound for Native spearmint oil and at about $13.04 per pound for Scotch spearmint oil. However, the current prices for both classes of oil are below the average due to several factors, including the general uncertainty being experienced through the U.S. economy and the continuing overall weak farm situation, as well as an abundant global supply of spearmint oil. As noted earlier—although lower than what producers believe to be viable—prices currently appear to be stable at about $9.50 for both classes of oil.

The Committee based its recommendation for the proposed salable quantity and allotment percentage for each class of spearmint oil for the 2004–2005 marketing year on the information discussed above, as well as the data outlined below.

(1) Class 1 (Scotch) Spearmint Oil

(A) Estimated carry-in on June 1, 2004—269,314 pounds. This figure is the difference between the estimated 2003–2004 marketing year trade demand of 650,000 pounds and the 2003–2004 marketing year total available supply of 919,314 pounds.

(B) Estimated trade demand for the 2004–2005 marketing year—650,000 pounds. This figure represents the Committee's estimate based on the average of the estimates provided by producers at six Scotch spearmint oil production area meetings held in September 2003, as well as estimates provided by handlers and others at the October 8, 2003, meeting. Handler trade demand estimates for the 2004–2005 marketing year ranged from 600,000 to 750,000 pounds. The average of sales over the last five years was 827,522 pounds.

(C) Salable quantity required from the 2004–2005 marketing year production—380,686 pounds. This figure is the difference between the estimated 2004–2005 marketing year trade demand (650,000 pounds) and the estimated carry-in on June 1, 2004 (269,314 pounds).

(D) Total estimated allotment base for the 2004–2005 marketing year—1,917,200 pounds. This figure represents a one-percent increase over the revised 2003–2004 total allotment base. This figure is generally revised each year on June 1 due to producer base being lost due to the bona fide effort production provisions of § 985.53(e). The revision is usually minimal.

(E) Computed allotment percentage—19.9 percent. This percentage is computed by dividing the required salable quantity by the total estimated allotment base.

(F) Recommended allotment percentage—40 percent. This recommendation is based on the Committee's determination that a decrease from the current season's allotment percentage of 45 percent to the computed 19.9 percent would not adequately supply the potential 2004–2005 market.

(G) The Committee's recommended salable quantity—766,880 pounds. This figure is the product of the

recommended allotment percentage and the total estimated allotment base.

(H) Estimated available supply for the 2004–2005 marketing year—1,036,194 pounds. This figure is the sum of the 2004–2005 recommended salable quantity (766,880 pounds) and the estimated carry-in on June 1, 2004 (269,314 pounds).

(2) Class 3 (Native) Spearmint Oil

(A) Estimated carry-in on June 1, 2004—130,610 pounds. This figure is the difference between the estimated 2003–2004 marketing year trade demand of 842,000 pounds and the revised 2003–2004 marketing year total available supply of 972,610 pounds.

(B) Estimated trade demand for the 2004–2005 marketing year—865,000 pounds. This figure is based on input from producers at the five Native spearmint oil production area meetings held in September 2003, from handlers, and from Committee members and other meeting participants at the October 8, 2003, meeting. The average estimated trade demand provided at the five production area meetings was 875,400 pounds, whereas the average handler estimate was 885,000 pounds. The Committee discussed several estimates below these figures to take into consideration a general lack of 2004 contract offers to date.

(C) Salable quantity required from the 2004–2005 marketing year production—734,390 pounds. This figure is the difference between the estimated 2004–2005 marketing year trade demand (865,000 pounds) and the estimated carry-in on June 1, 2004 (130,610 pounds).

(D) Total estimated allotment base for the 2004–2005 marketing year—2,148,539 pounds. This figure represents a one percent increase over the revised 2003–2004 total allotment base. This figure is generally revised each year on June 1 due to producer base being lost due to the bona fide effort production provisions of § 985.53(e). The revision is usually minimal.

(E) Computed allotment percentage—34.2 percent. This percentage is computed by dividing the required salable quantity by the total estimated allotment base.

(F) Recommended allotment percentage—36 percent. This is the Committee's recommendation based on the computed allotment percentage, the average of the computed allotment percentage figures from the five production area meetings (36.5 percent), and input from producers and handlers at the October 8, 2003, meeting.

(G) The Committee's recommended salable quantity—773,474 pounds. This figure is the product of the recommended allotment percentage and the total estimated allotment base.

(H) Estimated available supply for the 2004–2005 marketing year—904,084 pounds. This figure is the sum of the 2004–2005 recommended salable quantity (773,474 pounds) and the estimated carry-in on June 1, 2004 (130,610 pounds).

The salable quantity is the total quantity of each class of spearmint oil, which handlers may purchase from, or handle on behalf of producers during a marketing year. Each producer is allotted a share of the salable quantity by applying the allotment percentage to the producer's allotment base for the applicable class of spearmint oil.

The Committee's recommended Scotch and Native spearmint oil salable quantities and allotment percentages of 766,880 pounds and 40 percent and 773,474 and 36 percent, respectively, are based on the Committee's goal of maintaining market stability by avoiding extreme fluctuations in supplies and prices and the anticipated supply and trade demand during the 2004–2005 marketing year. The proposed salable quantities are not expected to cause a shortage of spearmint oil supplies. Any unanticipated or additional market demand for spearmint oil, which may develop during the marketing year, can be satisfied by an increase in the salable quantities. Both Scotch and Native spearmint oil producers who produce more than their annual allotments during the 2004–2005 season may transfer such excess spearmint oil to a producer with spearmint oil production less than his or her annual allotment or put it into the reserve pool.

This proposed regulation, if adopted, would be similar to regulations issued in prior seasons. Costs to producers and handlers resulting from this rule are expected to be offset by the benefits derived from a stable market and improved returns. In conjunction with the issuance of this proposed rule, USDA has reviewed the Committee's marketing policy statement for the 2004–2005 marketing year. The Committee's marketing policy statement, a requirement whenever the Committee recommends volume regulations, fully meets the intent of § 985.50 of the order. During its discussion of potential 2004–2005 salable quantities and allotment percentages, the Committee considered: (1) The estimated quantity of salable oil of each class held by producers and handlers; (2) the estimated demand for each class of oil; (3) prospective production of each class of oil; (4) total of allotment bases of each class of oil for the current marketing year and the estimated total of allotment bases of each class for the ensuing marketing year; (5) the quantity of reserve oil, by class, in storage; (6) producer prices of oil, including prices for each class of oil; and (7) general market conditions for each class of oil, including whether the estimated season average price to producers is likely to exceed parity. Conformity with the USDA's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" has also been reviewed and confirmed.

The establishment of these salable quantities and allotment percentages would allow for anticipated market needs. In determining anticipated market needs, consideration by the Committee was given to historical sales, as well as changes and trends in production and demand. This rule also provides producers with information on the amount of spearmint oil that should be produced for next season in order to meet anticipated market demand.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are 8 spearmint oil handlers subject to regulation under the order, and approximately 84 producers of Class 1 (Scotch) spearmint oil and approximately 97 producers of Class 3 (Native) spearmint oil in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those whose annual receipts are less than $750,000.

Based on the SBA's definition of small entities, the Committee estimates that 2 of the 8 handlers regulated by the order could be considered small entities. Most of the handlers are large corporations involved in the

international trading of essential oils and the products of essential oils. In addition, the Committee estimates that 16 of the 84 Scotch spearmint oil producers and 15 of the 97 Native spearmint oil producers could be classified as small entities under the SBA definition. Thus, a majority of handlers and producers of Far West spearmint oil may not be classified as small entities.

The Far West spearmint oil industry is characterized by producers whose farming operations generally involve more than one commodity, and whose income from farming operations is not exclusively dependent on the production of spearmint oil. A typical spearmint oil-producing operation has enough acreage for rotation such that the total acreage required to produce the crop is about one-third spearmint and two-thirds rotational crops. Thus, the typical spearmint oil producer has to have considerably more acreage than is planted to spearmint during any given season. Crop rotation is an essential cultural practice in the production of spearmint oil for weed, insect, and disease control. To remain economically viable with the added costs associated with spearmint oil production, most spearmint oil-producing farms fall into the SBA category of large businesses.

This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, that handlers may purchase from, or handle for, producers during the 2004–2005 marketing year. The Committee recommended this rule to help maintain stability in the spearmint oil market by avoiding extreme fluctuations in supplies and prices. Establishing quantities to be purchased or handled during the marketing year through volume regulations allows producers to plan their mint planting and harvesting to meet expected market needs. The provisions of §§ 985.50, 985.51, and 985.52 of the order authorize this rule.

Small spearmint oil producers generally are not as extensively diversified as larger ones and as such are more at risk to market fluctuations. Such small producers generally need to market their entire annual crop and do not have the luxury of having other crops to cushion seasons with poor spearmint oil returns. Conversely, large diversified producers have the potential to endure one or more seasons of poor spearmint oil markets because income from alternate crops could support the operation for a period of time. Being reasonably assured of a stable price and market provides small producing entities with the ability to maintain proper cash flow and to meet annual expenses. Thus, the market and price stability provided by the order potentially benefit the small producer more than such provisions benefit large producers. Even though a majority of handlers and producers of spearmint oil may not be classified as small entities, the volume control feature of this order has small entity orientation.

Instability in the spearmint oil subsector of the mint industry is much more likely to originate on the supply side than the demand side. Fluctuations in yield and acreage planted from season-to-season tend to be larger than fluctuations in the amount purchased by buyers. Demand for spearmint oil tends to be relatively stable from year-to-year. The demand for spearmint oil is expected to grow slowly for the foreseeable future because the demand for consumer products that use spearmint oil will likely expand slowly, in line with population growth.

Demand for spearmint oil at the farm level is derived from retail demand for spearmint-flavored products at retail such as chewing gum, toothpaste, and mouthwash. The manufacturers of these products are by far the largest users of mint oil. However, spearmint flavoring is generally a very minor component of the products in which it is used, so changes in the raw product price have no impact on retail prices for those goods.

Spearmint oil production tends to be cyclical. Years of large production, with demand remaining reasonably stable, have led to periods in which large producer stocks of unsold spearmint oil have depressed producer prices for a number of years. Shortages and high prices may follow in subsequent years, as producers respond to price signals by cutting back production.

The significant variability is illustrated by the fact that the coefficient of variation (a standard measure of variability; "CV") of northwest spearmint oil production from 1980 through 2002 was about 0.24. The CV for spearmint oil prices was about 0.13, well below the CV for production. This provides an indication of the price stabilizing impact of the marketing order.

Production in the shortest marketing year was about 49 percent of the 23-year average (1,870,783 pounds from 1980 through 2002) and the largest crop was approximately 165 percent of the 23-year average. A key consequence is that in years of oversupply and low prices, the season average producer price of spearmint oil is below the average cost of production (as measured by the Washington State University Cooperative Extension Service).

The wide fluctuations in supply and prices that result from this cycle, which was even more pronounced before the creation of the marketing order, can create liquidity problems for some producers. The marketing order was designed to reduce the price impacts of the cyclical swings in production. However, producers have been less able to weather these cycles in recent years because of the decline in prices of many of the alternative crops they grow. As noted earlier, almost all spearmint oil producers diversify by growing other crops.

In an effort to stabilize prices, the spearmint oil industry uses the volume control mechanisms authorized under the order. This authority allows the Committee to recommend a salable quantity and allotment percentage for each class of oil for the upcoming marketing year. The salable quantity for each class of oil is the total volume of oil that producers may sell during the marketing year. The allotment percentage for each class of spearmint oil is derived by dividing the salable quantity by the total allotment base.

Each producer is then issued an annual allotment certificate, in pounds, for the applicable class of oil, which is calculated by multiplying the producer's allotment base by the applicable allotment percentage. This is the amount of oil for the applicable class that the producer can sell.

By November 1 of each year, the Committee identifies any oil that individual producers have produced above the volume specified on their annual allotment certificates. This excess oil is placed in a reserve pool administered by the Committee.

There is a reserve pool for each class of oil that may not be sold during the current marketing year unless the Secretary approves a Committee recommendation to make a portion of the pool available. However, limited quantities of reserve oil are typically sold to fill deficiencies. A deficiency occurs when on-farm production is less than a producer's allotment. In that case, a producer's own reserve oil can be sold to fill that deficiency. Excess production (higher than the producer's allotment) can be sold to fill other producers' deficiencies.

In any given year, the total available supply of spearmint oil is composed of current production plus carry-over stocks from the previous crop. The Committee seeks to maintain market stability by balancing supply and demand, and to close the marketing year with an appropriate level of carryout. If the industry has production in excess of the salable quantity, then the reserve

pool absorbs the surplus quantity of spearmint oil, which goes unsold during that year, unless the oil is needed for unanticipated sales.

Under its provisions, the order may attempt to stabilize prices by (1) limiting supply and establishing reserves in high production years, thus minimizing the price-depressing effect that excess producer stocks have on unsold spearmint oil, and (2) ensuring that stocks are available in short supply years when prices would otherwise increase dramatically. The reserve pool stocks grow in large production years and are drawn down in short marketing years.

An econometric model was used to assess the impact that volume control has on the prices producers receive for their commodity. Without volume control, spearmint oil markets would likely be over-supplied, resulting in low producer prices and a large volume of oil stored and carried over to the next marketing year. The model estimates how much lower producer prices would likely be in the absence of volume controls.

The Committee estimated the available supply during the 2004–2005 marketing year for both classes of oil at 1,940,278 pounds, and that the expected carry-in will be 399,924 pounds. Therefore, with volume control, sales by producers for the 2004–2005 marketing year would be limited to 1,540,354 pounds (the recommended salable quantity for both classes of spearmint oil).

The recommended salable percentages, upon which 2004–2005 producer allotments are based, are 40 percent for Scotch and 36 percent for Native. Without volume controls, producers would not be limited to these allotment levels, and could produce and sell additional spearmint. The econometric model estimated a $1.71 decline in the season average producer price per pound (from both classes of spearmint oil) resulting from the higher quantities that would be produced and marketed without volume control. The Far West producer price for both classes of spearmint oil was $9.20 for 2002, which is below the average of $10.97 for the period from 1980 through 2002, based on National Agricultural Statistics Service data. The surplus situation for the spearmint oil market that would exist without volume controls in 2004–2005 also would likely dampen prospects for improved producer prices in future years because of the buildup in stocks.

The use of volume controls allows the industry to fully supply spearmint oil markets while avoiding the negative consequences of over-supplying these markets. The use of volume controls is believed to have little or no effect on consumer prices of products containing spearmint oil and will not result in fewer retail sales of such products.

The Committee discussed alternatives to the recommendations contained in this rule for both classes of spearmint oil. The Committee discussed and rejected the idea of recommending that there not be any volume regulation for Scotch spearmint oil because of the severe price-depressing effects that would occur without volume control.

The Committee also considered various alternative levels of volume control for Scotch spearmint oil, including leaving the percentage the same as the current season, increasing the percentage to a less restrictive level, or decreasing the percentage. After considerable discussion the Committee unanimously supported decreasing the percentage to 40 percent.

The Committee discussed and rejected the idea of recommending that there not be any volume regulation for Native spearmint oil. The immediate result would be to put an excessive amount of Native reserve pool oil on the market, causing depressed prices at the producer level. With the current price for Native spearmint oil lower than the 10-year average, and sales at the lowest level since 1987, the Committee, after considerable discussion, determined that 773,474 pounds and 36 percent would be the most effective salable quantity and allotment percentage, respectively, for the 2004–2005 marketing year. The dissenting Committee member felt that the recommended allotment percentage should have been lower, since the recommended salable quantity will likely be too high for market conditions, since demand has been flat.

As noted earlier, the Committee's recommendation to establish salable quantities and allotment percentages for both classes of spearmint oil was made after careful consideration of all available information, including: (1) The estimated quantity of salable oil of each class held by producers and handlers; (2) the estimated demand for each class of oil; (3) the prospective production of each class of oil; (4) the total of allotment bases of each class of oil for the current marketing year and the estimated total of allotment bases of each class for the ensuing marketing year; (5) the quantity of reserve oil, by class, in storage; (6) producer prices of oil, including prices for each class of oil; and (7) general market conditions for each class of oil, including whether the estimated season average price to producers is likely to exceed parity. Based on its review, the Committee believes that the salable quantity and allotment percentage levels recommended would achieve the objectives sought.

Without any regulations in effect, the Committee believes the industry would return to the pronounced cyclical price patterns that occurred prior to the order, and that prices in 2004–2005 would decline substantially below current levels.

As stated earlier, the Committee believes that the order has contributed extensively to the stabilization of producer prices, which prior to 1980 experienced wide fluctuations from year-to-year. National Agricultural Statistics Service records show that the average price paid for both classes of spearmint oil ranged from $4.00 per pound to $11.10 per pound during the period between 1968 and 1980. Prices have been consistently more stable since the marketing order's inception in 1980, with an average price of $13.04 per pound for Scotch spearmint oil (1918–2002) and $9.88 per pound for Native spearmint oil.

During the period of 1999 through 2002, however, large production and carry-in inventories have contributed to prices below the 23-year average, despite the Committee's efforts to balance available supplies with demand. Prices have ranged from $8.00 to $10.00 per pound for Scotch spearmint oil and between $9.10 to $9.20 per pound for Native spearmint oil.

According to the Committee, the recommended salable quantities and allotment percentages are expected to achieve the goals of market and price stability.

As previously stated, annual salable quantities and allotment percentages have been issued for both classes of spearmint oil since the order's inception. Reporting and recordkeeping requirements have remained the same for each year of regulation. These requirements have been approved by the Office of Management and Budget under OMB Control No. 0581–0065. Accordingly, this rule would not impose any additional reporting or recordkeeping requirements on either small or large spearmint oil producers and handlers. All reports and forms associated with this program are reviewed periodically in order to avoid unnecessary and duplicative information collection by industry and public sector agencies. The USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

The Committee's meeting was widely publicized throughout the spearmint oil industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 8, 2003 meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons the opportunity to respond to the proposal, including any regulatory and informational impacts of this action on small businesses. This comment period is deemed appropriate so that a final determination can be made prior to June 1, 2004, the beginning of the 2004–2005 marketing year. All written comments received within the comment period will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR Part 985 is proposed to be amended as follows:

PART 985—MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR part 985 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. A new § 985.223 is added to read as follows:

[**Note:** This section will not appear in the Code of Federal Regulations.]

§ 985.223 Salable quantities and allotment percentages—2004–2005 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year beginning on June 1, 2004, shall be as follows:

(a) Class 1 (Scotch) oil—a salable quantity of 766,880 pounds and an allotment percentage of 40 percent.

(b) Class 3 (Native) oil—a salable quantity of 773,474 pounds and an allotment percentage of 36 percent.

Dated: January 16, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–1404 Filed 1–22–04; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005, 1007, and 1094

[Docket No. AO–388–A15 and AO–366–A44; DA–03–11]

Milk in the Appalachian and Southeast Marketing Areas; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; Notice of public hearing on proposed rulemaking.

SUMMARY: A public hearing is being held in response to industry requests to consider proposals to amend the Appalachian and Southeast Federal milk marketing orders. A proposal by Southern Marketing Agency, Inc. (SMA), would merge the Appalachian and Southeast milk marketing areas into a single milk marketing area. A separate SMA proposal and a proposal by The Kroger Company would expand the proposed merged order to include certain currently unregulated counties and cities in the State of Virginia. Also, a proposal submitted by Prairie Farms and Dean Foods Company would create a "Mississippi Valley" milk marketing area by breaking the Southeast order into two orders. Additional proposals that seek to amend certain other terms and provisions of the orders also will be considered at the hearing.

DATES: The hearing will convene at 1 p.m. on Monday, February 23, 2004.

ADDRESSES: The hearing will be held at the Westin Atlanta Airport Hotel, 4736 Best Road, Atlanta, GA 30337; (404) 762–7676.

FOR FURTHER INFORMATION CONTACT: Antoinette M. Carter, Marketing Specialist, Order Formulation and Enforcement, USDA/AMS/Dairy Programs, Room 2971–Stop 0231, 1400 Independence Avenue, SW, Washington, DC 20250–0231, (202) 690–3465, e-mail address: *Antoinette.Carter@usda.gov*.

Persons requiring a sign language interpreter or other special accommodations should contact Sue L. Mosley, Market Administrator, at (770) 682–2501; e-mail *smosley@fmmatlanta.com* before the hearing begins.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Notice is hereby given of a public hearing to be held at the Westin Atlanta Airport Hotel, 4736 Best Road, Atlanta, GA 30337, (404) 762–7676, beginning at 1 p.m., on Monday, February 23, 2004, with respect to proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Appalachian and Southeast milk marketing areas.

The hearing is called pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The purpose of the hearing is to receive evidence with respect to the economic and marketing conditions that relate to the proposed amendments, hereinafter set forth, and any appropriate modifications thereof, to the tentative marketing agreements and to the orders.

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This Act seeks to ensure that, within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. For the purpose of the Act, a dairy farm is a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they

present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (Department) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This public hearing is being conducted to collect evidence for the record concerning merging the Appalachian and Southeast milk marketing areas, expanding the proposed merged marketing area, splitting the current Southeast marketing area, or retention of the current Appalachian and Southeast milk marketing areas, or any combination of the above. At the hearing, evidence also will be collected to consider certain proposed amendments to the current orders and all terms and provisions that would be included in a proposed order(s) including definitions, pricing, pooling, reporting, payment dates, transportation credits, and administrative provisions including disposition of administrative funds accumulated under the Appalachian and Southeast milk marketing orders.

Interested parties who wish to introduce exhibits should provide the Presiding Officer at the hearing with (4) copies of such exhibits for the Official Record. Also, it would be helpful if additional copies are available for the use of other participants at the hearing.

List of Subjects in 7 CFR Parts 1005, 1007 and 1094

Milk marketing orders.

The authority citation for 7 CFR parts 1005 and 1007 continues to read as follows:

Authority: 7 U.S.C. 601–674.

The proposed amendments, as set forth below, have not received the approval of the Department.

Proposed by Southern Marketing Agency, Inc.:

Proposal No. 1

This proposal seeks to merge the Appalachian and Southeast milk marketing areas to form a new Southeast milk marketing area (part 1007) by revising provisions of the Southeast milk marketing order.

1. Amend § 1007.2 by revising the Southeast marketing area to read as follows:

§ 1007.2 Southeast marketing area.

* * * * *

Alabama, Arkansas, Georgia, Louisiana, North Carolina, Mississippi, South Carolina, and Tennessee

All of the States of Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Florida Counties

Escambia, Okaloosa, Santa Rosa, and Walton.

Indiana Counties

Clark, Crawford, Daviess, Dubois, Floyd, Gibson, Greene, Harrison, Knox, Martin, Orange, Perry, Pike, Posey, Scott, Spencer, Sullivan, Vanderburgh, Warrick, and Washington.

Kentucky Counties

All of the State of Kentucky except for the counties of Boone, Boyd, Bracken, Campbell, Floyd, Grant, Greenup, Harrison, Johnson, Kenton, Lawrence, Lewis, Magoffin, Martin, Mason, Pendleton, Pike, and Robertson.

Missouri Counties

Barry, Barton, Bollinger, Butler, Cape Girardeau, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Howell, Iron, Jasper, Laclede, Lawrence, Madison, McDonald, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Perry, Polk, Reynolds, Ripley, Scott, Shannon, St. Francois, Stoddard, Stone, Taney, Texas, Vernon, Washington, Wayne, Webster, and Wright.

Virginia Counties and Cities

Buchanan, Dickenson, Lee, Russell, Scott, Tazewell, Washington, and Wise; and the cities of Bristol and Norton.

West Virginia Counties

McDowell and Mercer.

2. Amend § 1007.7 by revising paragraph (d) and adding a new paragraph (g)(6) to read as follows:

§ 1007.7 Pool Plant.

* * * * *

(d) A plant located within the marketing area or in the State of Virginia that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and during the month at least 60 percent of the producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) from the cooperative's plant.

* * * * *

(g) * * *

(6) That portion of a pool plant designated as a "nonpool plant" that is physically separate and operated separately from the pool portion of such plant. The designation of a portion of a regulated plant as a nonpool plant must be requested in writing by the handler and must be approved by the market administrator.

3. Amend § 1007.13 by revising paragraphs (d)(1) and (d)(2), redesignating paragraph (d)(7) as paragraph (d)(8), redesignating paragraph (d)(6) as paragraph (d)(7), adding a new paragraph (d)(6), and revising newly designated paragraph (d)(8) to read as follows:

§ 1007.13 Producer milk.

* * * * *

(d) * * *

(1) In any month of January through June, not less than 15 percent of the production of the producer whose milk is diverted is physically received at a pool plant during the month;

(2) In any month of July through December, not less than 33 percent of the production of the producer whose milk is diverted is physically received at a pool plant during the month;

* * * * *

(6) Milk of a dairy farmer shall be eligible for diversion the first day of the month during which the milk of such dairy farmer was physically received as producer milk at a pool plant and the dairy farmer meets the delivery requirements as specified in paragraphs (d)(1) or (2) of this section;

* * * * *

(8) The delivery percentage requirements and the diversion percentages in paragraphs (d)(1) through (4) of this section may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making

such a finding, the market administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing at least one day before the effective date.

4. Amend § 1007.82 by revising paragraphs (c)(1), (c)(2)(ii), and (c)(2)(iii) to read as follows:

§ 1007.82 Payments from the transportation credit balancing fund.

* * * * *

(c) * * *

(1) Bulk milk received from a plant regulated under another Federal order and allocated to Class I milk pursuant to § 1000.44(a)(9); and

(2) * * *

(ii) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of February through May and not more than 50 percent of the production of the dairy farmer during those 2 months, in aggregate, was received as producer milk under this order during those 2 months; Provided, from the inception of this amendment, any dairy farmer who qualified for payments under the provisions of the former Appalachian Federal Order 1005 or the Southeast Federal Order 1007 shall continue to qualify under these provisions through the following January; and

(iii) The farm on which the milk was produced is not located within the specified marketing area of this order.

* * * * *

Proposed by Southern Marketing Agency, Inc.:

Proposal No. 2

This proposal seeks to combine for the proposed "Southeast" Order the remaining balances of the Producer Settlement Funds, the Transportation Credit Balancing Funds, the Administrative Assessment Funds, and the Marketing Service Funds of the current Appalachian and Southeast milk marketing orders.

Proposed by Southern Marketing Agency, Inc.:

Proposal No. 3

This proposal seeks to expand the proposed "Southeast" marketing area in Proposal No. 1 to include certain currently unregulated counties and independent cities in the State of Virginia.

1. Amend § 1007.2 by revising the Virginia counties and cities in the proposed Southeast marketing area to read as follows:

§ 1007.2 Southeast marketing area.

* * * * *

Virginia Counties and Cities

Alleghany, Amherst, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Henry, Highland, Lee, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe; and the cities of Bedford, Bristol, Buena Vista, Clifton Forge, Covington, Danville, Galax, Harrisonburg, Lexington, Lynchburg, Martinsville, Norton, Radford, Roanoke, Salem, and Staunton.

* * * * *

Proposed by The Kroger Company:

Proposal No. 4

This proposal seeks to expand the proposed "Southeast" marketing area in Proposal No. 1 to include two currently unregulated counties and two currently unregulated cities in the State of Virginia, and include the current Appalachian marketing area pool plant order language in Proposal No. 1.

1. Amend § 1007.2 by revising the proposed "Southeast" marketing area to read as follows:

§ 1007.2 Southeast marketing area.

* * * * *

Alabama, Arkansas, Georgia, Louisiana, North Carolina, Mississippi, South Carolina, and Tennessee

All of the States of Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Florida Counties

Escambia, Okaloosa, Santa Rosa, and Walton.

Indiana Counties

Clark, Crawford, Daviess, Dubois, Floyd, Gibson, Greene, Harrison, Knox, Martin, Orange, Perry, Pike, Posey, Scott, Spencer, Sullivan, Vanderburgh, Warrick, and Washington.

Kentucky Counties

Adair, Allen, Anderson, Ballard, Barren, Bath, Bell, Bourbon, Boyle, Breathitt, Breckinridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Carroll, Carter, Casey, Christian, Clark, Clay, Clinton, Crittenden, Cumberland, Daviess, Edmonson, Elliott, Estill, Fayette, Fleming, Franklin, Fulton, Gallatin, Garrard, Graves, Grayson, Green, Hancock, Hardin, Harlan, Hart, Henderson, Henry, Hickman, Hopkins, Jackson, Jefferson, Jessamine, Knott, Knox, Larue, Laurel, Lee, Leslie, Letcher, Lincoln, Livingston, Logan, Lyon, Madison, Marion, Marshall, McCracken, McCreary, McLean, Meade, Menifee, Mercer, Metcalfe, Monroe, Montgomery, Morgan, Muhlenberg, Nelson, Nicholas, Ohio, Oldham, Owen, Owsley, Perry, Powell, Pulaski, Rockcastle, Rowan, Russell, Scott, Shelby, Simpson, Spencer, Taylor, Todd, Trigg, Trimble, Union, Warren, Washington, Wayne, Webster, Whitley, Wolfe, and Woodford.

Missouri Counties

Barry, Barton, Bollinger, Butler, Cape Girardeau, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Howell, Iron, Jasper, Laclede, Lawrence, Madison, McDonald, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Perry, Polk, Reynolds, Ripley, Scott, Shannon, St. Francois, Stoddard, Stone, Taney, Texas, Vernon, Washington, Wayne, Webster, and Wright.

Virginia Counties and Cities

Buchanan, Campbell, Dickenson, Lee, Pittsylvania, Russell, Scott, Tazewell, Washington, and Wise; and the cities of Bristol, Danville, Lynchburg and Norton.

West Virginia Counties

McDowell and Mercer.

2. Amend § 1007.7 by revising paragraph (d) and adding a new paragraph (g)(6) to read as follows:

§ 1007.7 Pool plant.

* * * * *

(d) A plant located within the marketing area or in the State of Virginia that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and during the month at least 60 percent of the producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) from the cooperative's plant.

* * * * *

(g) * * *

(6) That portion of a pool plant designated as a "nonpool plant" that is

physically separate and operated separately from the pool portion of such plant. The designation of a portion of a regulated plant as a nonpool plant must be requested in writing by the handler and must be approved by the market administrator.

Proposed by Prairie Farms and Dean Foods:

Proposal No. 5

Create a new "Mississippi Valley" marketing area (part 1094) to include Mississippi, Louisiana, Arkansas, western Tennessee, and southern Missouri, with terms and provisions to read as follows:

PART 1094—MILK IN MISSISSIPPI VALLEY MARKETING AREA

Subpart—Order Regulating Handling

General Provisions

§ 1094.1 General provisions.

The terms, definitions, and provisions in part 1000 of this chapter apply to this part 1094. In this part 1094, all references to sections in part 1000 refer to part 1000 of this chapter.

Definitions

§ 1094.2 Mississippi Valley marketing area.

The marketing area means all territory within the bounds of the following states and political subdivisions, including all piers, docks and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions:

Arkansas, Louisiana, and Mississippi

All of the States of Arkansas, Louisiana, and Mississippi.

Missouri Counties

Barry, Barton, Bollinger, Butler, Cape Girardeau, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Howell, Iron, Jasper, Laclede, Lawrence, Madison, McDonald, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Perry, Polk, Reynolds, Ripley, Scott, Shannon, St. Francois, Stoddard, Stone, Taney, Texas, Vernon, Washington, Wayne, Webster, and Wright.

Tennessee Counties

Benton, Carroll, Chester, Crockett, Decatur, Dyer, Fayette, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Lake, Lauderdale, McNairy, Madison, Obion, Shelby, Tipton, and Weakley.

§ 1094.3 Route disposition.

See § 1000.3.

§ 1094.4 Plant.

See § 1000.4.

§ 1094.5 Distributing plant.

See § 1000.5.

§ 1094.6 Supply plant.

See § 1000.6.

§ 1094.7 Pool plant.

Pool plant means a plant specified in paragraphs (a) through (d) of this section, or a unit of plants as specified in paragraph (e) of this section, but excluding a plant specified in paragraph (g) of this section. The pooling standards described in paragraphs (c) and (d) of this section are subject to modification pursuant to paragraph (f) of this section:

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or § ____.7(b) of any other Federal milk order, from which during the month 50 percent or more of the fluid milk products physically received at such plant (excluding concentrated milk received from another plant by agreement for other than Class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least 25 percent of such route disposition and transfers must be to outlets in the marketing area.

(b) Any distributing plant located in the marketing area which during the month processed at least 50 percent of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) into ultra-pasteurized or aseptically-processed fluid milk products.

(c) A supply plant from which 50 percent or more of the total quantity of milk that is physically received during the month from dairy farmers and handlers described in § 1000.9(c), including milk that is diverted from the plant, is transferred to pool distributing plants. Concentrated milk transferred from the supply plant to a distributing plant for an agreed-upon use other than Class I shall be excluded from the supply plant's shipments in computing the plant's shipping percentage.

(d) A plant located within the marketing area that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and during the month at least 60 percent of the producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) from the cooperative's plant.

(e) Two or more plants operated by the same handler and located within the marketing area may qualify for pool status as a unit by meeting the total in-area route disposition requirements specified in paragraph (a) of this section and the following additional requirements:

(1) At least one of the plants in the unit must qualify as a pool plant pursuant to paragraph (a) of this section;

(2) Other plants in the unit must process only Class I or Class II products and must be located in a pricing zone providing the same or a lower Class I price than the price applicable at the distributing plant included in the unit pursuant to paragraph (e)(1) of this section; and

(3) A written request to form a unit, or to add or remove plants from a unit, must be filed with the market administrator prior to the first day of the month for which it is to be effective.

(f) The applicable shipping percentages of paragraphs (c) and (d) of this section may be increased or decreased by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipment or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for adjustment either on the market administrator's own initiative or at the request of interested parties if the request is made in writing at least 15 days prior to the date for which the requested revision is desired effective. If the investigation shows that an adjustment of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that an adjustment is being considered and invite data, views, and arguments. Any decision to revise an applicable shipping percentage must be issued in writing at least one day before the effective date.

(g) The term pool plant shall not apply to the following plants:

(1) A producer-handler plant;

(2) An exempt plant as defined in § 1000.8(e);

(3) A plant qualified pursuant to paragraph (a) of this section which is not located within any Federal order marketing area, meets the pooling

requirements of another Federal order, and has had greater route disposition in such other Federal order marketing area for 3 consecutive months;

(4) A plant qualified pursuant to paragraph (a) of this section which is located in another Federal order marketing area, meets the pooling standards of the other Federal order, and has not had a majority of its route disposition in this marketing area for 3 consecutive months or is locked into pool status under such other Federal order without regard to its route disposition in any other Federal order marketing area; and

(5) A plant qualified pursuant to paragraph (c) of this section which also meets the pooling requirements of another Federal order and from which greater qualifying shipments are made to plants regulated under such other order than are made to plants regulated under the order in this part, or such plant has automatic pooling status under such other order.

§ 1094.8 Nonpool plant.

See § 1000.8.

§ 1094.9 Handler.

See § 1000.9.

§ 1094.10 Producer-handler.

Producer-handler means a person who:

(a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in the marketing area;

(b) Receives no fluid milk products, and acquires no fluid milk products for route disposition, from sources other than own farm production;

(c) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from own farm production;

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled, and the processing and packaging operations, are the producer-handler's own enterprise and are operated at the producer-handler's own risk;

(e) Has total route disposition and transfers in the form of packaged fluid milk products to other distributing plants during the month that does not exceed 3 million pounds; and

(f) Does not distribute fluid milk products to a wholesale customer who also is serviced by a plant described in § 1094.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to the wholesale customer during the month.

§ 1094.12 Producer.

(a) Except as provided in paragraph (b) of this section, *producer* means any person who produces milk approved by a duly constituted regulatory agency for fluid consumption as Grade A milk and whose milk (or components of milk) is:

(1) Received at a pool plant directly from the producer or diverted by the plant operator in accordance with § 1094.13; or

(2) Received by a handler described in § 1000.9(c).

(b) Producer shall not include:

(1) A producer-handler as defined in any Federal order;

(2) A dairy farmer whose milk is received at an exempt plant, excluding producer milk diverted to the exempt plant pursuant to § 1094.13(d);

(3) A dairy farmer whose milk in received by diversion at a pool plant from a handler regulated under another Federal order if the other Federal order designates the dairy farmer as a producer under that order and that milk is allocated by request to a utilization other than Class I; and

(4) A dairy farmer whose milk is reported as diverted to a plant fully regulated under another Federal order with respect to that portion of the milk so diverted that is assigned to Class I under the provisions of such other order.

§ 1094.13 Producer milk.

Producer milk means the skim milk (or the skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:

(a) Received by the operator of a pool plant directly from a producer or a handler described in § 1000.9(c). All milk received pursuant to this paragraph shall be priced at the location of the plant where it is first physically received;

(b) Received by a handler described in § 1000.9(c) in excess of the quantity delivered to pool plants;

(c) Diverted by a pool plant operator to another pool plant. Milk so diverted shall be priced at the location of the plant to which diverted; or

(d) Diverted by the operator of a pool plant or a handler described in § 1000.9(c) to a nonpool plant, subject to the following conditions:

(1) In any month of January through June, not less than 4 days' production of the producer whose milk is diverted is physically received at a pool plant during the month;

(2) In any month of July through December, not less than 10 days' production of the producer whose milk is diverted is physically received at a pool plant during the month;

(3) The total quantity of milk so diverted during the month by a cooperative association shall not exceed 33 percent during the months of July through December, and 50 percent during the months of January through June, of the producer milk that the cooperative association caused to be delivered to, and physically received at, pool plants during the month;

(4) The operator of a pool plant that is not a cooperative association may divert any milk that is not under the control of a cooperative association that diverts milk during the month pursuant to paragraph (d) of this section. The total quantity of milk so diverted during the month shall not exceed 33 percent during the months of July through December, or 50 percent during the months of January through June, of the producer milk physically received at such plant (or such unit of plants in the case of plants that pool as a unit pursuant to § 1094.7(e)) during the month, excluding the quantity of producer milk received from a handler described in § 1000.9(c);

(5) Any milk diverted in excess of the limits prescribed in paragraphs (d)(3) and (4) of this section shall not be producer milk. If the diverting handler or cooperative association fails to designate the dairy farmers' deliveries that will not be producer milk, no milk diverted by the handler or cooperative association shall be producer milk;

(6) Diverted milk shall be priced at the location of the plant to which diverted; and

(7) The delivery day requirements and the diversion percentages in paragraphs (d)(1) through (4) of this section may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such finding, the market administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must by issued in writing at least one day before the effective date.

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a

marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

§ 1094.14 Other source milk.

See § 1000.14.

§ 1094.15 Fluid milk product.

See § 1000.15.

§ 1094.16 Fluid cream product.

See § 1000.16.

§ 1094.18 Cooperative association.

See § 1000.18.

§ 1094.19 Commercial food processing establishment.

See § 1000.19.

§ 1094.30 Reports of receipts and utilization.

Each handler shall report monthly so that the market administrator's office receives the report on or before the 7th day after the end of the month, in the detail and on prescribed forms, as follows:

(a) With respect to each of its pool plants, the quantities of skim milk and butterfat contained in or represented by:

(1) Receipts of producer milk, including producer milk diverted by the reporting handler, from sources other than handlers described in § 1000.9(c);

(2) Receipts of milk from handlers described in § 1000.9(c);

(3) Receipts of fluid milk products and bulk fluid cream products from other pool plants;

(4) Receipts of other source milk;

(5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal orders 1005 and 1007, for which a transportation credit is requested pursuant to § 1094.82;

(6) Receipts of producer milk described in § 1094.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to that paragraph and the date that such milk was received;

(7) For handlers submitting transportation credit requests, transfers of bulk milk to nonpool plants, including the dates that such milk was transferred;

(8) Inventories at the beginning and end of the month of fluid milk products and bulk fluid cream products; and

(9) The utilization or disposition of all milk and milk products required to be reported pursuant to this paragraph.

(b) Each handler operating a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraphs (a)(1), (a)(2), (a)(3), (a)(4), and (a)(8) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. The report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1000.9(c) shall report:

(1) The quantities of all skim milk and butterfat contained in receipts of milk from producers;

(2) The utilization or disposition of all such receipts; and

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1094.82, all of the information required in paragraphs (a)(5), (a)(6), and (a)(7) of this section.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to its receipts and utilization of milk and milk products in such manner as the market administrator may prescribe.

§ 1094.31 Payroll reports.

(a) On or before the 20th day after the end of each month, each handler that operates a pool plant pursuant to § 1094.7 and each handler described in § 1000.9(c) shall report to the market administrator its producer payroll for the month, in detail prescribed by the market administrator, showing for each producer the information specified in § 1094.73(e).

(b) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1000.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

§ 1094.32 Other reports.

(a) On or before the 20th day after the end of each month, each handler described in § 1000.9(a) and (c) shall report to the market administrator any adjustments to transportation credit requests as reported pursuant to § 1094.30(a)(5), (6), and (7).

(b) In addition to the reports required pursuant to §§ 1094.30, 1094.31 and 1094.32(a), each handler shall report any information the market administrator deems necessary to verify or establish each handler's obligation under the order.

Classification of Milk

§ 1094.40 Classes of utilization.

See § 1000.40.

§ 1094.42 Classification of transfers and diversion.

See § 1000.42.

§ 1094.43 General classification rules.

See § 1000.43.

§ 1094.44 Classification of producer milk.

See § 1000.44.

§ 1094.45 Market administrator's reports and announcements concerning classification.

See § 1000.45.

Class Prices

§ 1094.50 Class prices, component prices, and advanced pricing factors.

See § 1000.50.

§ 1094.51 Class I differential and price.

The Class I differential shall be the differential established for Orleans Parish, Louisiana, which is reported in § 1000.52. The Class I price shall be the price computed pursuant to § 1000.50(a) for Orleans Parish, Louisiana.

§ 1094.52 Adjusted Class I differentials.

See § 1000.52.

§ 1094.53 Announcement of class prices, component prices, and advanced pricing factors.

See § 1000.53.

§ 1094.54 Equivalent price.

See § 1000.54.

Uniform Prices

§ 1094.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (e) of this section and subtracting from that total amount the value computed in paragraph (f) of this section. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) shall be excluded from pricing under this section.

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts;

(b) Multiply the pounds of skim milk and butterfat overage assigned to each class pursuant to § 1000.44(a)(11) by the

respective skim milk and butterfat prices applicable at the location of the pool plant;

(c) Multiply the difference between the Class IV price for the preceding month and the current month's Class I, II, or III price, as the case may be, by the hundredweight of skim milk and butterfat subtracted from Class I, II, or III, respectively, pursuant to § 1000.44(a)(7) and the corresponding step of § 1000.44(b);

(d) Multiply the difference between the Class I price applicable at the location of the pool plant and the Class IV price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1000.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(3)(i) through (vi) and the corresponding step of § 1000.44(b), excluding receipts of bulk fluid cream products from a plant regulated under other Federal orders and bulk concentrated fluid milk products from pool plants, plants regulated under other Federal orders, and unregulated supply plants;

(e) Multiply the Class I skim milk and Class I butterfat prices applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(f) For reconstituted milk made from receipts of nonfluid milk products, multiply $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class IV price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1000.43(d).

§ 1094.61 Computation of uniform prices.

On or before the 11th day of each month, the market administrator shall compute a uniform butterfat price, a uniform skim milk price, and a uniform price for producer milk receipts reported for the prior month. The report of any handler who has not made payments required pursuant to § 1094.71 for the preceding month shall not be included in the computation of these prices, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations.

(a) *Uniform butterfat price.* The uniform butterfat price per pound, rounded to the nearest one-hundredth cent, shall be computed by:

(1) Multiplying the pounds of butterfat in producer milk allocated to each class pursuant to § 1000.44(b) by the respective class butterfat prices;

(2) Adding the butterfat value calculated in § 1094.60(e) for other source milk allocated to Class I pursuant to § 1000.43(d) and the steps of § 1000.44(b) that correspond to § 1000.44(a)(3)(i) and § 1000.44(a)(8) by the Class I price; and

(3) Dividing the sum of paragraphs (a)(1) and (a)(2) of this section by the sum of the pounds of butterfat in producer milk and other source milk used to calculate the values in paragraphs (a)(1) and (a)(2) of this section.

(b) *Uniform skim milk price.* The uniform skim milk price per hundredweight, rounded to the nearest cent, shall be computed as follows:

(1) Combine into one total the values computed pursuant to § 1094.60 for all handlers;

(2) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1094.75;

(3) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(4) Subtract the value of total pounds of butterfat for all handlers. The butterfat value shall be computed by multiplying the sum of the pounds of butterfat in producer milk and other source milk used to calculate the values in paragraphs (a)(1) and (a)(2) of this section by the butterfat price computed in paragraph (a) of this section;

(5) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(i) The total skim pounds of producer milk; and

(ii) The total skim pounds for which a value is computed pursuant to § 1094.60(e); and

(6) Subtract not less than 4 cents and not more than 5 cents.

(c) *Uniform price.* The uniform price per hundredweight, rounded to the nearest cent, shall be the sum of the following:

(1) Multiply the uniform butterfat price for the month pursuant to paragraph (a) of this section times 3.5 pounds of butterfat; and

(2) Multiply the uniform skim milk price for the month pursuant to paragraph (b) of this section times 96.5 pounds of skim milk.

§ 1094.62 Announcement of uniform prices.

On or before the 11th day after the end of the month, the market administrator shall announce the uniform prices for the month computed pursuant to § 1094.61.

Payments for Milk

§ 1094.70 Producer-settlement fund.

See § 1000.70.

§ 1094.71 Payments to the producer-settlement fund.

Each handler shall make a payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than the 12th day after the end of the month (except as provided in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

(a) The total value of milk of the handler for the month as determined pursuant to § 1094.60; and

(b) The sum of the value at the uniform prices for skim milk and butterfat, adjusted for plant location, of the handler's receipts of producer milk; and the value at the uniform price, as adjusted pursuant to § 1094.75, applicable at the location of the plant from which received of other source milk for which a value is computed pursuant to § 1094.60(e).

§ 1094.72 Payments from the producer-settlement fund.

No later than one day after the date of payment receipt required under § 1094.71, the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1094.71(b) exceeds the amount computed pursuant to § 1094.71(a). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

§ 1094.73 Payments to producers and to cooperative associations.

(a) Each handler that is not paying a cooperative association for producer milk shall pay each producer as follows:

(1) *Partial payment.* For each producer who has not discontinued shipments as of the 23rd day of the month, payment shall be made so that it is received by the producer on or before the 26th day of the month (except as provided in § 1000.90) for milk received during the first 15 days of the month at not less than 90 percent of the preceding month's uniform price, adjusted for plant location pursuant to § 1094.75 and proper deductions authorized in writing by the producer.

(2) *Final payment.* For milk received during the month, a payment computed as follows shall be made so that it is received by each producer one day after the payment date required in § 1094.72:

(i) Multiply the hundredweight of producer skim milk received times the uniform skim milk price for the month;

(ii) Multiply the pounds of butterfat received times the uniform butterfat price for the month;

(iii) Multiply the hundredweight of producer milk received times the plant location adjustment pursuant to § 1094.75; and

(iv) Add the amounts computed in paragraph (a)(2)(i), (ii), and (iii) of this section, and from that sum:

(A) Subtract the partial payment made pursuant to paragraph (a)(1) of this section;

(B) Subtract the deduction for marketing services pursuant to § 1000.86;

(C) Add or subtract for errors made in previous payments to the producer; and

(D) Subtract proper deductions authorized in writing by the producer.

(b) One day before partial and final payments are due pursuant to paragraph (a) of this section, each handler shall pay a cooperative association for milk received as follows:

(1) *Partial payment to a cooperative association for bulk milk received directly from producers' farms.* For bulk milk (including the milk of producers who are not members of such association and who the market administrator determines have authorized the cooperative association to collect payment for their milk) received during the first 15 days of the month from a cooperative association in any capacity, except as the operator of a pool plant, the payment shall be equal to the hundredweight of milk received multiplied by 90 percent of the preceding month's uniform price, adjusted for plant location pursuant to § 1094.75.

(2) *Partial payment to a cooperative association for milk transferred from its pool plant.* For bulk fluid milk products and bulk fluid cream products received during the first 15 days of the month from a cooperative association in its capacity as the operator of a pool plant, the partial payment shall be at the pool plant operator's estimated use value of the milk using the most recent class prices available for skim milk and butterfat at the receiving plant's location.

(3) *Final payment to a cooperative association for milk transferred from its pool plant.* For bulk fluid milk products and bulk fluid cream products received during the month from a cooperative association in its capacity as the operator of a pool plant, the final payment shall be the classified value of such milk as determined by multiplying the pounds of skim milk and butterfat assigned to each class pursuant to § 1000.44 by the class prices for the month at the receiving plant's location, and subtracting from this sum the partial payment made pursuant to paragraph (b)(2) of this section.

(4) *Final payment to a cooperative association for bulk milk received directly from producers' farms.* For bulk milk received from a cooperative association during the month, including the milk of producers who are not members of such association and who the market administrator determines have authorized the cooperative association to collect payment for their milk, the final payment for such milk shall be an amount equal to the sum of the individual payments otherwise payable for such milk pursuant to paragraph (a)(2) of this section.

(c) If a handler has not received full payment from the market administrator pursuant to § 1094.72 by the payment date specified in paragraph (a) or (b) of this section, the handler may reduce payments pursuant to paragraphs (a) and (b) of this section, but by not more than the amount of the underpayment. The payments shall be completed on the next scheduled payment date after receipt of the balance due from the market administrator.

(d) If a handler claims that a required payment to a producer cannot be made because the producer is deceased or cannot be located, or because the cooperative association or its lawful successor or assignee is no longer in existence, the payment shall be made to the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the market administrator shall make the required payment from the producer-settlement fund to the handler or to the lawful claimant as the case may be.

(e) In making payments to producers pursuant to this section, each pool plant operator shall furnish each producer, except a producer whose milk was received from a cooperative association described in § 1000.9(a) or (c), a supporting statement in such form that it may be retained by the recipient which shall show:

(1) The name, address, Grade A identifier assigned by a duly constituted regulatory agency, and the payroll number of the producer;

(2) The month and dates that milk was received from the producer, including the daily and total pounds of milk received;

(3) The total pounds of butterfat in the producer's milk;

(4) The minimum rate or rates at which payment to the producer is required pursuant to the order in this part;

(5) The rate used in making payment if the rate is other than the applicable minimum rate;

(6) The amount, or rate per hundredweight, and nature of each deduction claimed by the handler; and

(7) The net amount of payment to the producer or cooperative association.

§ 1094.75 Plant location adjustments for producer milk and nonpool milk.

For purposes of making payments for producer milk and nonpool milk, a plant location adjustment shall be determined by subtracting the Class I price specified in § 1094.51 from the Class I price at the plant's location. The difference, plus or minus as the case may be, shall be used to adjust the payments required pursuant to §§ 1094.73 and 1094.76.

§ 1094.76 Payments by a handler operating a partially regulated distributing plant.

See § 1000.76.

§ 10094.77 Adjustment of accounts.

See § 1000.77.

§ 1094.78 Charges on overdue accounts.

See § 1000.78.

Marketwide Service Payments

§ 1094.80 Transportation credit balancing fund.

The market administrator shall maintain a separate fund known as the *Transportation Credit Balancing Fund* into which shall be deposited the payments made by handlers pursuant to § 1094.81 and out of which shall be made payments due handlers pursuant

to § 1094.82. Payments due a handler shall be offset against payments due from the handler.

§ 1094.81 Payments to the transportation credit balancing fund.

(a) On or before the 12th day after the end of the month (except as provided in § 1000.90), each handler operating a pool plant and each handler specified in § 1000.9(c) shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I producer milk assigned pursuant to § 1000.44 by $0.07 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the total transportation credits disbursed during the prior June-January period. In the event that during any month of the June-January period the fund balance is insufficient to cover the amount of credits that are due, the assessment should be based upon the amount of credits that would have been disbursed had the fund balance been sufficient.

(b) The market administrator shall announce publicly on or before the 5th day of the month (except as provided in § 1000.90) the assessment pursuant to paragraph (a) of this section for the following month.

§ 1094.82 Payments from the transportation credit balancing fund.

(a) Payments from the transportation credit balancing fund to handlers and cooperative associations requesting transportation credits shall be made as follows:

(1) On or before the 13th day (except as provided in § 1000.90) after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1094.30(a)(5), bulk milk transferred from a plant fully regulated under another Federal order as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1094.30(a)(6), milk directly from producers' farms as specified in paragraph (c)(2) of this section, a preliminary amount determined pursuant to paragraph (d) of this section to the extent that funds are available in the transportation credit balancing fund. If an insufficient balance exists to pay all the credits computed pursuant to this section, the market administrator shall distribute the balance available in the transportation credit balancing fund by reducing payments pro rata using the percentage derived by dividing the balance in the fund by the total credits that are due for the month. The amount of credits resulting from this initial proration shall be subject to audit adjustment pursuant to paragraph (a)(2) of this section;

(2) The market administrator shall accept adjusted requests for transportation credits on or before the 20th day of the month following the month for which such credits were requested pursuant to § 1094.32(a). After such date, a preliminary audit will be conducted by the market administrator, who will recalculate any necessary proration of transportation credit payments for the preceding month pursuant to paragraph (a) of this section. Handlers will be promptly notified of an overpayment of credits based upon this final computation and remedial payments to or from the transportation credit balancing fund will be made on or before the next payment date for the following month;

(3) Transportation credits paid pursuant to paragraphs (a)(1) and (2) of this section shall be subject to final verification by the market administrator pursuant to § 1000.77. Adjusted payments to or from the transportation credit balancing fund will remain subject to the final proration established pursuant to paragraph (a)(2) of this section; and

(4) In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1094.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

(b) The market administrator may extend the period during which transportation credits are in effect (*i.e.*, the transportation credit period) to the months of January and June if a written request to do so is received 15 days prior to the beginning of the month for which the request is made and, after conducting an independent investigation, finds that such extension is necessary to assure the market of an adequate supply of milk for fluid use. Before making such a finding, the market administrator shall notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, view, and arguments. Any decision to extend the transportation credit period must be issued in writing prior to the first day of the month for which the extension is to be effective.

(c) Transportation credits shall apply to the following milk:

(1) Bulk milk received from a plant regulated under another Federal order, except Federal orders 1005 and 1007, and allocated to Class I milk pursuant to § 1000.44(a)(9); and

(2) Bulk milk received directly from the farms of dairy farmers at pool distributing plants subject to the following conditions:

(i) The quantity of such milk that shall be eligible for the transportation credit shall be determined by multiplying the total pounds of milk received from producers meeting the conditions of this paragraph by the lower of:

(A) The marketwide estimated Class I utilization of all handlers for the month pursuant to § 1000.45(a); or

(B) The Class I utilization of all producer milk of the pool plant operator receiving the milk after the computations described in § 1000.44;

(ii) The dairy farmer was not a "producer" under the order in this part during more than 2 of the immediately preceding months of February through May and not more than 50 percent of the production of the dairy farmer during those 2 months, in aggregate, was received as producer milk under the order in this part during those 2 months; and

(iii) The farm on which the milk was produced is not located within the specified marketing area of the order in this part or the marketing area of Federal order 1005 (7 CFR part 1005) or Federal order 1007 (7 CFR part 1007).

(d) Transportation credits shall be computed as follows:

(1) The market administrator shall subtract from the pounds of milk described in paragraphs (c)(1) and (2) of this section the pounds of bulk milk transferred from the pool plant receiving the supplemental milk if milk was transferred to a nonpool plant on the same calendar day that the supplemental milk was received. For this purpose, the transferred milk shall be subtracted from the most distant load of supplemental milk received, and then in sequence with the next most distant load until all of the transfers have been offset;

(2) With respect to the pounds of milk described in paragraph (c)(1) of this section that remain after the computations described in paragraph (d)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway distance between the shipping plant and the receiving plant;

(ii) Multiply the number of miles so determined by 0.35 cent;

(iii) Subtract the applicable Class I differential in § 1000.52 for the county in which the shipping plant is located from the Class I differential applicable for the county in which the receiving plant is located;

(iv) Subtract any positive difference computed in paragraph (d)(2)(iii) of this section from the amount computed in paragraph (d)(2)(ii) of this section; and

(v) Multiply the remainder computed in paragraph (d)(2)(iv) of this section by the hundredweight of milk described in paragraph (d)(2) of this section.

(3) For the remaining milk described in paragraph (c)(2) of this section after computations described in paragraph (d)(1) of this section, the market administrator shall:

(i) Determine an origination point for each load of milk by locating the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant;

(ii) Determine the shortest hard-surface highway distance between the receiving pool plant and the origination point;

(iii) Subtract 85 miles from the mileage so determined;

(iv) Multiply the remaining miles so computed by 0.35 cent;

(v) Subtract the Class I differential specified in § 1000.52 applicable for the county in which the origination point is located from the Class I differential applicable at the receiving pool plant's location;

(vi) Subtract any positive difference computed in paragraph (d)(3)(v) of this section from the amount computed in paragraph (d)(3)(iv) of this section; and

(vii) Multiply the remainder computed in paragraph (d)(3)(vi) of this section by the hundredweight of milk described in paragraph (d)(3) of this section.

Administrative Assessment and Marketing Service Deduction

§ 1094.85 Assessment for order administration.

See § 1000.85.

§ 1094.86 Deduction for marketing services.

See § 1000.86.

Proposed by Prairie Farms and Dean Foods:

Proposal No. 6

This proposal seeks to amend the Producer milk provision of the Appalachian and Southeast marketing areas to prevent producers who share in the proceeds of a state marketwide pool from simultaneously sharing in the proceeds of a Federal marketwide pool on the same milk in the same month.

1. Amend § 1005.13 by adding a new paragraph (e), to read as follows:

§ 1005.13 Producer milk.

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

2. Amend § 1007.13 by adding a new paragraph (e), to read as follows:

§ 1007.13 Producer milk.

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

Proposed by Prairie Farms and Dean Foods:

Proposal No. 7

This proposal seeks to amend the Producer-handler provision of the Appalachian and Southeast milk marketing areas.

1. Amend § 1005.10 by revising paragraphs (c) and (d), and adding new paragraphs (e) and (f), to read as follows:

§ 1005.10 Producer-handler.

* * * * *

(c) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from own farm production;

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled, and the processing and packaging operations are the producer-handler's own enterprise and are operated at the producer-handler's own risk;

(e) Has total route disposition and transfers in the form of packaged fluid milk products to other distributing plants during the month that does not exceed 3 million pounds; and

(f) Does not distribute fluid milk products to a wholesale customer who also is serviced by a plant described in § 1005.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to the wholesale customer during the month.

2. Amend § 1007.10 by revising paragraphs (c) and (d) , and adding new paragraphs (e) and (f), to read as follows:

§ 1007.10 Producer-handler.

* * * * *

(c) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from own farm production;

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled, and the processing and packaging operations are the producer-handler's own enterprise and are operated at the producer-handler's own risk;

(e) Has total route disposition and transfers in the form of packaged fluid milk products to other distributing plants during the month that does not exceed 3 million pounds; and

(f) Does not distribute fluid milk products to a wholesale customer who also is serviced by a plant described in § 1005.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to the wholesale customer during the month.

Proposed by Michael Sumners, Dairy Producer, Paris, TN:

Proposal No. 8

Amend the *Producer-handler* definition in the current Appalachian and Southeast orders to allow producer-handlers to purchase a regulated amount of milk to balance their supply—ten percent of the producer's monthly milk production during December through May and 30 percent during June through November.

Proposed by Dairy Programs, Agricultural Marketing Service:

Proposal No. 9

For all Federal Milk Marketing Orders, make such changes as may be necessary to make the entire marketing agreements and the orders conform with any amendments thereto that may result from this hearing.

Copies of this notice of hearing and the orders may be procured from the Market Administrator of each of the aforesaid marketing areas, or from the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250, or may be inspected there.

Copies of the transcript of testimony taken at the hearing will not be available for distribution through the Hearing Clerk's Office. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decision-making process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

Office of the Secretary of Agriculture;

Office of the Administrator, Agricultural Marketing Service;

Office of the General Counsel;

Dairy Programs, Agricultural Marketing Service (Washington office) and the Offices of all Market Administrators.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Dated: January 16, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–1402 Filed 1–20–04; 10:30 am]

BILLING CODE 3410–02–P

POSTAL RATE COMMISSION

39 CFR Part 3001

[Docket No. RM2004–1; Order No. 1389]

Definition of Postal Service

AGENCY: Postal Rate Commission.

ACTION: Proposed rule.

SUMMARY: The Commission hereby provides notice that it is initiating a proposed rulemaking for the purpose of adding a definition of the term "postal service" to its rules of practice. This change is intended, among other things, to clarify Commission jurisdiction and thereby minimize the need for ad hoc determinations.

DATES: Initial comments are due March 1, 2004; reply comments are due April 1, 2004.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system, which can be accessed at *http://www.PRC.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820.

SUPPLEMENTARY INFORMATION:

Regulatory History

68 FR 14437 (March 25, 2003)

The Commission's rules of practice and procedure, 39 CFR 3001.1 *et seq.*, do not define the term "postal service." Historically, this omission has created little confusion or controversy. Of late, however, that would appear no longer to be the case. See PRC Order No. 1388, January 16, 2004. Consequently, in the interests of administrative efficiencies, the Commission proposes to amend its rules to define the term "postal service."

1. Background

In only a relatively few proceedings has the Commission been called upon to consider, for jurisdictional purposes, the meaning of the term "postal service." The first instance involved special services, over which, the Postal Service had contended, it had unilateral rate setting authority. In Docket No. R76–1, following the District Court's decision in *Associated Third Class Mailer Users* v. *U.S. Postal Service,*[1] the Commission addressed the issue of which special services fell within its rate jurisdiction. In considering those that might properly be characterized as "postal services," the Commission determined that:[2]

> [s]pecial postal services "that is, those which fall within the ambit of § 3622—are services other than the actual carriage of mail but supportive or auxiliary thereto. They enhance the value of service rendered under one of the substantive mail classes by providing such features as added security, added convenience or speed, indemnity against loss, correct information as to the current address of a recipient, etc.

Nearly two decades elapsed before the Commission again confronted the issue as presented in a series of complaints filed in 1995 and thereafter.[3] In Docket No. C95–1, the Commission considered a complaint concerning shipping and handling charges for orders placed with the Postal Service Philatelic Fulfillment Service Center. Finding first that complaints regarding fees for postal services fell within the scope of section 3662, the Commission dismissed the complaint based on the court's reasoning in *Associated Third Class Mailer Users* v. *U.S. Postal Service,* supra.[4] Specifically, the Commission found that the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center were not closely related to the delivery of mail and, thus, charges for those services did not constitute fees for postal services under section 3662.[5]

Subsequently, Docket No. C96–1 involved a complaint that the Postal Service was operating and charging fees for a packaging service (Pack & Send) that had not been submitted to the Commission for a recommended decision.[6] The complainant, a coalition comprised of organizations and individuals doing business in the Commercial Mail Receiving Agency industry, alleged, inter alia, that the Postal Service was charging rates that did not conform with the policies of the Postal Reorganization Act. In reviewing the record and the parties' arguments, the Commission recognized that "there are a variety of analytical lenses through which potential relationships to customary postal functions may be usefully viewed."[7] To that end, the Commission analyzed whether Pack & Send service should be characterized as a postal or nonpostal service by, among other things, considering its relationship to the Postal Service's nonpostal statutory functions, its intrinsic and structural features, and the correlation between its use and subsequent mailing. Based on its analyses, the Commission found Pack & Send to be a postal service due to, among other things, its direct structural relationship to the provision of postal services (as a wholly new method of accepting mailable matter for delivery) as well as its intrinsic value as an added-value service available for certain categories of parcel service offered by the Postal Service.[8]

In Docket No. C99–1, United Parcel Service filed a complaint contending that the Postal Service was providing a new service, Post Electronic Courier Service (Post ECS), in violation of the Act.[9] Post ECS service, a pilot program available only to licensees, offered an

[1] *Associated Third Closs Mailer Users* v. *U.S. Postal Service,* 405 F.Supp. 1109 (D. D.C. 1975); National Association of Greeting Card Publishers v. U.S. Postal Service, 569 F.2d 570 (D.C. Cir. 1976); *vocoted on other grounds,* 434 U.S. 884 (1977).

[2] PRC Op. R76–1, Vol. 1, June 30, 1976, at 266–67 (footnote omitted).

[3] Jurisdictional issues were addressed in Docket No. MC78–3 concerning the Postal Service's request for a recommended decision to establish an Electronic Computer Originated Mail subclass.

[4] PRC Order No. 1075, September 11, 1995, at 4–5.

[5] *Id.* at 5.

[6] See Complaint of Coalition Against Unfair USPS Competition, Docket No. C96–1, May 23, 1996.

[7] PRC Order No. 1145, December 16, 1996, at 12 (footnote omitted).

[8] *Id.* at 18–19; see also id. at 11–18. Following this finding, the Commission held further proceedings in Docket No. C96–1 in abeyance pending a filing by the Postal Service requesting a recommended decision concerning Pack & Send service, or the filing of a notice by the Service indicating that the packaging service was discontinued. *Id.* at 25. Further proceedings proved unnecessary as the Postal Service chose to discontinue Pack & Send service. PRC Order No. 1171, April 25, 1997.

[9] See Complaint of United Parcel Service, Docket No. C99–1, October 5, 1998. UPS's complaint was based on three claims: (a) That the service may only be established pursuant to sections 3622 and 3623 of the Act; (b) that the provision of the service at no charge violates sections 3622(b)(3) and 3622(b)(4); and (c) that Post ECS represents a change in the nature of postal services affecting service on a nationwide or substantially nationwide basis.

all-electronic means of transmitting documents securely via the Internet.[10] The Postal Service moved to dismiss the complaint arguing, first, that the Commission lacks authority to determine the status of the service as either postal or nonpostal, and second that, even assuming the Commission had authority to determine the status of Post ECS service, the complaint should be dismissed as beyond the Commission's authority because the service is neither postal nor domestic.[11] The Commission denied the motion, finding that its mail classification authority empowered it to review the status of services proposed or offered by the Postal Service.[12] Nor was the Commission persuaded, based on the record developed to that point, that the service did not include domestic operations or that it was nonpostal. In that regard, the Commission did not find it dispositive that service did not entail hardcopy mail.[13] For purposes of ruling on the motion to dismiss, the Commission, however, did not decide whether Post ECS was, or was not, a postal service.[14] That issue, which was deferred pending further proceedings in the docket, was not reached as the complaint was subsequently dismissed as moot.[15]

The most recent proceedings in which jurisdictional issues have been raised share a common theme. In the latest rate proceeding, Docket No. R2001–1, interrogatories were filed by the Office of Consumer Advocate (OCA) requesting information concerning various services offered by the Postal Service, including, for example, Post ECS, USPS eBillPay, and USPS Send Money. The Postal Service objected to these interrogatories, characterizing the services as nonpostal and irrelevant to the rate proceeding. OCA sought to compel production. The Postal Service was directed to respond to certain interrogatories, but this ruling was suspended in light of the settlement filed in that proceeding that ultimately became the basis for the Commission's recommended decision.[16]

Finally, the petition filed by Consumer Action, addressed separately in companion Order No. 1389, requests the Commission to initiate proceedings concerning 14 services offered to the public by the Postal Service without prior Commission approval. The 14 services identified encompass not only electronic services, including online payment services, electronic postmark, and NetPost Certified, but also miscellaneous other services, ranging from retail merchandise to the Unisite Antenna Program. While issues related to the petition are fully addressed in Order No. 1389, it is sufficient to note, for purposes of this discussion, that the Postal Service characterized all of the services identified in the petition as nonpostal.[17]

Prior to Docket No. C99–1, the Commission had three occasions to consider an electronic service provided by the Postal Service. Each has some bearing on issues to be considered in this proceeding.

In Docket Nos. MC76–1–4, the Commission approved a stipulation and agreement concerning Mailgram service.[18] Under the terms of the settlement, the parties stipulated that Mailgram service was a communications service subject to regulation by the Federal Communications Commission and not a postal service subject to regulation by this Commission. While the Commission concurred that Mailgram service need not be included in the Domestic Mail Classification Schedule (DMCS), it rejected the inference that the parties to the settlement could stipulate away the Commission's jurisdiction.[19] Furthermore, the Commission specifically noted that its "decision is without prejudice to our future consideration of any other alternative communications methods or our jurisdiction thereof."[20]

The principal issue presented in Docket No. MC78–3, concerning Electronic Computer Originated Mail (E–COM), was whether the Postal Service should enter the field of electronic mail.[21] The Postal Service's proposal consisted essentially of two electronic transmissions, the first from the mailer to a Western Union facility located in Virginia, and the second from that facility to one of 25 serving post offices. Under its proposal, the Postal Service would provide both data processing services and data transmission services. As proposed, the Postal Service would control the mailer's messages from the time they arrived at Western Union's facility until they were delivered to the addressee.[22] Regarding its proposal, the Postal Service maintained the position that E–COM messages, while in electronic form, were deemed "in the mails."[23]

The Commission also had before it an alternative proposal that differed from E–COM in an important respect. While both would make use of the Postal Service's delivery network, the alternative would be available to any common carrier connecting its transmission facilities to the Postal Service's data processing and printing facilities. For a variety of reasons, the Commission ultimately recommended the alternative proposal.[24] Among the factors influencing this decision were the pro-competitive aspects of the alternative as well its jurisdictional implications.[25]

During the pendency of Docket No. MC78–3, the Carter Administration issued a policy statement outlining its position concerning the Postal Service's role in providing electronic mail service.[26] The Commission addressed the applicability of the eight conditions in the policy statement to the proposals before it, and, among other things, concluded that the Postal Service should make its delivery services available to all electronic carriers at the same rates as those it charges itself. "We find * * * that this rate constraint is required not only by §§ 403(c), 3622 (b)(1) and 3623 (c)(1) of the Act, but by § 3622(b)(4). * * *"[27] Moreover, in discussing a related condition, which concerned developing technical interconnecting standards to ensure equal access to the mail delivery system, the Commission found that § 101(f), as relates to modes of transportation, is applicable to telecommunication

[10] Briefly, licensees could transmit documents to a Postal Service Electronic Commerce Server whereupon the Postal Service would notify the addressee by e-mail that the document was available at a specified URL address. To retrieve the document, the addressee would access the site, enter the appropriate password, and, if desired, download the document.

[11] Motion of the United States Postal Service to Dismiss, Docket No. C99–1, November 5, 1998.

[12] PRC Order No. 1239, May 3, 1999, at 12.

[13] *Id.* at 15–21.

[14] *Id.* at 20–21.

[15] PRC Order No. 1352, November 6, 2002. Because it terminated Post ECS service, the Postal Service moved to dismiss the complaint as moot.

[16] *See* P.O. Ruling R2001–1/42, January 29, 2002, at 5–11 and 13.

[17] The Report by the President's Commission on the Postal Service touches on the issue of electronic mail, noting that "the online revolution dramatically blurred the lines of what constitutes a "postal service," producing some dubious forays." The President's Commission recommends that the Postal Service abandon electronic services and focus on traditional mail. Report of the President's Commission on the United States Postal Service, July 31, 2003, at 27.

[18] PRC Op. Docket Nos. MC76–1–4, June 15, 1977.

[19] *Id.* at 4–5. This finding was based on two considerations: (a) that the general public could not obtain this service from the Postal Service, and (2) the service was regulated by the FCC.

[20] *Id.* at 6.

[21] PRC Op. Docket No. MC78–3, December 17, 1979, at 1.

[22] *Id.* at 29.

[23] *Id.* at 172 (footnote omitted).

[24] Although not dispositive, the Commission noted that prior to its decision, the contract between Western Union and the Postal Service was cancelled. *See id.* at 3–4.

[25] *See* generally *Id.* at 6–11.

[26] *Id.* at 159.

[27] *Id.* at 171.

carriers.[28] In December 1984, the Commission recommended, pursuant to a request from the Postal Service, that E–COM be eliminated from the DMCS.[29]

Mailing Online represents the Postal Service's third attempt to provide electronic mail service. Pursuant to a request filed by the Postal Service in November 1999, the Commission recommended that Mailing Online be implemented as a three-year experiment. Mailing Online provided electronic transmission of documents to the Postal Service via the Internet for printing, finishing, and posting as hard copy mail. Upon receipt of the data files containing the document and related information, such as the address list and printing options, the Postal Service performed various tasks, such as address hygiene and merging of names and addresses with document files, to create print-image files to be sent to commercial printing contractors. The latter would print and finish the documents, prepare them for mailing, and enter the pieces at a local postal facility for delivery.[30] By letter dated August 29, 2003, the Postal Service gave notice that Mailing Online service would be terminated as of September 1, 2003.[31]

2. Rationale for the Rule

As this background underscores, the postal character of new services provided by the Postal Service is unsettled. Because the issue appears to be increasingly controversial, the Commission has determined that it would be administratively most efficacious to clarify it by rule rather than on an ad hoc basis.

The concept of "postal service" is not static. It is evolutionary, with technology driving the change. For example, to transport the mails, the Postal Service originally relied on stagecoaches. In the 1800's, railroads were used to provide faster service. In the 20th century, trucks and airplanes became the dominant means to transport the mails. The Postal Service has characterized its entry into the electronic mail field as "a natural progression of technology," by using "electronics to move the mail" instead of a surface or air carrier. [32] The Postal Service's position was instrumental in the Commission's determination that section 101(f) of the Act is applicable to telecommunications carriers.[33]

It is not merely that these technological advances provided for improved service, rather they gave rise to wholly new forms of "postal service." Examples include airmail service, Express Mail services, as well as electronic mail. In addition, technology has given rise to many new types of special postal services such as Confirm, and delivery and signature confirmation.

The point is that the character of services provided by the Postal Service has changed with advances in technology. It is a trend that may accelerate as the Postal Service considers how it may wish to employ advances in technology to satisfy its statutory mandate to provide prompt, reliable, and efficient services.[34] The recent proceedings before the Commission give evidence of the Postal Service's efforts to employ the latest technology. For example, services provided by the Postal Service that rely, in some fashion, on the Internet include NetPost CardStore, NetPost Certified Mail, Mailing Online,[35] Returns@Ease, online payment services,[36] and electronic postmark.

The Postal Service has also offered an array of other services not reliant on the Internet whose operations may or may not have postal implications. These services include, inter alia, Mall Package Shipment Program, a pilot program offering pickup service to select merchants,[37] LibertyCash, a stored value card for use in purchasing postage and related products,[38] and Unisite Antenna Program, which concerns leasing Postal Service real estate for wireless communication towers.

Many of the latest services, particularly those relying on electronic communications, share a common bond with the Postal Service's initial forays into electronic mail. A principal impetus for the Postal Service to offer electronic mail service was an early concern that its message market share would be substantially reduced, based on projections that seven out of eight domestic messages would be lost to other carriers.[39] Today, the concern over electronic diversion continues to drive the Postal Service's efforts to generate increased revenues and to serve the public's communications needs. Even if its earlier efforts proved unsuccessful, it is not to say that the Postal Service's latest attempts to grow its revenues and volumes by offering new services or harnessing technology to enhance services offered to the mailing public will not succeed.

With the proliferation of these services, the Commission finds it appropriate to propose to codify in its rules the term "postal service" to provide guidance to the Postal Service and the public concerning services that fall within the ambit of sections 3622 and 3623 of the Act. The proposed rule imposes no restrictions on the types of postal service that the Postal Service may wish to offer. Such services, however, must be reasonably related to the functions customarily performed by the national post.

In pleadings before the Commission, the Postal Service has asserted that it is authorized to provide commercial nonpostal services.[40] The Commission takes no position on this claim, other than to reiterate that the lawfulness of the Postal Service's actions in implementing a nonpostal service is not an issue before the Commission.[41] While the Commission has formed no opinion about whether any of the services identified in Consumer Action's petition are postal or nonpostal, it would appear, based on little more than a review of the

[28] *Id.* at 175–176. The Commission noted that the Postal Service also appeared to regard electronic media as equivalent to a mail transportation mode. *Id.* at 176.

[29] PRC Op., Docket No. MC84–2, December 21, 1984.

[30] For a more complete description of Mailing Online, *see* PRC Op. MC2000–2, June 21, 2000, at 1–3.

[31] Letter to the Honorable Steven W. Williams, Docket No. MC2000–2, August 29, 2003.

[32] Initial Brief of the United States Postal Service, Docket No. MC78–3, November 9, 1979, at 9. In that proceeding, the Postal Service argued that "E–COM service fits squarely within the scheme of transmitting messages envisioned by the Postal Reorganization Act. * * * The E–COM proposal keeps pace with advances in technology * * * by utilizing electronics to move mail, instead of utilizing [a surface or air carrier]." Ibid.

[33] See PRC Op. MC78–3, December 17, 1979, at 175–76.

[34] 39 U.S.C. § 101(a).

[35] As noted above, the Postal Service terminated Mailing Online as of September 1, 2003. Letter to the Honorable Steven W. Williams, Docket No. MC2000–2, August 29, 2003.

[36] These include USPS eBillPay, USPS Send Money, and USPS Pay@Delivery. With respect to USPS eBillPay, the Postal Service indicates it has informed CheckFree Corporation that it will not renew its contract upon its expiration in April 2004. In addition, the Postal Service states that, as of that date, it will no longer offer either USPS Send Money or USPS Pay@Delivery, since both are features of its agreement with CheckFree. See Update to Report on Nonpostal Initiatives, November 14, 2003 (Update). Nonetheless, the Postal Service's website indicates that these services remain available without any reference to their apparent discontinuance as of April 2004.

[37] The Postal Service indicates it has terminated this program. Update.

[38] The Postal Service indicates it has terminated this program. Ibid.

[39] PRC Op. MC78–3, December 17, 1979, at 22–24.

[40] See Comments of United States Postal Service on Consumer Action Petition, January 30, 2003, at 14–17.

[41] See PRC Order No. 1239.

pleadings in that proceeding, that the claim that each service is nonpostal may be somewhat strained. The converse would appear to be equally true; not each service would appear to be postal.

New services offered by the Postal Service are not without public interest considerations.[42] The proposed rule provides a framework in which they may be considered. The need for Commission review, with an opportunity for public participation, is heightened because of the possibility (or even the likelihood) that new postal services may operate in competition with private sector services. The proceedings discussed above give ample evidence of this. Concerns about the effects on competition were at the heart of the two complaint proceedings, Docket Nos. C96–1 and C99–1. Similarly, in response to Consumer Action's petition, various commenters question the Postal Service's role in providing services in markets that are also served by the private sector.[43] The need to consider the competitive and financial implications of new Postal Service products provides compelling support for Commission review under section 3623 of the Act and is thoroughly consistent with the statutory scheme.[44]

The Commission has the primary responsibility for interpreting whether services offered or proposed by the Postal Service are subject to chapter 36 of the Act.[45] In exercising its rate and classification authority, the Commission is required to carefully balance the competing interests of those affected by the Postal Service's actions, *e.g.*, assessing the effects of the Postal Service's proposals or services on the public, including both users and competitors. Courts have explained that the Commission's involvement:

> insures that an agency independent of the Postal Service will provide for public notice and hearing—input of those affected by the proposed action—in full and on the record, *see* 39 U.S.C. § 3624(a), consideration of pertinent factors and congressionally imposed goals before certain types of decisions are made.[46]

The Court underscored the importance of the Commission's role by further noting that it was designed, among other things, "to assure that the public is heard from and the public interest represented before rate, classification, and significant service changes are made."[47]

3. Proposed Rule

The Commission proposes to amend its rules by inserting the following definition into new subsection (r) of rule 5, 39 CFR 3001.5, as follows: "postal service means the delivery of letters, printed matter, or packages weighing up to 70 pounds, including acceptance, collection, processing, transmission, or other services supportive or ancillary thereto." A proposed amendment to the Code of Federal Regulations reflecting the addition of a definition of the term "postal service" to the Commission's rules of practice appears following the Secretary's signature.

The intent of the proposed rule is to afford the Postal Service sufficient flexibility to engage in functions ordinarily performed by a national post as may be affected, from time-to-time, by changes in technology. The principal standard that has been applied in analyzing different services is "the relationship of the service to the carriage of mail. Those which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services within the meaning of § 3622."[48] Thus, the proposed definition is intended not to represent a change, but to clarify the definition to all interested persons.

Taking technological changes into account is consistent with the Act. Section 101(a) directs the Postal Service to "provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities."[49] To that end, it is charged with "promot[ing] modern and efficient operations."[50] As the Commission has previously observed, "the fact that a given service accomplishes one or more functional components of 'the carriage of mail' by means that do not involve a physical object does not necessarily support a conclusion that the service is 'nonpostal.'"[51] As corroboration, the Commission cited filings by the Postal Service in Docket Nos. MC78–3, E–COM, and MC98–1, Mailing Online.[52] Notably, with respect to the former, the Postal Service maintained that "E–COM messages, while in electronic form, are * * * 'in the mails.'"[53] Regarding Mailing Online service, a Postal Service witness characterized the bits of electronic data that would ultimately be reduced to hard copy messages "as mail pieces."[54] Moreover, there are other contemporaneous indications that the Postal Service considered electronic service offerings as an extension of traditional mail services.[55]

Finally, while it takes no position on any service identified in Consumer Action's petition, the Commission notes that certain services are offered through the Postal Service's Web site and are described there as mail or its functional equivalent. For example, regarding NetPost services, users are encouraged to "[d]iscover the many types of mail and many creative ways you can send mail online and have it delivered to their mailbox."[56] "Prepare and send hardcopy mail from the convenience of your computer."[57] As an inducement, there are "[p]ostage discounts with every mailing of any size."[58] Similarly, users are encouraged to use the USPS Electronic Postmark (EPM), which

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[42] The Commission's Rules offer various alternatives for expedited consideration of proposed classification changes.

[43] See, *e.g.*, Comments of Pitney Bowes, Inc., Petition for Review of Unclassified Services, April 18, 2003; Comments of the Computer & Communications Industry Association on the Motion of the Office of the Consumer Advocate to Request that the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services, Petition for Review of Unclassified Services, January 28, 2003.

[44] Nothing in the proposed rule is intended to suggest that the Commission has or intends to assert jurisdiction over any "nonpostal" service. One might legitimately question the need for such service where offered in competition with the private sector. While that might also be said of competitive postal services, statutory considerations might may well dictate a different result.

[45] See *United Parcel Service* v. *United States Postal Service*, 604 F.2d 1370, 1381 (3rd Cir. 1979), cert. denied, 446 U.S. 957 (1980).

[46] *United Parcel Service* v. *United States Postal Service*, 455 F.Supp. 857, 869 (E.D. PA 1978), *aff'd*, 604 F.2d 1370 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

[47] Ibid.

[48] PRC Order No. 1128, July 30, 1996, at 10.

[49] See also 39 U.S.C. § 403(a) ("The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services * * *."); and 39 U.S.C. § 403(b)(2) ("provide types of mail service to meet the needs of different categories of mail and mail users.")

[50] 39 U.S.C. § 2010.

[51] PRC Order No. 1239, May 3, 1999, at 19.

[52] Ibid.

[53] PRC Op. MC78–3, December 17, 1979, at 172 (footnote omitted).

[54] Docket No. MC98–1, Tr. 7/1718.

[55] See 61 FR 42,219 (1996) (Electronic services "will provide security and integrity to electronic correspondence and transactions, giving them attributes usually associated with First-Class Mail.") See also General Accounting Office Report on New Postal Products, GAO/GGD–99–15 (November 24, 1998) at 36–37 (The Postal Service "views its entry into the electronic commerce market as an extension of its core business—the delivery of traditional mail. According to service officials, electronic mail has the same attributes as traditional mail * * *.") Id. at 36.

[56] U.S. Postal Service Create and Send Mail Online page <*http://www.usps.com/send/waystosendmailandpackages/createandsendmailonline.htm*>.

[57] U.S. Postal Service NetPost Mailing Online page <*http://www.usps.com/mailingonline/welcome.htm*>.

[58] Ibid.

employs an auditable time stamp, because: [59]

- "Correspondence handled by USPS subject to confidentiality statutes and regulations."
- "Neutral third party with universal public service mandate."
- "Federally imposed regulations on USPS employees— enhancing customer confidence."
- "History of providing postmarks with legal significance."
- "Long-lived statutory purpose 'to bind the nation together through the * * * correspondence of the people.' 39 U.S.C. 101."

In the same vein, the Universal Postal Union recently indicated that it "is working with * * * progressive postal services to promote an electronic postmark that would facilitate electronic transactions and guarantee their security * * *." [60] The electronic postmark is described as the "digital equivalent of the * * * indicia that appears on every stamped envelope today and has legally binding implications in matters of mail tampering." [61]

4. Procedural Matters

Comments. By this order, the Commission hereby gives notice that comments from interested persons concerning the proposed amendment to the Commission's rules are due on or before March 1, 2004. Reply comments may also be filed and are due April 1, 2004.

Representation of the general public. In conformance with § 3624(a) of title 39, the Commission designates Shelley S. Dreifuss, Director of the Commission's Office of the Consumer Advocate, to represent the interests of the general public in this proceeding. Pursuant to this designation, Ms. Dreifuss will direct the activities of Commission personnel assigned to assist her and, upon request, will supply their names for the record. Neither Ms. Dreifuss nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

It is ordered:

1. Interested persons may submit initial comments by no later than March 1, 2004. Reply comments may also be filed and are due no later than April 1, 2004.

2. Shelley S. Dreifuss, director of the Office of the Consumer Advocate, is designated to represent the interests of the general public.

3. The Secretary shall arrange for publication of this proposed rulemaking in the **Federal Register**.

List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Postal Service.

Issued: January 16, 2004.
By the Commission.

Steven W. Williams,
Secretary.

For the reasons discussed above, the Commission proposes to amend 39 CFR part 3001 as follows:

PART 3001—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(b); 3603; 3622–24; 3661, 3663.

Subpart A—Rules of General Applicability

2. Amend § 3001.5 by adding new paragraph (r) to read as follows:

§ 3001.5 Definitions.

* * * * *

(r) *Postal service* means the delivery of letters, printed matter, or packages weighing up to 70 pounds, including acceptance, collection, processing, transmission, or other services supportive or ancillary thereto.

[FR Doc. 04–1389 Filed 1–22–04; 8:45 am]
BILLING CODE 7710–FW–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 579

[Docket No. NHTSA 2001–8677; Notice 8]

RIN 2127–AI92

Reporting of Information and Documents About Potential Defects

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

ACTION: Response to petitions for reconsideration.

SUMMARY: This document denies the petitions filed by several associations of motor vehicle manufacturers for reconsideration of the final rule published on July 10, 2002, that implemented the early warning reporting (EWR) provisions of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act and responds to petitions for rulemaking. Under the final rule, in general, all manufacturers of motor vehicles whose yearly production of vehicles for sale in the United States is 500 or more in a particular vehicle category are required to report comprehensive information to NHTSA, including the numbers of property damage claims, consumer complaints, warranty claims, and field reports. Manufacturers of fewer than 500 vehicles per year are required to report only limited types of information (*e.g.*, information about incidents involving deaths referred to in claims and notices received by the company). We have decided to retain the existing thresholds for the present time, although we will consider this issue in approximately two years, after we have had experience under the early warning reporting regulation.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, contact Jonathan White, Office of Defects Investigation, NHTSA (phone: 202–366–5226). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202–366–5263).

SUPPLEMENTARY INFORMATION:

I. Background

On July 10, 2002, NHTSA published a final rule implementing the early warning reporting provisions of the TREAD Act, established by 49 U.S.C. 30166(m) (67 FR 45822). The agency published its responses to some issues raised by petitions for reconsideration on April 15, 2003 (68 FR 18136) and others on June 11, 2003 (68 FR 35132 and 35145) and announced that it would respond to other issues at a later date. The reader is referred to those documents, and the prior notice of proposed rulemaking (NPRM) (66 FR 66190) for further information.

The final rule established different reporting requirements for manufacturers, depending upon the type of product produced and, for vehicle manufacturers, the number of vehicles produced annually. Manufacturers of tires and child restraint systems (CRS) and vehicle manufacturers that produce 500 or more vehicles per year of one of four categories of vehicles (light vehicles, medium-heavy vehicles and buses, motorcycles, and trailers) must provide comprehensive quarterly reports to NHTSA. In general, such comprehensive reports must include information on deaths and injuries

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[59] U.S. Postal Service Benefits of EPM page <*http://www.usps.com/electronicpostmark/benefits.htm*>.

[60] UPU Press Release, Electronic Postmark Aims to Build Confidence, Trust and Security for Global E-Trade and E-Business, Bern, Switzerland, 10 December 2003 <*http://www.upu.int/presse/eu/electronic_postmark_aims_to_build_confidence_en.pdf*>.

[61] Ibid.

based on claims and notices about incidents involving the manufacturer's products, and the numbers of property damage claims, consumer complaints, warranty claims, and field reports received by the manufacturer. For field reports other than those from dealers, a copy of the field report must also be submitted. All other manufacturers of equipment, and manufacturers that produce fewer than 500 vehicles per year of each category, need only report a very limited amount of information; *i.e.*, information regarding claims and notices of death received by the manufacturer involving its products.

Petitions for reconsideration of this aspect of the rule were filed on or before August 26, 2002, by the National Association of Trailer Manufacturers (NATM), the National Truck Equipment Association (NTEA), and the Recreational Vehicle Industry Association (RVIA), among others. NATM filed untimely supplemental comments on October 15, 2002, and a petition for rulemaking was filed by the National Trailer Dealers Association (NTDA) on November 1, 2002 relating to the threshold for comprehensive reporting.

NTEA, NTDA, and RVIA petitioned for an increase in the threshold number of "fewer than 500" with regard to vehicles that their members produce or sell. NTEA suggested that instead of basing the threshold on the number of vehicles produced by a manufacturer in a given category, such as trailers, that NHTSA consider a manufacturer's annual total production and raise the threshold significantly. To support this suggestion, NTEA cited the agency's temporary exemption regulation, 49 CFR part 555. This regulation (implementing 49 U.S.C. 30113) establishes a threshold of an annual production of less than 10,000 motor vehicles for applying for hardship exemptions from the Federal motor vehicle safety standards. Under the provisions authorizing exemptions on bases other than hardship, exemptions covering up to 2,500 vehicles a year may be granted.

Alternatively, NTEA recommended that the threshold be 5,000 motor vehicles per year, as did RVIA, on the ground that this number is consistent with similar NHTSA and other Federal regulations. RVIA noted that S14.1 of Federal Motor Vehicle Safety Standard (FMVSS or Standard) No. 208 exempts from its provisions "vehicles that are manufactured by a manufacturer that produces fewer than 5,000 vehicles worldwide annually" (as does S14.3(d)), and that "a similar 5,000 vehicle per year limit appears in the new FMVSS 138 [relating to tire pressure monitoring systems], issued June 5, 2002, at Section 7.6." It considered "this figure " consistent with Environmental Protection Agency definitions, which [establish] a subcategory [of small volume manufacturer] of 5,000 vehicles per year for maximum benefits (see 40 CFR 86.1845–04(b)(3) and Table S04–06)." RVIA concluded that: "Establishing a 5,000 vehicle per year definition "in these final rules will maintain consistency and harmonization with current FMVSS and across agency boundaries."

NATM took a different approach, in which it requested that trailers with a gross vehicle weight rating (GVWR) of 26,000 lbs. or less be excluded from comprehensive early warning reporting. In its view, merely increasing the threshold from 500 "to some higher number will * * * do little if anything to alleviate the unfair burden upon the 26,000 lbs.-and-under GVWR trailer manufacturers, 96 percent of which are also 'small businesses.'"

II. Discussion

1. The Development of the Current Threshold

In our advance notice of proposed rulemaking to implement the early warning reporting provisions, we requested comments, in general, and specific answers to certain questions. We specifically asked: "Which of the manufacturers * * * should be covered by the Final Rule and why?" 66 FR 6532 at 6537 (January 22, 2001). The Truck Trailer Manufacturers Association (TTMA) responded that 500 motor vehicles was an appropriate threshold since "some trailer manufacturers are so small that their reporting would not advance the Agency's goals in any meaningful way." Docket # 2001–8677–30, available at *http://dms.dot.gov*. We then proposed the threshold figure of 500 vehicles per category in the early warning reporting regulation notice of proposed rulemaking (NPRM), and we received comments on this issue from NTEA, RVIA, Gillig Corporation, and the Waste Equipment Technology Corporation (WASTEC). These commenters, as did NTEA in its petition for reconsideration, recommended that the limit be based on Part 555 (10,000 vehicles, or alternatively, 2,500). The rationale that NTEA offered for these suggestions was that "many companies producing multi-stage trucks and RVs in quantities greater than 500 are nevertheless 'small businesses' by the criteria of the Small Business Administration (SBA) (13 CFR 121.201 (2000))." In adopting the Final Rule, we did not find this argument persuasive, observing that our investigations into alleged defects in products by relatively small businesses had led to safety recalls (67 FR 45822 at 45832). We discuss this below in more detail.

2. Safety-Related Defect Concerns

The TREAD Act requires NHTSA to undertake a rulemaking to enhance the Secretary's ability to carry out the provisions of Chapter 301 of Title 49 of the U.S. Code (49 U.S.C. 30101 *et seq.*), which includes the identification of vehicles and equipment with safety-related defects. The TREAD Act also authorizes NHTSA to require manufacturers to provide information to the extent that such information may assist in the identification of defects related to motor vehicle safety. 49 U.S.C. 30166(m).

Since the purpose of requiring comprehensive early warning reporting is to assure that NHTSA's Office of Defects Investigation (ODI) has relevant data to promptly identify possible safety defects, we have considered whether safety recalls have been conducted by, or are applicable to, low-production vehicle manufacturers. Although we do not have precise production data, we were able to identify a number of safety recalls in each vehicle category in 49 CFR 579.21–24 that were conducted by companies whose annual production of vehicles in the category at issue was more than 500, but not significantly over 500. We chose manufacturers with an annual production between 500 and 1500. Many of these recalls involved serious safety problems. The following are illustrative examples of recalls by such manufacturers during the past five years, with one example provided for each category or subcategory of vehicle:

1. Recall No. 98V–331 (transit buses with steering arms that can fail without warning, causing a loss of steering);

2. Recall No. 99V–167 (passenger cars in which the fuel lines to the fuel injection system can leak, possibly resulting in a fire);

3. Recall No. 01V–088 (motorhomes (medium heavy vehicles) in which a floor support leg could collapse, causing the liquid propane gas line to leak);

4. Recall No. 00V–273 (motorhomes (both light vehicles and medium heavy vehicles) in which safety belt buckles could unlatch in a collision);

5. Recall No. 99V–254 (motorcycles on which the rear wheel could lock without warning);

6. Recall No. 00V–102 (full size trailers equipped with pregreased axle hubs that could experience hub and wheel separations); and

7. Recall No. 00V–241 (small trailers in which the pinbox can fail, resulting in release of the trailer from the towing vehicle).

If we were to raise the threshold for comprehensive reporting to a higher level, such as 1,500 vehicles per year, we would not receive timely early warning information about these types of safety problems from a significant number of manufacturers. Raising the threshold to 5,000 vehicles per year, as requested by some petitioners, would allow even more potential problems to escape our consideration.

In addition, the regulations cited by NTEA and RVIA (*i.e.*, Standards Nos. 138 and 208) are distinguishable from the early warning reporting requirements. Those regulations provide a delayed compliance date for manufacturers whose world-wide production of vehicles is less than 5,000 per year. The early warning reporting regulation threshold is fewer than 500 vehicles for sale in the United States for each of four specific categories, regardless of the manufacturer's world-wide production. Adopting a world-wide limitation of 5,000 vehicles would result in a foreign manufacturer that produces more than 5,000 vehicles annually, but that sells fewer than 500 of a given category in the United States, having to report fully even though only reports of incidents of death are required under the current rule.

3. NATM's Suggested Weight-Based Threshold for Trailers

As noted above, NATM's petition for reconsideration was not based upon a numerical production or sales-based threshold. Rather, NATM asked the agency "to separate out and treat differently for early-warning reporting purposes" all trailer manufacturers whose trailers have a gross vehicle weight rating (GVWR) of 26,000 pounds or less, regardless of the manufacturer's annual sales or production. NATM asserted that this category encompasses two types of trailers, trailers that it regarded as small (those with a GVWR less than 10,000 lbs.) and trailers that it classified as medium (those with a GVWR from 10,000 lbs. to and including 26,000 lbs.). NATM claimed that small and medium trailers "are rarely involved in a death or serious personal injury," because of their "much reduced exposure to over-the-road travel and its attendant hazards." It estimated that "the smaller trailer rarely logs more than 10,000 miles per year on the public highways." It also claimed that the costs of compliance with the comprehensive early warning reporting requirements would be excessive.

In support of its suggestion, on June 27, 2003, NATM submitted the result of a survey that it had conducted of its 154 "large-volume trailer manufacturers," *i.e.*, those that produce more than 500 trailers annually.[1] NATM had first asked "each member to provide the total numbers of fatalities and serious injuries occurring during the past ten (10) years in which its trailers have been involved." It next asked, "of these "trailer" accidents or incidents, how many prompted allegations of a manufacturing or design defect or a trailer malfunction causing the fatality or injury." Third, the survey asked "how many NHTSA recalls (responding to FMVSS violations or safety-related defects) each member initiated." Finally, "to add perspective to the data, the survey concludes by asking each responding manufacturer how many vehicles it manufactured each year during the past five (5) years."

NATM provided only a general summary of survey results, as opposed to copies of actual responses. NATM stated that it received 91 responses to its survey from the 154 inquiries sent. Thus, the survey results do present a complete representative picture of NATM's membership, much less the entire population of manufacturers of trailers with a GVWR less than or equal to 26,000 lbs.

The NATM survey indicated that, during the past five years, there were 14 safety recalls of trailers manufactured by these 91 respondents (2.8 per year). Yet, an ODI review of recalls during the period from calendar year 1995 through 2002 (described below) reveals that there were 80 safety recall campaigns conducted by such trailer manufacturers (10 recalls per year, or almost four times the rate reported by the NATM survey respondents). Moreover, NATM's survey was limited in scope to only questions on death and serious injuries, employed a definition of defect that is narrower than that in 49 U.S.C. § 30102, and failed to include other information required by subpart C of 49 CFR part 579, such as numbers of property damage claims, warranty claims, consumer complaints and field reports received by the manufacturer.

In response to NATM's petition for reconsideration, ODI conducted a review of safety-related recalls involving trailers initiated between calendar years 1995 and 2002 (excluding certain noncompliance recalls such as those involving labeling, since they are not relevant to the early warning reporting regulation). ODI divided the data into the categories of under 26,000 pounds GVWR and of 26,000 pounds GVWR and over. The results of this review have been placed in the Docket for this rulemaking proceeding.

Table 1 summarizes the results of ODI's review. It lists the trailer safety recalls by calendar years 1995 to 2002 by the numbers of recalls and numbers (population) of recalled trailers. More particularly, it first provides the number of recalls by trailer weight rating in two categories—under 26,000 pounds GVWR, and 26,000 pounds GVWR and over—and states the total. It then states the percentage of trailer recalls where the trailers weighed under 26,000 pounds GVWR or less for any given year. Next, it provides similar information in terms of the number of trailers recalled. Lastly, the table provides the number of ODI-influenced recalls (those where the recall was initiated after ODI began an investigation), divided into the categories of trailers under 26,000 pounds GVWR and 26,000 pounds GVWR and over.

TABLE 1.—TRAILER SAFETY RECALLS: 1995–2002

Year	# Recalls by trailer weight rating (in pounds)		Total recalls	% recalls gvwr<26k	Recall population by weight rating		Total recall population	ODI–influenced recalls	
	<26K	26K+			<26K	26K+		<26K	26K+
1995	8	7	15	53	47,494	9,291	56,785	3	0
1996	7	2	9	78	7,165	7,164	14,329	2	0
1997	6	3	9	67	3,236	2,542	5,778	2	0

[1] According to its website, *www.natm.com*, NATM has 339 members.

TABLE 1.—TRAILER SAFETY RECALLS: 1995–2002—Continued

Year	# Recalls by trailer weight rating (in pounds)		Total recalls	% recalls gvwr<26k	Recall population by weight rating		Total recall population	ODI–influenced recalls	
	<26K	26K+			<26K	26K+		<26K	26K+
1998	7	4	11	64	23,145	1,676	24,821	3	0
1999	12	4	16	75	86,918	215	87,133	4	2
2000	17	6	23	74	23,993	19,098	43,091	1	3
2001	12	7	19	63	24,437	2,454	26,891	2	1
2002	11	6	17	65	12,287	6,981	19,268	1	3
Total	80	39	119	67	228,675	49,421	278,096	18	9

As shown in the Table, during the past eight years, trailers with a GVWR of less than 26,000 pounds have accounted for, overall, 67 percent of the trailer safety recalls. Moreover, the trailers under 26,000 pounds accounted for approximately 82 percent of the total trailers recalled. Of the ODI influenced recalls, two-thirds of the recalls involved trailers of less than 26,000 pounds GVWR.

ODI also reviewed the potential risks to safety posed by the identified defects in the recalls reflected in Table 1. Many of these recalls were conducted to address significant safety risks. Examples of safety defects that have been found to exist in trailers with a GVWR equal to or below 26,000 pounds include brake failure, wheel separation, hitch/tongue separation, and fire hazard due to electrical short circuits or fuel leakage.

In addition, it is important to recognize that many trailers with a GVWR equal to or below 26,000 pounds are used extensively on the public roads. This category of trailer covers a wide range of designs, from recreational and part-time living quarters to freight and equipment hauling. Consequently, some applications may result in year-round highway use versus seasonal or recreational use, as suggested by NATM. In any event, it would not be practical to base the threshold for comprehensive reporting on the anticipated amount of on-road use of a vehicle, since this could vary widely within a given categories or types of vehicles.

Although NATM asserted in its petition that trailers with a GVWR equal to or below 26,000 pounds tend to be manufactured by entities that are small businesses, NATM did not advocate reducing the early warning reporting requirements that apply to its smaller members. Indeed, in a June 27, 2003 letter to the agency, NATM stated that, in its view, raising the threshold for comprehensive reporting to 2500 trailers per year would be worse than maintaining the status quo.

This position is apparently based on NATM's belief that "most trailer manufacturers producing more than 2500 trailers per year may have only minimal concerns about their [alleged] economic disadvantage (stemming from their early warning compliance obligations) competing against trailer manufacturers producing fewer than 500 units per year, but with no early warning reporting burdens," but would fear "far more serious competition from much stronger, more substantial, viable companies producing, for example, only 2400 trailers per year."

As described below, NATM has significantly exaggerated the costs of preparing for, and complying with, the early warning reporting requirements. A majority of the trailer manufacturers that have provided cost information to ODI stated that their anticipated compliance costs were well under $50,000. Other trailer manufacturers that did not provide a cost figure have stated that the annual compliance cost would be negligible. Moreover, the information provided by these trailer manufacturers confirm NHTSA's conclusion in the Final Regulatory Evaluation (FRE) that the major portion of the costs associated with early warning reporting involves setting up the manufacturer's reporting system, while the annual, recurring costs of compliance are low. Since the first quarterly reports were due on December 1, 2003, it is likely that most, if not all, manufacturers have already completed these initial preparations and have already incurred those set up costs. For these reasons, there is little likelihood that companies that are not required to provide comprehensive reports will have any significant competitive advantage over larger manufacturers.

4. Burden on Small Vehicle Manufacturers[2]

The TREAD Act provided for the promulgation of the early warning reporting regulation without reference to the size of manufacturers of motor vehicles under SBA definitions. *See* 49 U.S.C. § 30166(m). The Act directed the agency only not to impose requirements that are unduly burdensome to a manufacturer, taking into account cost and the agency's ability to use the information to assist in the identification of defects related to motor vehicle safety. *See* 49 U.S.C. 30166(m)(4)(D).

In the Final Regulatory Analysis (FRE) that accompanied the Final Rule, we stated that: "We estimate that there are 8 large manufacturers and hundreds of small businesses that manufacture trailers." For the eight "large" trailer manufacturers, NHTSA estimated that setting up a computer system to handle all this information would cost $200,000. For the others we assumed that they would have so few claims of fatalities, injuries and property damage, warranty claims, and field reports that they would not set up a computer system for reporting, but would review and process the claims manually as they came in. We estimated a $10,000 annual cost for these manufacturers.

NATM claims in its petition for reconsideration that "Industry estimates put the annual cost at $145,000 per company." This is unsubstantiated. The cost estimates in the FRE were based on estimates of the costs that were likely to be incurred by very large vehicle manufacturers. The amount of data likely to be received by trailer manufacturers, and particularly relatively small companies, will not require that level of expenditure.

[2] Additional points related to the burden imposed by the early warning reporting regulation on small manufacturers are set forth in the discussion of the regulation under the Regulatory Flexibility Act, which appears later in this document.

We continue to believe that the burden on relatively small manufacturers from early warning reporting will not be significant. Vehicle manufacturers that are subject to comprehensive reporting have to provide the numbers of property damage claims, consumer complaints, warranty claims, and field reports.[3] As explained in the Regulatory Flexibility Act statement below, it is unlikely that relatively small manufacturers will receive many of these items in any calendar quarter, and therefore they will not have to develop complex, computerized data systems. For example, ODI's docketed review of the number of consumer complaints received by trailer manufacturers whose products were the subject of defect investigations during the past nine years revealed that, with a few exceptions, the manufacturers had received fewer than five consumer complaints about the product under investigation. (And it is likely that there would be even fewer complaints about products that are not the subject of a defect investigation.) Moreover, as specified in Section 579.29(a), these manufacturers will be able to submit the small amount of relevant data that they compile as an attachment to an e-mail message. And, as explained below, all vehicle manufacturers are already required to retain the data in question for five years under NHTSA's recordkeeping regulations, 49 CFR part 576.

A number of trailer manufacturers, most of whom produce trailers with a GVWR of less than 26,000 pounds, have contacted the agency to inquire about the early warning reporting regulation. ODI has had discussions with many of these manufacturers about their experiences in preparing to comply with that regulation. In these discussions, ODI obtained information about the expenditures that they have incurred and expect to incur, both to set up their reporting systems and to provide information in the future. (We believe that it is reasonable to assume that the information provided would also be applicable to manufacturers of vehicles other than trailers.)

ODI discussed these issues with 31 trailer manufacturers, with annual production ranging from 674 to over 30,000 vehicles. ODI made no attempt to verify the responses or to obtain details about the precise expenditures made and/or anticipated. A summary of the responses has been placed in the Docket for this rulemaking proceeding, with the names of the specific manufacturers deleted to maintain confidentiality.

ODI asked whether the manufacturers were confident about their ability to comply with the early warning reporting regulation. The overwhelming majority of manufacturers were confident and did not anticipate any problems in complying. Of the few that were not, the chief concerns involved computer upgrades, software, data retention, or personnel resources.

ODI also asked the manufacturers whether they had experienced any problems in preparing for compliance with the early warning reporting regulation. About one third stated that they had not had any problems and that they have the necessary mechanisms set up for reporting. Another third stated that that they had experienced some difficulties in sorting or categorizing input data, converting their existing data system to report in accordance with the requirements of early warning reporting regulation, or capturing the historical data required by the rule. Only a very small percentage referred to a financial burden associated with the preparation for reporting.

Slightly over one third of the manufacturers informed ODI that they had not needed to make any significant investment in connection with the regulation. About a third reported that they hired or reassigned personnel to handle early warning reporting. Approximately one fourth of the manufacturers stated that they had to purchase computer hardware or software, or that they had hired a consulting service to assist them.

With respect to the estimated cost of preparing for compliance, about one fourth of the manufacturers described the cost as "minimal" and did not provide a dollar estimate; four others simply did not provide an estimate. Twenty-two manufacturers provided cost information in dollar figures. These estimates are set out in Table 2, Costs of Early Warning Reporting Start-Up. The estimates ranged from $0 to as high as $250,000. Of those estimating relatively high expenditures, most did not explain why the costs were so high or state whether those costs also addressed other issues. As we had anticipated, the larger companies generally had the highest average costs.

TABLE 2.—COSTS OF EARLY WARNING REPORTING START-UP

Annual production range	Number of respondents	Average expense	Median expense	Expense range	
				Low	High
500–2,500	9	$46,080	$125,000	$0	$250,000
2,501–5,000	6	41,202	100,000	0	200,000
5,001–10,000	4	126,250	132,500	15,000	250,000
10,001–20,000	1	15,000			
>20,000	2	142,500		100,000	185,000

With respect to the estimated cost of ongoing compliance, only twelve manufacturers provided a dollar figure. Ten others stated that they would have to incur the cost of adding one employee to handle early warning reporting, while six stated that costs of continued compliance would be "negligible" or they did not expect any additional costs.

Table 3, below, reflects the annual estimated compliance costs reported by those manufacturers that provided a dollar figure. Notably, there are very large differences in the anticipated costs reported by these manufacturers, and the differences are not explainable by the size of the companies.

[3] Regardless of the threshold, all vehicle manufacturers have to report incidents involving deaths based on claims and notices received by the company. *See* 49 CFR 579.27. The petitioners agree that their member companies will not receive many of these claims or notices, and therefore they will not have to report a large number of such incidents.

TABLE 3.—ANNUAL COMPLIANCE COST FOR MANUFACTURERS THAT REPORTED A DOLLAR FIGURE

Annual production range	Number of respondents	Average expense	Median expense	Expense range	
				Low	High
500–2,500	10	$15,244	$15,000	$0	$30,000
2,501–5,000	5	21,800	17,000	5,000	45,000
5,001–10,000	4	132,500	200,000	0	400,000
10,001–20,000	2	20,355		15,000	25,710
>20,000	2	95,000		90,000	100,000

To obtain additional information on the cost issue, ODI contacted a business that provides consultation services and computer software designed to assist vehicle and equipment manufacturers in preparing for and complying with the early warning reporting regulation. This company advised ODI that its fee for its consulting services (including on-site visits) is a minimum of $10,000, up to a maximum of $50,000 for six weeks of consultation. The software offered costs $16,000 or more, depending upon the amount and complexity of reporting to be performed by the vehicle manufacturer. According to this company, the annual cost for maintaining the software, including updates, is $3,000.

For the reasons set forth above, as well as those set forth in the Regulatory Flexibility Act Statement below, at this time we are denying the petitions requesting us to raise the reporting threshold, and to exempt all manufacturers of trailers of 26,000 pounds GVWR or less from comprehensive reporting. However, as we stated in the Final Rule, 67 FR 45822, 45867 and 45870 (July 10, 2002), and consistent with 49 U.S.C. 30166(m)(5), we will conduct a review to determine whether it would be appropriate to make changes to the early warning reporting regulation, including possible changes to the reporting threshold. We expect to complete this review by the end of 2005. If we find that the information submitted by relatively small vehicle manufacturers does not help in the prompt identification of safety defects, we will commence a rulemaking proceeding to adjust the reporting requirements appropriately.

III. Rulemaking Analyses

Regulatory Policies and Procedures. We previously considered the impact of this rulemaking under E.O. 12866 and the Department of Transportation's regulatory policies and procedures in the Final Rule. 67 FR 45870 (July 10, 2002). We incorporate our previous statements by reference.

Regulatory Flexibility Act. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant impact on a substantial number of small entities.

In the TREAD Act, Congress directed NHTSA to adopt regulations that impose early warning reporting obligations on manufacturers of motor vehicles and motor vehicle equipment. 49 U.S.C. 30166(m). Congress included a provision directing the agency not to impose requirements that are "unduly burdensome * * * taking into account the manufacturer's cost of complying with such requirements and [NHTSA's] ability to use the information sought in a meaningful manner to assist in the identification of defects related to motor vehicle safety." 49 U.S.C. 30166(m)(4)(D). In proposing and adopting the EWR regulation, NHTSA considered this provision, as well as other Federal laws and policies (including the RFA) that generally seek to minimize or reduce the impact of regulations on small businesses.

NHTSA addressed the RFA at the time it issued the EWR NPRM, and the agency issued a certification statement of no significant impact at that time. 66 FR 66190 at 66216–66217 (December 21, 2001). No one submitted any responsive comments. The agency published another RFA certification statement with the Final Rule. 67 FR 45822 at 45870–45871 (July 10, 2002). After considering the information and arguments related to small business impacts that were submitted with the petitions for reconsideration, we are supplementing that statement in this document.[4]

[4] Additional issues related to the impact of the EWR regulation on small businesses are discussed in Section II.4 of this notice, which is incorporated by reference in this RFA statement.

As explained earlier in this notice, the EWR regulation establishes different reporting requirements for manufacturers, depending upon the type of product produced and, for vehicle manufacturers, the number of vehicles produced annually. Manufacturers of tires and child restraint systems (CRS) and vehicle manufacturers that produce 500 or more vehicles per year of one of four categories of vehicles (light vehicles, medium-heavy vehicles and buses, motorcycles, and trailers) must provide comprehensive quarterly reports to NHTSA. In general, such comprehensive reports must include information on deaths and injuries based on claims and notices about incidents involving the manufacturer's products, and the numbers of property damage claims, consumer complaints, warranty claims, and field reports received by the manufacturer. For field reports other than those from dealers, a copy of the field report must also be submitted. All other manufacturers of equipment, and manufacturers that produce fewer than 500 vehicles per year of each category, need only report a very limited amount of information; *i.e.*, information regarding claims and notices of death received by the manufacturer involving its products.

Business entities are defined as small by standard industry classification for the purposes of receiving Small Business Administration (SBA) assistance. One criterion for determining size, as stated in 13 CFR 121.201, is the number of employees in the firm. For establishments primarily engaged in manufacturing or assembling automobiles, light and heavy duty trucks, buses, motor homes, new tires, or motor vehicle body manufacturing, the firm must have less than 1,000 employees to be classified as a small business. For establishments manufacturing truck trailers, motorcycles, child restraint systems, lighting, motor vehicle seating and interior trim packages, or re-tread tires, the firm must have less than 500 employees to be classified as a small business. That 500-employee limit also

applies to vehicle alterers and second-stage vehicle manufacturers. For establishments manufacturing many other equipment items, the firm must have less than 750 employees to be classified as a small business.

The EWR regulation will have some cost impact on both large and small manufacturers throughout the motor vehicle and motor vehicle equipment industry. With respect to equipment manufacturers, we believe that there are many thousands of manufacturers of original equipment and of replacement equipment (other than tires and CRS), most of which are small businesses. However, as noted above, we decided not to require such equipment manufacturers to submit comprehensive EWR information.

We believe that there are few, if any, manufacturers of CRSs that are small businesses. While there are some tire manufacturers that are small businesses, it is likely that they will not have to report comprehensive EWR information about their products, since the agency included a provision under which such reporting is not required for "each group of tires with the same SKU [stock keeping unit], plant where manufactured, and year for which the volume produced or imported is less than 15,000, or are deep tread, winter-type snow tires, space-saver or temporary use spare tires, tires with nominal rim diameters of 12 inches or less, or are not passenger car tires, light truck tires, or motorcycle tires." See the introductory paragraph to 49 CFR 579.26, as amended at 68 FR 35132 (June 11, 2003).

Most vehicles are manufactured by large businesses; however, many vehicle manufacturers are small businesses under the SBA guidelines. While those guidelines refer to the number of employees and the EWR regulation differentiates in terms of vehicle production, it is reasonable to assume that the number of employees of a company is related to the number of vehicles produced by that company.

With respect to trailer manufacturers, their production ranges from under 500 to over 50,000 units per year. In the Preliminary Regulation Evaluation (PRE)[5] for the EWR regulation, we estimated that there were eight large trailer manufacturers and hundreds of small trailer manufacturers of trailers. (We did not attempt to divide this group by the size of the trailers manufactured by the company.) We received no comments in response to that estimate, and we retained it in the Final Regulatory Evaluation (FRE).[6]

Following receipt of the petitions for reconsideration, we have reexamined the trailer manufacturing industry. Among other things, we reviewed the North American Industry Classification System (NAICS) maintained by the SBA, which indicates that, in 2000, there were slightly over one thousand manufacturers of truck trailers and travel/camper trailers that are considered small businesses (*i.e.*, that have fewer than 500 employees). *See http://www.sba.gov/advo/stats/us00_n6.pdf.* However, the NAICS does not indicate which of these manufacturers produce 500 or more vehicles per year. NATM, which submitted one of the petitions for reconsideration of the EWR regulation, stated that 154 of its members manufacture over 500 trailers per year, and 148 of those members employ less than 500 employees.[7]

In order to estimate the percentage of vehicle manufacturers that will be required to submit comprehensive EWR reports (*i.e.*, those that produce 500 or more vehicles per year), we examined World Manufacturer Identifier (WMI) data.[8] The WMI is included in the Vehicle Identification Number (VIN), which is required on all vehicles. *See* 49 CFR part 565. From its WMI, it is possible to determine whether a given manufacturer produces fewer than 500 vehicles per year.[9] It is likely that virtually all of those manufacturers are small businesses as defined in the SBA regulations.

There are approximately 23,500 WMI codes assigned to manufacturers for vehicles intended for sale in the United States. This number likely overstates the number of current manufacturers, since a WMI code is assigned for 30 years, and some of the manufacturers that have been assigned WMI codes may no longer be in business.[10] However, the WMI data allow us to estimate the proportion of manufacturers that produce 500 or more vehicles per year.

Of those 23,500 codes, approximately 17,700 (75 percent) are assigned to manufacturers that produce fewer than 500 vehicles per year. By examining the VINs, we were able to ascertain the vehicle category for approximately 15,000 of those 17,700 small manufacturers.[11] Of those, 84 percent (about 12,800) were trailer manufacturers, 8 percent were medium/heavy truck and bus manufacturers, 5 percent were motorcycle manufacturers, and 3 percent were light vehicle manufacturers.

The remaining 5800 WMI codes were assigned to manufacturers of 500 or more vehicles per year. Of the approximately 3400 manufacturers for which the vehicle category could be determined, approximately 64 percent (almost 2,200) were trailer manufacturers, 9 percent were medium/heavy truck and bus manufacturers, 10 percent were motorcycle manufacturers, and 16 percent were light vehicle manufacturers.

We do not have data that would enable us to identify how many manufacturers of 500 or more vehicles per year employ over 500 (or 1000) employees. However, it is reasonable to assume that there are at least several hundred (and perhaps more) manufacturers of 500 or more vehicles per year that would be considered small businesses under the SBA criterion, while there are thousands of small businesses that manufacture fewer than 500 vehicles per year. The vast majority of the latter group are trailer manufacturers.

We previously considered the economic impacts of early warning reporting on manufacturers that are small entities in the context of 49 U.S.C. 30166(m)(4)(D) and the RFA. As noted earlier, in the NPRM, we asked interested persons to submit information on estimated costs of compliance. Although we received responses on behalf of large vehicle manufacturers, we did not receive any usable information with respect to the cost impacts on small businesses.

[5] Docket NHTSA–2001–8677–64. Available at *http://dmses.dot.gov/docimages/pdf75/145583_web.pdf.*

[6] Docket NHTSA–2001–8677–470. Available at *http://dmses.dot.gov/docimages/pdf82/178899_web.pdf.*

[7] NATM's Web site states that the association has 339 members. Thus, somewhat over half of its members are not subject to the comprehensive EWR reporting requirements.

[8] The agency's analysis of the WMI data is described in more detail in a memorandum submitted to the docket for this proceeding. A table listing all WMIs is publicly available through the NHTSA Web site. The table can be viewed on the Internet as follows:

1. Enter the address "*ftp://ftp.nhtsa.dot.gov/Manufacture.*"

2. Open the MS Access database titled "Manufacturer.mdb."

3. Open the table titled "WMI."

[9] Such manufacturers have a "9" in the third position of the WMI code and a specific numeric code in the 12th, 13th, and 14th position of the VIN.

[10] In addition, while the vast majority of manufacturers have only a single WMI, a few manufacturers have more than one (*e.g.*, a large U.S. manufacturer with production facilities worldwide may utilize several WMI codes for the same make and model of vehicle that is produced in different countries). Also, foreign manufacturers may register for a WMI for use in the United States, but then decide not to sell any vehicles in this country.

[11] In the other cases, the information was either not provided, vague, or in a foreign language.

It is clear that the limited reporting required of equipment manufacturers (other than manufacturers of tires and CRSs) and of those small vehicle manufacturers that produce fewer than 500 vehicles per year would impose at most a negligible economic burden, and in most cases absolutely no burden at all. These manufacturers need only report information about claims and notices they receive that involve deaths allegedly associated with their products. *See* 49 CFR 579.27. Most of these manufacturers will never receive such a claim or notice, and therefore they would not need to submit anything to the agency under the regulation. And, in those rare instances where such a manufacturer does receive such a claim or notice, it can provide the required information to NHTSA by filling out a simple form that can be found on the NHTSA Internet Web site. *See* 49 CFR 579.28(a)(2).

As we explained above, this group contains approximately 75 percent of all vehicle manufacturers (based on an analysis of the WMI codes) and all of the many thousands of equipment manufacturers, many of which are small businesses under the SBA criterion. Thus, it is likely that well over 80 percent of all the manufacturers in the motor vehicle industry, and probably well over 90 percent of the small businesses in that industry, will have a negligible reporting burden.

Vehicle manufacturers that must report comprehensive EWR information (*see* 49 CFR 579.21–24) will have a reporting burden that is larger than the burden on those manufacturers that only report information about incidents involving deaths under Section 579.27. However, as explained below, we continue to believe the regulation will not impose a significant burden on a substantial number of small entities.

As we first pointed out in the preamble to the Final Rule (67 FR at 45870), the costs of reporting are directly related to the volume of reportable communications submitted to a given manufacturer. After explaining that the regulation does not require manufacturers to undertake new collections of information, we concluded that the total number of reportable communications to relatively small manufacturers would probably be low enough that the company would not have to invest in a new computer system. *Id.*[12]

Unlike the large manufacturers, small vehicle manufacturers are unlikely to prepare any field reports, as that term is defined in the EWR regulation, since they generally do not maintain an engineering staff or an extensive dealer network. And, as noted above, the vast majority are unlikely to receive any claims or notices of deaths or injuries and will receive few (if any) property damage claims.

It is likely that small vehicle manufacturers will receive some warranty claims and, to a lesser extent, consumer complaints. In an effort to estimate the number of consumer complaints that are likely to be received by relatively small manufacturers, NHTSA's Office of Defects Investigation (ODI) reviewed data compiled during its investigations of alleged defects in trailers during the past nine years.[13] A total of 18 defect investigations were opened on trailers of all sizes from 1995 through 2003, and ODI received information about the number of consumer complaints submitted to the manufacturer about the alleged defect in 14 of those investigations. The overall average number of such complaints in those 14 investigations was 26; however, 3 of the investigations had significantly larger number of complaints than all the rest. The average number of consumer complaints in the 11 other investigations was 2. Considering the number of affected models and model years involved, there was an average of approximately one consumer complaint per model and model year of production in these investigations. The overall average number of vehicles involved in those 14 investigations was 40,000. However, there were 4 outlying populations—two large (398,918 and 85,361) and two small (8 and 133)—which skew the data. Absent these 4 unrepresentative investigations, the average vehicle production was 8,000.

These data from ODI investigative files likely overstate the average number of such items received by trailer manufacturers in general, since ODI would not have opened an investigation unless there was reason to believe that there was a possible defect in the vehicle in question. Thus, it is likely that vehicles that are not the subject of a defect investigation would be the subject of fewer, if any, warranty claims and consumer complaints than vehicles that are the subject of an ODI investigation.[14]

It is important to recognize that the burden of maintaining and retaining information about warranty claims and consumer complaints is not attributable to the EWR regulation. Pursuant to NHTSA's recordkeeping regulations, set out at 49 CFR part 576, all vehicle manufacturers (small as well as large) have long been required to maintain all records "that contain information concerning malfunctions that may be related to motor vehicle safety," including "work performed under warranties," for a period of five calendar years. *See* 49 CFR 576.5(a) and 576.6.[15] The only additional burden added by the EWR regulation is to sort this information into specified systems and components,[16] prepare the data in a specified format, and submit it to NHTSA electronically four times per year. Those additional steps do not impose a significant burden on these manufacturers.

As discussed above in this notice, during the summer of 2003, ODI received information from a number of trailer manufacturers about the anticipated burdens of compliance with the EWR regulation. Almost all of the companies indicated that they had not had, and did not foresee, any significant difficulties in complying. Although the anticipated costs varied widely, depending in part upon the size of the

[12] In the PRE and in the FRE, we provided estimates of the numbers of reportable communications and costs. However, because we did not have much information about relatively small companies, most of this analysis was based on information provided by the Alliance of Automobile Manufacturers (Alliance), which represents most of the largest light vehicle manufacturers. It is evident that the number of items to be reported by the members of the Alliance will far exceed the numbers to be reported by small manufacturers, as will the costs of such reporting.

[13] We limited this inquiry to trailer investigations because, as shown above, most trailer manufacturers are small businesses, and it is difficult to identify which manufacturers of other categories of vehicles are small businesses. We limited the inquiry to consumer complaints because we did not have relevant warranty data for most of those investigations. More details about this analysis are included in a memorandum that we have placed in the docket for this rulemaking.

[14] We recognize that if there were an emerging problem in a vehicle model that led to an increase in the number of death and injury incidents and/or the amount of other reportable data, it could increase the costs of EWR reporting. However, any such deviation from the normal, expected number of problems is exactly the sort of information that NHTSA needs to promptly identify potential safety defects, which is consistent with the Congressional direction in 49 U.S.C. § 30166(m)(4)(D) to weigh reporting burdens against the need to obtain relevant information about safety defects.

[15] Companies also maintain warranty data for their own business purposes. First, the cost of repairing products under warranty can be deducted from income, assuming proper records are kept. Moreover, companies generally want to identify problems that lead to warranty repairs as soon as possible, so they can correct those problems prospectively in new production and thereby minimize future warranty costs. Unless they keep warranty data, they cannot identify any problem trends. Similarly, consumer complaints can also indicate product problems that companies will want to address.

[16] There are 14 such groupings for trailers (*see* 49 CFR 579.24(b)(2)) and several additional categories for other types of vehicles that contain engines (*see* paragraph (b)(2) of 49 CFR 579.21 through 579.23).

manufacturer, estimated average start-up costs ranged from $15,000 to $142,500, and estimated average annual compliance costs ranged from $15,244 to $132,000.

In a separate effort to obtain cost information, ODI contacted a business that provides consultation services and computer software that is designed to assist vehicle and equipment manufacturers in preparing for and complying with the EWR regulation. As discussed above, this company advised ODI that its fee for these services would vary, depending on the amount and complexity of reporting to be performed by the manufacturer.

For the reasons stated above, including the matters discussed in Section II.4 of this notice, and based on the best information available to the agency at this time, I certify that maintaining the existing 500-vehicle threshold for comprehensive early warning reporting will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism). We previously considered Executive Order 13132 in the Final Rule. 67 FR 45871 (July 10, 2002). We incorporate our previous statements by reference.

Civil Justice Reform. This notice makes no changes to the current early warning reporting regulation, nor will it have a retroactive or preemptive effect, and judicial review of it may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

Paperwork Reduction Act. We received Paperwork Reduction Act clearance from OMB on December 20, 2002, which will expire on December 31, 2005. The clearance number is 2127–0616. This notice does not make any substantive amendments to the Final Rule, so the overall paperwork burden is not changed.

Data Quality Act. We previously considered the Data Quality Act in the Final Rule. 67 FR 45871–45872 (July 10, 2002). We incorporate our previous statements by reference.

Unfunded Mandates Reform Act. We previously considered the Unfunded Mandates Reform Act in the Final Rule. 67 FR 49263–49264 (July 30, 2002). We incorporate our previous statements by reference.

Issued on: January 16, 2004.

Jeffrey W. Runge,

Administrator.

[FR Doc. 04–1469 Filed 1–22–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 040113012–4012–01; I.D. 121903D]

RIN 0648–AR62

50 CFR Part 648

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; Framework Adjustment 4

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes measures contained in Framework Adjustment 4 (Framework 4) to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) that would allow for the transfer at sea of scup between commercial fishing vessels, and clarify the circumstances under which a vessel must operate with the specified mesh. Regulations regarding the establishment and administration of research set-aside (RSA) quota would also be amended to clarify how unused RSA quota is to be returned to the fishery.

DATES: Comments on this proposed rule must be received by February 9, 2004.

ADDRESSES: Copies of the Framework 4 document, its Regulatory Impact Review (RIR), the Initial Regulatory Flexibility Analysis (IRFA), the Environmental Assessment (EA), and other supporting documents for the framework adjustment are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901–6790. The EA/RIR/IRFA is also accessible via the Internet at *http:/www.nero.nmfs.gov.* Written comments on the proposed rule should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on Framework 4 (Scup)." Comments may also be sent via facsimile (fax) to (978) 281–9135. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Paul Perra, Fishery Policy Analyst, (978) 281–9153, fax (978) 281–9135, e-mail paul.perra@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Atlantic States Marine Fisheries Commission (Commission) and the Mid-Atlantic Fishery Management Council (Council), in consultation with the New England and South Atlantic Fishery Management Councils. The management unit for scup (Stenotomus chrysops), specified in the FMP, is defined as U.S. waters of the Atlantic Ocean from 35°13.3′ N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, NC) northward to the U.S./Canada border. The FMP and its implementing regulations at 50 CFR part 648, subparts A (general provisions), and H (scup) describe the process for specifying commercial scup measures that apply in the Exclusive Economic Zone (EEZ). The states manage these fisheries within 3 nautical miles of their coasts, under the Commission's Interstate Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan. The Federal regulations govern vessels fishing in the EEZ, as well as vessels possessing a Federal fisheries permit, regardless of where they fish.

The Council initiated Framework 4, pursuant to § 648.127(a), to reduce regulatory discards of scup that can occur when vessels catch large amounts of scup, which would exceed their trip limits, and must discard them. The majority of these discarded scup would die, and thus be counted as fishing mortality, rather than landings that would be counted under the quota. Framework 4 would allow the commercial scup fishery to be more efficient and to better achieve the management objectives of the FMP, specifically regarding attainment of optimum yield from the scup fishery.

The commercial scup fishery is managed under a system that allocates the annual quota to three periods: Winter I, January-April (45.11 percent); Summer, May-October (38.95 percent); and Winter II, November-December (15.94 percent). During the Winter periods, the quota is monitored on a coastwide basis. During the Summer period, the quota is also monitored on a coastwide basis, but the Commission uses a state-by-state allocation system to help manage the Federal quota. The Federal commercial scup fishery is closed coastwide when the allocation for a period is reached. In addition, any overages during a quota period are subtracted from that period's allocation for the following year. Any quota overages by a state during the Summer period (whether or not the total Summer period quota is exceeded) are subtracted

by the Commission from that state's Summer period share the following year. Also, the regulations allow for the rollover of unused quota from the Winter I period to the Winter II period within a fishing year (68 FR 62250, November 3, 2003). The final rule to implement the 2003 annual quota specifications (68 FR 60, January 2, 2003) established possession limits of 15,000 lb (6,804 kg) per trip during Winter I and 1,500 lb (680 kg) during Winter II, and specified that the Winter I possession limit be reduced to 1,000 lb (454 kg) per trip when 80 percent of the commercial quota allocated to that period is projected to be harvested.

Framework 4 proposes to allow the transfer at sea of scup between commercial fishing vessels, subject to certain requirements, to improve the enforceability of the transfers and to ensure that they are used to respond to occasional unanticipated catches, rather than targeted fishing. Any amount of scup less than the possession limit could be transferred between two vessels, given the following conditions: Transfers could only occur between vessels with Federal scup permits; transfers could only occur seaward of a boundary line that is roughly 20 nm from shore; the donating and receiving vessels must possess gear that meets the regulatory requirements at § 648.123(a)(2), (3), and (4) for commercial scup fishing gear; transfers could occur in the Winter I or Winter II periods only; only one transfer would be allowed per fishing trip for the donor vessel; after the donor vessel removes only enough scup to attain the scup possession limit, the transfer would include the entire codend; only scup and its normal bycatch could be transferred; only scup could be retained by the receiving vessel; while fishing for scup, all other nets must be stored below deck; and the donating and receiving vessels would report the transfer amount on the vessel trip report for each vessel.

Framework 4 was initiated to address discard issues, because otter trawl vessels targeting scup occasionally make very large hauls consisting almost entirely of scup, which can easily exceed the scup possession limit. Currently, when one of these large hauls occurs, most scup in the net are dead, and all scup in excess of the possession limit must be discarded. Under Framework 4, the contents of a large scup haul could be transferred to another federally permitted scup vessel under prescribed circumstances. This would convert regulatory discards of scup into landings, thus reducing bycatch and improving the efficiency of the commercial scup fishery. Both the donor and receiver vessels could benefit financially. The donor vessel could benefit by selling fish that would otherwise be discarded, and the receiver vessel could benefit from obtaining fish while using less resources than under a typical fishing operation. It is possible that allowing the transfer of scup at sea could result in an earlier closure of the fishery because of higher scup retained catch rates. However, discard rates of scup are expected to be less during a scup fishery closure, because vessels would not be directing on scup. Thus, the proposed measures would serve to minimize bycatch and improve efficiency in fleet operations.

It is the Council's intention that the framework adjustment apply only to the scup otter trawl fishery, and that the transfer of scup at sea would occur only under safe weather and sea conditions, as determined by the participants in any such transfer.

NMFS proposes to implement the conditions on the transfer of scup at sea that the Council included in Framework 4, as summarized in this preamble. In addition, NMFS has defined a boundary beyond which transfers of scup may occur. This boundary is intended to improve enforceability of these regulations and to restrict transfers at sea to vessels already on the fishing grounds. The proposed boundary line begins at 40°50′ N. lat., 70°00′ W. long., and runs south to connect the points at 40°15′ N. lat., 73°30′ W. long.; 37°50′ N. lat., 75°00′ W. long; and 35°30′ N. lat., 75°00′ W. long. Further, NMFS proposes to modify the Council's recommendations that the transfer include the entire codend, and that only scup and its normal bycatch could be transferred by requiring that the donor vessel may only remove enough scup from the net to attain the scup possession limit for the donor vessel, and that, after removal of scup from the net by the donor vessel, only the entire codend, with all its contents, could be transferred to the receiving vessel. This is intended to allow for retention of scup by the donor vessel up to its possession limit, and to improve at-sea enforcement of the proposed measures.

Need for Correction/Clarification

NMFS also proposes to clarify the circumstances under which a vessel must operate consistent with the specified mesh size restrictions for otter trawl vessels that possess scup. This proposed rule would modify current regulations to indicate that no owner or operator of an otter trawl vessel that is issued a scup moratorium permit may possess 500 lb (226.8 kg) or more of scup from November 1 through April 30, or 100 lb (45.4.kg) or more of scup from May 1 through October 31, unless fishing with nets that have a minimum mesh size of 4.5–inch (11.4–cm) diamond mesh for no more than 25 continuous meshes forward of the terminus of the codend, and with at least 100 continuous meshes of 5.0–inch (12.7–cm) mesh forward of the 4.5–inch (11.4–cm) mesh, and all other nets are stored in accordance with § 648.23(b). For trawl nets with codends (including an extension) less than 125 meshes, the entire trawl net must have a minimum mesh size of 4.5 inches (11.4–cm) throughout the net. Scup on board these vessels would be required to be stored separately and kept readily available for inspection.

Also, current regulations state that unused RSA quota from disapproved RSA proposals may be reallocated to the respective commercial and recreational fisheries by the Regional Administrator, but the regulations are silent regarding the reallocation of RSA quota from approved but discontinued projects. Framework 1 to the FMP states that, in the event approved proposals do not make use of any or all of the set-aside quota for a particular species, the Regional Administrator would be authorized to restore the unutilized portion to its respective commercial and recreational fisheries. In order to clarify the circumstances under which the Regional Administrator shall reallocate unutilized RSA quota, NMFS proposes a change to the RSA provisions which appear in the Atlantic mackerel, squid, and butterfish regulations. Therefore, this proposed rule would modify current regulations to indicate that, if a RSA proposal is disapproved, or if the Regional Administrator determines that the allocated RSA quota cannot be utilized by a project, the Regional Administrator shall reallocate the unused amount of RSA quota to the respective commercial and recreational fisheries by notice in the **Federal Register**, provided that the reallocation of the unused amount of RSA quota is in accord with National Standard 1, and must be available for harvest before the end of the fishing year in which the initial RSA allocation was made. Any reallocation of unused RSA quota would be consistent with the proportional division of quota between the commercial and recreational fisheries in the relevant FMP, and allocated to the remaining quota periods for the fishing year, proportionally. The intent is to ensure that unused quota be returned to the fishery, if possible.

Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An IRFA was prepared that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the reasons why this action is being considered, and the objectives of and legal basis for this action are contained at the beginning of this preamble. The preamble to this proposed rule also includes complete descriptions of the proposed and no action alternatives discussed here. There are no new recordkeeping or reporting requirements proposed in this rule. There are no relevant Federal rules that duplicate, overlap, or conflict with this proposed rule. All vessels that would be impacted by this proposed rulemaking are considered to be small entities; therefore, there would be no disproportionate impacts between large and small entities. A summary of the analysis follows:

The purpose of this framework is to reduce discards and improve efficiency in the scup fishery by allowing for the transfer at sea of scup between commercial fishing vessels, and clarifying the circumstances under which a vessel must operate with the specified mesh. Alternative 1 (No Action) would not affect the manner in which the commercial fishery operates or the quantity of scup landed in the commercial sector. The Preferred Alternative would allow for the transfer of scup at sea; both the donor and receiver vessels may benefit economically. The owner of the donor vessel may benefit by selling fish that would otherwise be discarded to the owner of the receiving vessel and the owner of the receiving vessel may benefit from acquiring fish obtained from fishing activity of another vessel, thus requiring less resources (e.g., less fuel and wear and tear on the net) than under a typical fishing operation. It is possible that allowing the transfer of scup at sea could result in the scup fishery being closed earlier because of higher retained catch rates. This would depend on the number of vessels that have large scup catches, and the opportunity to conduct transfers. If a scup period were to close sooner under the Preferred Alternative, the level of discards during a longer closure may not offset the saving of discards realized through the ability to transfer. However, scup discards are expected to be lower during a closure of the directed scup fishery, because vessels will not be directing on scup. Also, it is reasonable to expect that the ability to transfer scup would be limited to a somewhat narrow window of time and would depend on the proximity of a nearby, permitted scup vessel, and how quickly that vessels could retrieve the codend of the donor vessel. Large catches of scup in the net die quickly and may sink to a point where they are irretrievable or, if held in the codend on board the donor vessel for too long, they spoil and become unmarketable. A longer closure may also have adverse economic impacts if affected fishermen do not have suitable alternative opportunities. However, since there are no data available to determine accurately how many vessels would participate in the transfer of scup at sea and how much scup would be transferred at sea under this alternative, the full impact of this alternative on early closures cannot be fully assessed.

The Council's recommendation on this action was predicated upon the need to make a decision to either allow at-sea transfers of scup to reduce regulatory discards (the preferred alternative), or to maintain the current prohibition on at-sea transfers (the no action alternative). Other alternatives to address the larger issues of regulatory discards and/or economic efficiency of the fleet were not considered to be within the scope of this action (which is a Framework Adjustment and therefore of limited scope). The Council did identify and discuss additional options to be part of the preferred alternative, but these were determined to be either unenforceable (e.g., allowing transfers of scup in excess of the possession limit to occur off the fishing grounds), cost prohibitive (e.g., requiring vessels to obtain a vessel monitoring system prior to participating), or not practicable (e.g., requiring participating vessels to contact NMFS personnel prior to conducting an at-sea transfer).

List of Subjects in 50 CFR Part 648

Fishing, Fisheries, Reporting and recordkeeping requirements.

Dated: January 16, 2004.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.6, paragraph (a)(1) is revised by adding a new final sentence to read as follows:

§ 648.6 Dealer/processor permits.

(a) General. (1) * * * Persons aboard vessels receiving transfers of scup at sea from other vessels are deemed not to be dealers, and are not required to possess a valid dealer permit under this section, for purposes of receiving scup, provided the vessel complies with § 648.13(2).

* * * * *

3. In § 648.13, paragraph (i) is added to read as follows:

§ 648.13 Transfers at sea.

* * * * *

(i) *Scup.* (1) Except as provided in paragraph (i)(2) of this section, all persons or vessels issued a Federal scup permit are prohibited from transferring, or attempting to transfer, at sea any scup to any vessel, and all persons or vessels are prohibited from transferring, or attempting to transfer, at sea to any vessel any scup while in the EEZ, or any scup taken in or from the EEZ portion of the Scup Management Unit.

(2) The owner or operator of a vessel issued a Federal scup permit under § 648.4(a)(6)(i)(A) may transfer at sea scup taken in or from the EEZ portion of the Scup Management Unit, provided:

(i) The transfer occurs between vessels with Federal scup permits;

(ii) The transfer occurs seaward of a boundary line that begins at 40°50′ N. lat., 70°00′ W. long., and runs south to connect points at 40°15′ N. lat., 73°30′ W. long.; 37°50′ N. lat., 75°00′ W. long.; and 35°30′ N. lat., 75°00′ W. long.;

(iii) The donating and receiving vessels possess gear that meets the requirements at § 648.123(a)(2), (3), and (4) for commercial scup fishing gear;

(iv) The transfer occurs in the Winter I or Winter II periods of the scup fishing year;

(v) There is only one transfer per fishing trip for the donor vessel;

(vi) The donor vessel removes only enough scup from the net to attain the scup possession limit;

(vii) After removal of scup from the net by the donor vessel, only the entire codend, with all its contents, is transferred to the receiving vessel;

(viii) Only scup are retained by the receiving vessel;

(ix) While fishing for scup, all other nets are stored in accordance with § 648.23(b)(1); and

(x) The donating and receiving vessels report the transfer amount on the vessel trip report for each vessel.

4. In § 648.14, new paragraph (k)(13) is added to read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(13) Transfer scup at sea, except pursuant to provisions of § 648.13(i).

* * * * *

5. In § 648.21, paragraph (g)(5) is revised to read as follows:

§ 648.21 Procedures for determining initial annual amounts.

* * * * *

(g) * * *

(5) If a proposal is disapproved by the Regional Administrator or the NOAA Grants Office, or if the Regional Administrator determines that the allocated research quota cannot be utilized by a project, the Regional Administrator shall reallocate the disapproved or unused amount of research quota to the respective commercial and recreational fisheries by notice in the **Federal Register**, provided:

(i) The reallocation of the disapproved or unused amount of research quota is in accord with National Standard 1, and can be available for harvest before the end of the fishing year in which the initial allocation was made; and

(ii) Any reallocation of unused research quota shall be consistent with the proportional division of quota between the commercial and recreational fisheries in the relevant FMP and allocated to the remaining quota periods for the fishing year proportionally.

* * * * *

6. In § 648.123, paragraph (a)(1) is revised to read as follows:

§ 648.123 Gear restrictions.

(a) * * *

(1) *Minimum mesh size.* No owner or operator of an otter trawl vessel that is issued a scup moratorium permit may possess 500 lb (226.8 kg) or more of scup from November 1 through April 30, or 100 lb (45.4 kg) or more of scup from May 1 through October 31, unless fishing with nets that have a minimum mesh size of 4.5–inch (11.4–cm) diamond mesh for no more than 25 continuous meshes forward of the terminus of the codend, and with at least 100 continuous meshes of 5.0–inch (12.7–cm) mesh forward of the 4.5–inch (11.4–cm) mesh, and all other nets are stowed in accordance with § 648.23(b)(1). For trawl nets with codends (including an extension) less than 125 meshes, the entire trawl net must have a minimum mesh size of 4.5 inches (11.4 cm) throughout the net. Scup on board these vessels shall be stowed separately and kept readily available for inspection. Measurement of nets will be in conformity with § 648.80(f)(2)(ii).

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Notices

Federal Register
Vol. 69, No. 15
Friday, January 23, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability; Inviting Applications for Emerging Markets Program

Announcement Type: New.
Catalog of Federal Domestic Assistance (CFDA) Number: 10.603.

SUMMARY: The Commodity Credit Corporation (CCC) announces the availability of approximately $7 million in funding for the Emerging Markets Program (EMP) for fiscal year (FY) 2004. The intended effect of this notice is to solicit applications from the private sector and from government agencies for FY 2004 and awards funds in early July 2004. The EMP is administered by personnel of the Foreign Agricultural Service (FAS).

DATES: All proposals must be received by 5 p.m. eastern standard time, March 15, 2004. Applications received after this date will not be considered.

FOR FURTHER INFORMATION CONTACT: Entities wishing to apply for funding assistance should contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932 South, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *emo@fas.usda.gov*. Information is also available on the Foreign Agricultural Service Web site at *http://www.fas.usda.gov/mos/em-markets/em-markets/html*.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Authority: The EMP is authorized by section 1542(d)(1)(D) of the Food, Agriculture, Conservation and Trade Act of 1990, as amended.

Purpose: The EMP provides funding for technical assistance to assist U.S. organizations, public and private, to improve market access through genetic, rather than branded, activities that can develop and promote U.S. agricultural products and/or processes in low- to middle-income countries that offer promise of emerging market opportunities. Activities funded are those that primarily benefit U.S. industry as a whole.

All agricultural products, except tobacco, are eligible for consideration. Proposals which include multiple commodities are also eligible.

Only technical assistance activities are eligible for reimbursement. Following are examples of the types of activities that may be funded:

—Projects designed specifically to improve market access in emerging foreign markets. Examples: activities intended to mitigate the impact of sudden political events or economic and currency crises in order to maintain U.S. market share; responses to time-sensitive market opportunities;

—Marketing and distribution of value-added products, including new products or uses. Examples: food service development; market research on potential for consumer ready foods or new uses of a product;

—Studies of food distribution channels in emerging markets, including infrastructural impediments to U.S. exports; such studies should be specific in their focus and may include cross-commodity activities which address specific problems. Examples: grain storage handling and inventory systems development; distribution infrastructure development;

—Projects that specifically address various constraints to U.S. exports, including sanitary and phytosanitary issues and other non-tariff barriers. Examples: seminars on U.S. food safety standards and regulations; assessing and addressing pest and disease problems that inhibit U.S. exports;

—Assessments and follow up activities designed to improve country-wide food and business systems, to reduce trade barriers, to increase prospects for U.S. trade and investment in emerging markets, and to determine the potential use for general export credit guarantees for commodities and services. Examples: product needs assessments and market analysis; assessments to address infrastructural impediments;

—Projects that help foreign governments collect and use market information and develop free trade policies that benefit American exporters as well as the target country or countries. Examples: agricultural statistical analysis; development of market information systems; policy analysis; and,

—Short-term training in broad aspects of agriculture and agribusiness trade that will benefit U.S. exporters, including seminars and training at trade shows designed to expand the potential for U.S. agricultural exports by focusing on the trading system. Examples: retail training; marketing seminars; transportation seminars; training on opening new or expanding existing markets.

The program funds technical assistance activities on a project-by-project basis. EMP funds may not be used to support normal operating costs of individual organizations, nor as a source by which to recover pre-award costs or prior expenses from previous or ongoing projects. Ineligible activities include restaurant promotions; branded product promotions (including labeling and supplementing normal company sales activities intended to increase awareness and stimulate sales of branded products); advertising; administrative and operational expenses for trade shows; and the preparation and printing of brochures, flyers, posters, *etc.*, except in connection with specific technical assistance activities such as training seminars. Other items excluded from funding are contained in the 2004 Program Guidelines.

The Act defines an emerging market as any country that the Secretary of Agriculture determines:

(1) Is taking steps toward a market-oriented economy through the food, agriculture, or rural business sectors of the economy of the country; and

(2) Has the potential to provide a viable and significant market for United States agricultural commodities or products of United States agricultural commodities.

Because funds are limited and the range of potential emerging market countries is worldwide, proposals for technical assistance activities will be considered which target those countries with: (1) Per capita income less than

$9,206 (the current ceiling on upper middle income economies as determined by the World Bank [World Development Indicators]); and (2) population greater than 1 million. Proposals may address suitable regional groupings, *e.g.*, the islands of the Caribbean Basin.

II. Award Information

In general, all qualified proposals received before the application deadline will compete for EMP funding. Priority consideration will be given to proposals that identify and seek to address specific problems or constraints to agricultural exports in emerging markets through technical assistance activities that are intended to expand or maintain U.S. agricultural exports. Priority will also be given to those proposals that include the willingness of the applicant to commit its own funds, or those of the U.S. industry, to seek export opportunities in an emerging market. The percentage of private funding proposed for a project will, therefore,be a critical factor in determining which proposals are funded under the EMP. Proposals will also be judged on their ability to provide benefits to the organization receiving EMP funds and to the broader industry which that organization represents.

The limited funds and the range of emerging markets worldwide in which the funds may be used preclude CCC from approving large budgets for individual projects. While there is no minimum or maximum amount set for EMP-funded projects, most are funded at a level of less than $500,000 and for a duration of one year or less. Multi-year proposals may be considered in the context of a strategic detailed plan of implementation. Funding in such cases is normally provided one year at a time, with commitments beyond the first year subject to interim evaluations.

Funding for successful proposals will be provided through specific agreements. The CCC, through FAS, will be kept informed of the implementation of approved projects through the requirement to provide quarterly progress reports and final performance reports. Changes in the original project time lines and adjustments within project budgets beyond a certain amount must be approved by FAS. Details are available in the 2004 Program Guidelines.

III. Eligibility Information

1. *Eligible Applicants.* Any United States private or Government entity with a demonstrated role or interest in exports of U.S. agricultural commodities or products may apply to the program. Government organizations consist of Federal, State, and local agencies. Private organizations include non-profit trade associations, universities, agricultural cooperatives, state regional trade groups, and profit-making entities and consulting businesses.

Proposals from research and consulting organizations will be considered if they provide evidence of substantial participation by the U.S. industry. Individuals/consultants may not use program funds to conduct private business or to promote private self-interests.

U.S. market development cooperators and state regional trade groups (SRTGs) may seek funding to address priority, market specific issues and to undertake activities not suitable for funding under other marketing programs, *e.g.*, the Foreign Market Development Cooperator (Cooperator) Program and the Market Access Program (MAP). Foreign organizations, whether government or private, may participate as third parties in activities carried out by U.S. organizations, but are not eligible for funding assistance from the program.

2. *Cost Sharing.* No private sector proposal will be considered without the element of cost-share from the participant and/or U.S. partners. The EMP is intended to complement, not supplant, the efforts of the U.S. private sector. There is no minimum or maximum amount of cost share, though the range in recent successful proposals has been between 35 and 75 percent. The degree of commitment to a proposed project represented by the amount and type of private funding are both used in determining which proposals will be approved for funding. Cost-share may be actual cash invested or professional time of staff assigned to the project. Proposals in which private industry is willing to commit cash, rather than in-kind contributions such as staff resources, will be given priority consideration.

Cost-sharing is not required for proposals from U.S. Government agencies, but is mandatory for all other eligible entities, even when they may be party to a joint proposal with a U.S. Government agency.

Contributions from USDA or other U.S. Government agencies or programs may not be counted toward the stated cost share requirement. Similarly, contributions from foreign (non-U.S.) organizations may not be counted toward the cost share requirement, but may be counted in the total cost of the project.

3. *Other.* Proposals should include a justification for funding assistance from the program—an explanation as to what specifically could not be accomplished without federal funding assistance and why participating organization(s) are unlikely to carry out the project without such assistance.

Applicants may submit more than one proposal.

IV. Application and Submission Information

1. *Address to Request Application Package.* For 2004, EMP applicants have the opportunity to utilize the Unified Export Strategy (UES) application process, an online system which provides a means for interested applicants to submit a consolidated and strategically coordinated single proposal that incorporates funding requests for any or all of the market development programs administered by FAS. Applicants are not required to use the UES, but are strongly encouraged to do so because it reduces paperwork and expedites the FAS processing and review cycle.

Applicants planning to use the on-line system must contact the Marketing Operations Staff at (202) 720–4327 to obtain site access information including a user of id and password. The Internet-based application, including step-by-step instructions for its use, is located at the following URL address: *http://www.fas.usda.gov/cooperators.html.* A Help file is available to assist applicants with the process. Applicants using the online system must also provide, promptly after the deadline for submitting the on-line application, a printed or e-mailed version of each proposal (using Word or compatible format) to one of the following addresses:

Hand Delivery (including FedEx, DHL, UPS, *etc.*): U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, Room 4932-South, 1400 Independence Avenue, SW., Washington, DC 20250–1042.

U.S. Postal Delivery: U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042.

E-mail address: *emo@fas.usda.gov.*

Applicants electing not to use the online system must submit a printed copy of their application to one of the above addresses.

Applicants must obtain a Dun & Bradstreet (D–U–N–S) number for Federal contracting purposes prior to submitting applications. Information and numbers may be obtained by calling the toll number 1–866–705–5711.

2. *Content and Form of Application Submission.* It is highly recommended that any organization considering applying to the program first obtain a copy of the 2004 Program Guidelines. These guidelines contain information on requirements that a proposal must include in order to be considered for funding under the program, along with other important information. Requests for the 2004 Program Guidelines and additional information may be obtained from the Marketing Operations Staff at the address above. The guidelines are also available at the following URL address: *http://www.fas.usda.gov/mos/em-markets/em-markets.html.*

In addition, in accordance with the Office of Management and Budget's policy directive regarding the use of a universal identifier for all Federal grants or cooperative agreements, all applicants must submit a Dun and Bradstreet Data Universal Numbering System (DUNS) number. An applicant may request a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711.

Applications should be no longer than ten (10) pages and include the following information:

(a) Date of proposal;

(b) Name of organization submitting proposal;

(c) Organization address, telephone and fax numbers,

(d) Tax ID number

(e) DUNS number;

(f) Primary contact person;

(g) Full title of proposal;

(h) Target market(s);

(i) Current conditions in the target market(s) affecting the intended commodity or product;

(j) Description of problem(s), *i.e.,* constraint(s), to be addressed by the project, such as: Inadequate knowledge of the market, insufficient trade contacts, lack of awareness by foreign officials of U.S. products and business practices, impediments: Infrastructure, financing, regulatory or other non-tariff barriers, etc.;

(k) Project objectives;

(l) Performance measures: benchmarks for quantifying progress in meeting the objectives;

(m) Rationale: Explanation of the underlying reasons for the project proposal and its approach, the anticipated benefits, and any additional pertinent analysis;

(n) Clear demonstration that successful implementation will benefit a particular industry as a whole, not just the applicant(s);

(o) Explanation as to what specifically could not be accomplished without federal funding assistance and why participating organization(s) are unlikely to carry out the project without such assistance;

(p) Specific description of activity/activities to be undertaken;

(q) Time line(s) for implementation of activity, including start and end dates (start date should be no earlier than 15 July 2004);

(r) Information on whether similar activities are or have previously been funded with USDA sources in target country/countries (*e.g.,* under MAP and/or FMD programs);

(s) Detailed line item activity budget. Cost items should be allocated separately to each participating organization. Expense items constituting a proposed activity's overall budget (*e.g.,* salaries, travel expenses, consultant fees, administrative costs, etc.), with a line item cost for each, should be listed, clearly indicating:

(1) Which items are to be covered by EMP funding;

(2) Which by the participating U.S. organization(s); and

(3) Which by foreign third parties (if applicable).

Cost items for individual consultant fees should show calculation of daily rate and number of days. Cost items for travel expenses should show number of trips, destinations, cost, and objective for each trip.

Qualifications of applicant(s) should be included as an attachment.

3. Submission Dates and Times. All proposals must be received by 5 p.m. eastern standard time on March 15, 2004 in the MOS office, either electronically or by mail. Proposals received after this date and time will not be reviewed nor considered for program funding.

4. Funding Restrictions. Certain types of expenses are not eligible for reimbursement by the program, and there are limits on other categories of expenses such as indirect overhead charges, travel expenses and consulting fees. CCC will not reimburse expenditures made prior to approval of a proposal or unreasonable expenditures. Full details are available in the 2004 Program Guidelines.

V. Application Review Information

1. Criteria. Key criteria used in judging proposals include:

—The appropriateness of the activities for the targeted market(s), and the extent to which the project identifies market barriers, *e.g.,* a fundamental deficiency in the market, and/or a recent change in market conditions;

—Potential of the project to expand U.S. market share, increase U.S. exports or sales, and/or improve awareness of U.S. agricultural commodities and products;

—Quality of the project's performance measures, and the degree to which they relate to the objectives, proposed approach and activities, and deliverables;

—Justification for federal funding;

—Budget: overall cost and the amount of funding provided by applications, the U.S. private sector and partners, if any;

—Evidence that the organization has the knowledge, expertise, ability, and resources to successfully implement the project;

2. Review and Selection Process. All applications undergo a multi-phase review within FAS, by appropriate FAS field offices, and by the private sector Advisory Committee on Emerging Markets to determine qualifications, quality and appropriateness of projects, and reasonableness of project budgets prior to making recommendations to the deciding official.

3. Anticipated Announcement Date. Announcements of funding decisions for the EMP are anticipated on or about July 1, 2004.

VI. Award Administration Information

1. Award Notices. FAS will notify all applicants in writing of the final disposition of its application. FAS will send an approval letter and project agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of EMP funding and cost-share contribution requirements.

2. Administrative and National Policy Requirements. Interested parties should review the 2004 Program Guidelines which are available at the following URL address: *http://www.fas.usda.gov/mos/em-markets/em-markets.html.* Hard copies may be obtained by contacting MOS at (202) 720–4327.

3. Reporting. Quarterly progress reports for all programs longer than six months in duration are required. Final performance reports are due 90 days after completion of each project. Content for both types of reports is contained in the 2004 Program Guidelines. Final financial reports are also due 90 days after completion of each project, as attachments to the final reports.

VII. Agency Contact(s)

For additional information and assistance, contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932 South, STOP 1042, 1400

Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *emo@fas.usda.gov*.

Signed at Washington, DC, on January 16, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service and Vice President, Commodity Credit Corporation.

[FR Doc. 04–1453 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability; Inviting Applications for the Foreign Market Development Cooperator Program

Announcement Type: New.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.600.

SUMMARY: The Commodity Credit Corporation (CCC) announces that it is inviting proposals for the 2005 Foreign Market Development Cooperator (Cooperator) Program. The intended effect of this notice is to solicit application from eligible applicants and award funds in June 2004. The Cooperator Program is administered by personnel of the Foreign Agricultural Service (FAS).

DATES: All applications must be received by 5 p.m. eastern standard time, March 15, 2004. Applications received after this date will not be considered.

FOR FURTHER INFORMATION CONTACT: Entities wishing to apply for funding assistance should contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932-South, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov*. Information is also available on the Foreign Agricultural Service Web site at *http://www.fas.usda.gov/mos/programs/fmd.html*.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Authority: The Cooperator Program is authorized by title VII of the Agricultural Trade Act of 1978, as amended. Cooperator Program regulations appear at 7 CFR part 1484.

Purpose: The Cooperator Program is designed to create, expand, and maintain foreign market for U.S. agricultural commodities and products through cost-share assistance. Financial assistance under the Cooperator Program will be made available on a competitive basis and applications will be reviewed against the evaluation criteria contained herein. All agricultural commodities, except tobacco, are eligible for consideration.

The FAS allocates funds in a manner that effectively supports the strategic decision-making initiatives of the Government Performance and Results Act (GPRA) of 1993 and the USDA's Food and Agricultural Policy (FAP). In deciding whether a proposed project will contribute to the effective creation, expansion, or maintenance of foreign market, the FAS seeks to identify a clear, long-term agricultural trade strategy and a program effectiveness time line against which results can be measured at specific intervals using quantifiable product or country goals. The FAS also considers the extent to which a proposed project targets markets with the greatest growth potential. These factors are part of the FAS resource allocation strategy to fund applicants who can demonstrate performance and address the objectives of the GPRA and FAP.

II. Award Information

Under the Cooperator Program, the FAS enters into agreements with nonprofit U.S. trade organizations which have the broadest possible producer representation of the commodity being promoted and gives priority to those organizations which are nationwide in membership and scope. Cooperators may receive assistance only for the promotion of generic activities that do not involve promotions targeted directly to consumers. The program generally operates on a reimbursement basis.

III. Eligibility Information

1. Eligible Applicants. To participate in the Cooperator Program an applicant must be a nonprofit U.S. agricultural trade organization.

2. Cost Sharing. To participate in the Cooperator Program, an applicant must agree to contribute resources to its proposed promotional activities. The Cooperator Program is intended to supplement, not supplant, the efforts of the U.S. private sector. The contribution must be stated in dollars and be at least 50 percent of the value of resources provided by CCC for activities conducted under the project agreement.

The degree of commitment of an applicant to the promotional strategies contained in its application, as represented by the agreed cost share contributions specified therein, is considered by the FAS when determining which applications will be approved for funding. Cost-share may be actual cash invested or in-kind contributions, such as professional staff time spent on design and execution of activities. The Cooperator Program regulations, in sections 1484.50 and 1484.41, provide detailed discussion of eligible and ineligible cost-share contributions.

3. Other. Applications should include a justification for funding assistance from the program—an explanation as to what specifically could not be accomplished without federal funding assistance and why participating organization(s) are unlikely to carry out the project without such assistance.

IV. Application and Submission Information

1. Address to Request Application Package. Organizations that are interested in applying for Cooperator Program funds are encouraged to submit their requests using the Unified Export Strategy (UES) format. The UES allows interested entities to submit a consolidated and strategically coordinated single proposal that incorporates requests for funding and recommendations for virtually all the FAS marketing programs, financial assistance programs, and market access programs. The suggested UES format encourages applicants to examine the constraints or barriers to trade that they face, identify activities, which would help overcome such impediments, consider the entire pool of complementary marketing tools and program resources, and establish realistic export goals. Applicants are not required, however, to use the UES format. Organizations can submit applications in the UES format by two methods. The first allows an applicant to submit information directly to the FAS through the Unified Export Strategy (UES) application Internet Web site. The FAS highly recommends applying via the Internet, as this format virtually eliminates paperwork and expedites the FAS processing and review cycle. Applicants also have the option of submitting electronic versions (along with tow paper copies) of their applications to the FAS on diskette.

Applicants planning to use the Internet-based system must contact the FAS Marketing Operations Staff on (202) 720–4327 to obtain site access information. The Internet-based application, including a Help file containing step-by-step instructions for its use, may be found at the following URL address: *http://www.fas.usda.gov/cooperators.html*.

Applicants who choose to submit applications on diskette can obtain an application format by contacting the Marketing Operations Staff on (202) 720–4327.

2. Content and Form of Application Submission. To be considered for the Cooperator Program, an applicant must submit to the FAS information required by the Cooperator Program regulations in section 1484.20. In addition, in accordance with the Office of Management and Budget's issuance of a final policy (68 FR 38402) regarding the need to identify entities that are receiving government awards, all applicants must submit a Dun and Bradstreet Data Universal Numbering System (DUNS) number. An applicant may request a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711. Incomplete applications and applications which do not otherwise conform to this announcement will not be accepted for review.

The FAS administers various other agricultural export assistance programs, including the Market Access Program (MAP), Cochran Fellowships, the Emerging Markets Program, the Quality Samples Program, Section 108 Foreign Currency Program, Technical Assistance for Specialty Crops Program, and several Export Credit Guarantee programs. Any organization that is not interested in applying for the Cooperator Program but would like to request assistance through one of the other programs mentioned should contact the Marketing Operations Staff on (202) 720–4327.

3. Submission Dates and Times. All applications must be received by 5 p.m. eastern standard time, March 15, 2004. All Cooperator Program applicants, regardless of the method of submitting an application, also must submit by the application deadline, via hand delivery or U.S. mail, an original signed certification statement as specified in 7 CFR 1484.20(a)(14). Applications or certifications received after this date will not be considered.

4. Funding Restrictions. Certain types of expenses are not eligible for reimbursement by the program, and there are limits on other categories of expenses. CCC will not reimburse unreasonable expenditures or expenditures made prior to approval. Full details are available in the Cooperator Program regulations in sections 1484.54 and 1484.55.

5. Other Submission Requirements and Considerations. All Internet-based applications must be properly submitted by 5 p.m. eastern standard time, March 15, 2004. Signed certification statements also must be received by that time at one of the addresses listed below.

All applications on diskette (with two accompanying paper copies and a signed certification statement) and any other form of application must be received by 5 p.m. eastern standard time, March 15, 2004, at one of the following addresses:

Hand Delivery (including FedEx, DHL, UPS, etc.): U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, Room 4932–S, 14th and Independence Avenue, SW., Washington, DC 20250–1042.

U.S. Postal Delivery: U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042.

V. Application Review Information

1. Criteria and Review Process. Following is a description of the FAS process for reviewing applications and the criteria for allocating available Cooperator Program funds.

(1) Phase 1—Sufficiency Review and FAS Divisional Review

Applications received by the closing date will be reviewed by the FAS to determine the eligibility of the applicants and the completeness of the applications. These requirements appear at sections 1484.14 and 1484.20 of the Cooperator Program regulations. Applications that meet the requirements then will be further evaluated by the proper FAS Commodity Division. The Divisions will review each application against the criteria listed in sections 1484.21 and 1484.22 of the Cooperator Program regulations. The purpose of this review is to identify meritorious proposals and to recommend an appropriate funding level for each application based upon these criteria.

(2) Phase 2—Competitive Review

Meritorious applications then will be passed on to the Office of the Deputy Administrator, Commodity and Marketing Programs, for the purpose of allocating available funds among the applicants. Applications will compete for funds on the basis of the following allocation criteria (the number in parentheses represents a percentage weight factor):

(a) Contribution Level (40)

- The applicant's 6-year average share (2000–2005) of all contributions (contributions may include cash and goods and services provided by U.S. entities in support of foreign market development activities) compared to:
- The applicant's 6-year average share (2000–2005) of all Cooperator marketing plan expenditures.

(b) Past Export Performance (20)

- The 6-year average share (1999–2004) of the value of exports promoted by the applicant compared to:
- The applicant's 6-year average share (1999–2004) of all Cooperator marketing plan expenditures plus a 6-year average share (1998–2003) of MAP expenditures and a 6-year average share (1998–2003) of foreign overhead provided for co-location within a U.S. agricultural trade office.

(c) Past Demand Expansion Performance (20)

- The 6-year average share (1999–2004) of the total value of world trade of the commodities promoted by the applicant compared to:
- The applicant's 6-year average share (1999–2004) of all Cooperator marketing plan expenditures plus a 6-year average share (1998–2003) of MAP expenditures and a 6-year average share (1998–2003) of foreign overhead provided for co-location within a U.S. agricultural trade office.

(d) Future Demand Expansion Goals (10)

- The projected total dollar value of world trade of the commodities being promoted by the applicant for the year 2010 compared to:
- The applicant's requested funding level.

(e) Accuracy of Past Demand Expansion Projections (10)

- The actual dollar value share of world trade of the commodities being promoted by the applicant for the year 2003 compared to:
- The applicant's past projected share of world trade of the commodities being promoted by the applicant for the year 2003, as specified in the 2000 Cooperator Program application.

The Commodity Divisions' recommended funding levels for each applicant are converted to percentages of the total Cooperator Program funds available then multiplied by the total weight factor to determine the amount of funds allocated to each applicant.

2. Anticipated Announcement Date. Announcements of funding decisions for the Cooperator Program are anticipated during June 2004.

VI. Award Administration Information

1. Award Notices. The FAS will notify all applicants in writing of the final disposition of its application. The FAS will send an approval letter and project

agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of Cooperator Program funding and cost-share contribution requirements.

2. Administrative and National Policy Requirements. Interested parties should review the Cooperator Program regulations which are available at the following URL address: *http://www.fas.usda.gov/mos/programs.fmd.html.* Hard copies may be obtained by contacting MOS at (202) 720–4327.

3. Reporting. The FAS requires various reports and evaluations from Cooperators. Reporting requirements are detailed in the Cooperator Program regulations in sections 1484.53, 1484.70, and 1484.72.

VII. Agency Contact(s)

For additional information and assistance, contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932 South, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.*

Signed in Washington, DC on January 19, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service and Vice President, Commodity Credit Corporation.

[FR Doc. 04–1455 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability; Inviting Applications for the Market Access Program

Announcement Type: New.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.601.

SUMMARY: The Commodity Credit Corporation (CCC) announces that it is inviting proposals for the 2004 Market Access Program (MAP). The intended effect of this notice is to solicit applications from eligible applicants and award funds in June 2004. The MAP is administered by personnel of the Foreign Agricultural Service (FAS).

DATES: All applications must be received by 5 p.m. Eastern Standard Time, March 15, 2004. Applications received after this date will not be considered.

FOR FURTHER INFORMATION CONTACT: Entities wishing to apply for funding assistance should contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932-South, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.* Information is also available on the Foreign Agricultural Service Web site at *http://www.fas.usda.gov/mos/programs/mapprog.html.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Authority: The MAP is authorized under Section 203 of the Agricultural Trade Act of 1978, as amended. MAP regulations appear at 7 CFR part 1485.

Purpose: The MAP is designed to create, expand and maintain foreign markets for United States' agricultural commodities and products through cost-share assistance. Financial assistance under the MAP will be made available on a competitive basis and applications will be reviewed against the evaluation criteria contained herein. All agricultural commodities, except tobacco, are eligible for consideration.

The FAS allocates funds in a manner that effectively supports the strategic decision-making initiatives of the Government Performance and Result Act (GPRA) of 1993 and the USDA's Food and Agricultural Policy (FAP). In deciding whether a proposed project will contribute to the effective creation, expansion, or maintenance of foreign markets, the FAS seeks to identify a clear, long-term agricultural trade strategy and a program effectiveness time line against which results can be measured at specific intervals using quantifiable product or country goals. The FAS also considers the extent to which a proposed project targets markets with the greatest growth potential. These factors are part of the FAS resource allocation strategy to fund applicants who can demonstrate performance and address the objectives of the GPRA and FAP.

II. Award Information

Under the MAP, the CCC enters into agreements with eligible participants to share the costs of certain overseas marketing and promotion activities. MAP participants may receive assistance for either generic or brand promotion activities. The program generally operates on a reimbursement basis.

III. Eligibility Information

1. Eligible Applicants. To participate in the MAP, an applicant must be: a nonprofit U.S. agricultural trade organization, a nonprofit state regional trade group (*i.e.*, an association of State Departments of Agriculture), a U.S. agricultural cooperative, a State agency, or a small-sized U.S. commercial entity (other than a cooperative or producer association).

2. Cost Sharing. To participate in the MAP, an applicant must agree to contribute resources to its proposed promotional activities. The MAP is intended to supplement, not supplant, the efforts of the U.S. private sector. In the case of generic promotion, the contribution must be stated in dollars and be at least 10 percent of the value of resources provided by CCC for such generic promotion. In the case of brand promotion, the contribution must be stated in dollars and be at least 50 percent of the total cost of such brand promotion.

The degree of commitment of an applicant to the promotional strategies contained in its application, as represented by the agreed cost share contributions specified therein, is considered by the FAS when determining which applications will be approved for funding. Cost-share may be actual cash invested or in-kind contributions, such as professional staff time spent on design and execution of activities. The MAP regulations, in section 1485.13(c), provide detailed discussion of eligible and ineligible cost-share contributions.

3. Other. Applications should include a justification for funding assistance from the program—an explanation as to what specifically could not be accomplished without federal funding assistance and why participating organization(s) are unlikely to carry out the project without such assistance.

IV. Application and Submission Information

1. Address to Request Application Package. Organizations that are interested in applying for MAP funds are encouraged to submit their requests using the UES format. The UES allows interested entities to submit a consolidated and strategically coordinated single proposal that incorporates requests for funding and recommendations for virtually all the FAS marketing programs, financial assistance programs, and market access programs. The suggested UES format encourages applicants to examine the constraints or barriers to trade, which they face, identify activities, which

would help overcome such impediments, consider the entire pool of complementary marketing tools and program resources, and establish realistic export goals. Applicants are not required, however, to use the UES format. Organizations can submit applications in the UES format by two methods. The first allows an applicant to submit information directly to the FAS through the Unified Export Strategy (UES) application Internet website. The FAS highly recommends applying via the Internet, as this format virtually eliminates paperwork and expedites the FAS processing and review cycle. Applicants also have the option of submitting electronic versions (along with two paper copies) of their applications to the FAS on diskette.

Applicants planning to use the Internet-based system must contact the FAS Marketing Operations Staff on (202) 720–4327 to obtain site access information. The Internet-based application, including a Help file containing step-by-step instructions for its use, may be found at the following URL address: *http://www.fas.usda.gov/cooperators.html*.

Applicants who choose to submit applications on diskette can obtain an application format by contacting the Marketing Operations Staff on (202) 720–4327.

2. Content and Form of Application Submission. To be considered for the MAP, an applicant must submit to the FAS information required by the MAP regulations in section 1485.13. In addition, in accordance with the Office of Management and Budget's issuance of a final policy (68 FR 38402) regarding the need to identify entities that are receiving government awards, all applicants must submit a Dun and Bradstreet Data Universal Numbering System (DUNS) number. An applicant may request a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711. Incomplete applications and applications which do not otherwise conform to this announcement will not be accepted for review.

The FAS administers various other agricultural export assistance programs including the Foreign Market Development Cooperator (Cooperator) Program, cochran Fellowships, the Emerging Markets Program, the Quality Samples Program, the Technical Assistance for Specialty Crops Program and several Export Credit Guarantee programs. Any organization that is not interested in applying for the MAP but would like to request assistance through one of the other programs mentioned should contact the Marketing Operations Staff on (202) 720–4327.

3. Submission Dates and Times. All applications must be received by 5 p.m. Eastern Standard Time, March 15, 2004. All MAP applicants, regardless of the method of submitting an application, also must submit by the application deadline, via hand delivery or U.S. mail, an original signed certification statement as specified in 7 CFR 1485.13(a)(2)(i)(G). Applications or certifications received after this date will not be considered.

4. Funding Restrictions. Certain types of expenses are not eligible for reimbursement by the program, and there are limits on other categories of expenses. CCC will not reimburse unreasonable expenditures or expenditures made prior to approval. Full details are available in the MAP regulations in section 1485.16.

5. Other Submission Requirements and Considerations. All Internet-based applications must be properly submitted by 5 p.m. Eastern Standard Time, March 15, 2004. Signed certification statements also must be received by that time at one of the addresses listed below.

All applications on diskette (with two accompanying paper copies and a signed certification statement) and any other form of application must be received by 5 p.m. Eastern Standard Time, March 15, 2004, at one of the following addresses:

Hand Delivery (including FedEx, DHL, UPS, *etc.*): U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, Room 4932–S, 14th and Independence Avenue, SW., Washington, DC 20250–1042.

U.S. Postal Delivery: U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, STOP 1042, 1400 Independence Ave. SW., Washington, DC 20250–1042.

V. Application Review Information

1. Criteria and Review Process. Following is a description of the FAS process for reviewing applications and the criteria for allocating available MAP funds.

(1) Phase 1—Sufficiency Review and FAS Divisional Review

Applications received by the closing date will be reviewed by the FAS to determine the eligibility of the applicants and the completeness of the applications.

These requirements appear at sections 1485.12 and 1485.13 of the MAP regulations. Applications that meet the requirements then will be further evaluated by the proper FAS Commodity Division. The Divisions will review each application against the criteria listed in section 1485.14 of the MAP regulations. The purpose of this review is to identify meritorious proposals and to recommend an appropriate funding level for each application based upon these criteria.

(2) Phase 2—Competitive Review

Meritorious applications then will be passed on to the Office of the Deputy Administrator, Commodity and Marketing Programs, for the purpose of allocating available funds among the applicants. Applications will compete for funds on the basis of the following allocation criteria (the number in parentheses represents a percentage weight factor):

(a) Applicant's Contribution Level (40)

- The applicant's 4-year average share (2001–2004) of all contributions (cash and goods and services provided by U.S. entities in support of overseas marketing and promotion activities) compared to
- The applicant's 4-year average share (2001–2004) of the funding level for all MAP participants.

(b) Past Performance (30)

- The 3-year average share (2001–2003) of the value of exports promoted by the applicant compared to
- The applicant's 2-year average share (2002–2003) of the funding level for all MAP applicants plus, for those groups participating in the Cooperator program, the 2-year average share (2003–2004) of Cooperator marketing plan budgets, and the 2-year average share (2002–2003) of foreign overhead provided for co-location within a U.S. agricultural office;

(c) Projected Export Goals (15)

- The total dollar value of projected exports promoted by the applicant for 2004 compared to
- The applicant's requested funding level;

(d) Accuracy of Past Projections (15)

- Actual exports for 2002 as reported in the 2004 MAP application compared to
- Past projections of exports for 2002 as specified in the 2002 MAP application.

The Commodity Divisions' recommended funding levels for each applicant are converted to percentages of the total MAP funds available then multiplied by the total weight factor as described above to determine the amount of funds allocated to each applicant.

2. Anticipated Announcement Date. Announcements of funding decisions

for the MAP are anticipated during June 2004.

VI. Award Administration Information

1. Award Notices. The FAS will notify all applicants in writing of the final disposition of its application. The FAS will send an approval letter and project agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of MAP funding and cost-share contribution requirements.

2. Administrative and National Policy Requirements. Interested parties should review the MAP regulations which are available at the following URL address: *http://www.fas.usda.gov/mos/programs/mapprog.html.* Hard copies may be obtained by contacting MOS at (202) 720–4327.

3. Reporting. The FAS requires various reports and evaluations from MAP participants. Reporting requirements are detailed in the MAP regulations in section 1485.20(b) and (c).

VII. Agency Contact(s)

For additional information and assistance, contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932 South, STOP 1042, 1400 Independence Ave. SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.*

Signed at Washington, DC on January 19, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.

[FR Doc. 04–1451 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability; Inviting Applications for the Quality Samples Program

Announcement Type: New.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.605.

SUMMARY: The Commodity Credit Corporation (CCC) announces the availability of $2.5 million in funding for the 2004 Quality Samples Program (QSP). The intended effect of this notice is to solicit applications and award funds in June 2004. The QSP is administered by personnel of the Foreign Agricultural Service (FAS). This notice supercedes any prior notices concerning the QSP.

DATES: All proposals must be received by 5 p.m. eastern standard time, March 15, 2004. Applications received after this date will be considered only if funds are still available.

FOR FURTHER INFORMATION CONTACT: Entities wishing to apply for funding assistance should contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932–S, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.* Information is also available on the Foreign Agricultural Service Web site at *http://www.fas.usda.gov/mos/programs/QSP.html.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Authority: The QSP is authorized under section 5(f) of the CCC Charter Act, 15 U.S.C. 714c(f).

Purpose: The QSP is designed to encourage the development and expansion of export markets for U.S. agricultural commodities by assisting U.S. entities in providing commodity samples to potential foreign importers to promote a better understanding and appreciation for the high quality of U.S. agricultural commodities.

QSP participants will be responsible for procuring (or arranging for the procurement of) commodity samples, exporting the samples, and providing the technical assistance necessary to facilitate successful use of the samples by importers. Participants that are funded under this announcement may seek reimbursement for the sample purchase price and the costs of transporting the samples domestically to the port of export and then to the foreign port, or point, of entry. Transportation costs from the foreign port, or point, of entry to the final destination will not be eligible for reimbursement. CCC will not reimburse the costs incidental to purchasing and transporting samples, for example, inspection or documentation fees. Although providing technical assistance is required for all projects, CCC will not reimburse the costs of providing technical assistance. A QSP participant will be reimbursed after CCC reviews its reimbursement claim and determines that the claim is complete.

General Scope of QSP Projects: QSP projects are the activities undertaken by a QSP participant to provide an appropriate sample of a U.S. agricultural commodity to a foreign importer, or a group of foreign importers, in a given market. The purpose of the project is to provide information to an appropriate target audience regarding the attributes, characteristics, and proper use of the U.S. commodity. A QSP project addresses a single market/commodity combination.

As a general matter, QSP projects should conform to the following guidelines:

- Projects should benefit the represented U.S. industry and not a specific company or brand;
- Projects should develop a new market for a U.S. product, promote a new U.S. product, or promote a new use for a U.S. product, rather than promote the substitution of one established U.S. product for another;
- Sample commodities provided under a QSP project must be in sufficient supply and available on a commercial basis;
- The QSP project must either subject the commodity sample to further processing or substantial transformation in the importing country, or the sample must be used in technical seminars designed to demonstrate to an appropriate target audience the proper preparation or use of the sample in the creation of an end product;
- Samples provided in a QSP project shall not be directly used as part of a retail promotion or supplied directly to consumers. However, the end product, that is, the product resulting from further processing, substantial transformation, or a technical seminar, may be provided to end-use consumers to demonstrate to importers consumer preference for that end product; and,
- Samples shall be in quantities less than a typical commercial sale and limited to the amount sufficient to achieve the project goal (*e.g.,* not more than a full commercial mill run in the destination country). QSP projects shall target foreign importers and target audiences who:
- Have not previously purchased the U.S. commodity which will be transported under the QSP;
- Are unfamiliar with the variety, quality attribute, or end-use characteristic of the U.S. commodity which will be transported under the QSP;
- Have been unsuccessful in previous attempts to import, process, and market the U.S. commodity which will be transported under the QSP (*e.g.,* because of improper specification, blending, or formulation; or sanitary or phytosanitary issues);
- Are interested in testing or demonstrating the benefits of the U.S.

commodity which will be transported under the QSP; or,

• Need technical assistance in processing or using the U.S. commodity that will be transported under the QSP.

II. Award Information

Under the QSP, the CCC enters into agreements with approved participants to share the costs of certain overseas marketing and promotion activities. Under this announement, the number of projects per participant will not be limited. However, individual projects will be limited to $75,000 of QSP reimbursement. Projects comprised of technical preparation seminars, that is, projects that do not include further processing or substantial transformation, will be limited to $15,000 of QSP reimbursement as these projects require smaller samples. Financial assistance will be made available on a reimbursement basis; that is, cash advances will not be made available to any QSP participant.

All proposals will be reviewed against the evaluation criteria contained herein and funds will be awarded on a competitive basis. Funding for successful proposals will be provided through specific agreements. These agreements will incorporate the proposal as approved by FAS. FAS must approve in advance any subsequent changes to the project.

III. Eligibility Information

1. Eligible Applicants. Any United States private or government entity with a demonstrated role or interest in exporting U.S. agricultural commodities may apply to the program. Government organizations consist of Federal, State, and local agencies. Private organizations include non-profit trade associations, universities, agricultural cooperatives, State regional trade groups, and profit-making entities.

2. Cost Sharing. Although a minimum level of cost share contribution is not required under the program, FAS does consider the applicant's willingness to contribute resources, including cash and goods and services of the U.S. industry and foreign third parties, when determining which proposals are approved for funding.

IV. Application and Submission Information

1. Address to Request Application Package. Organizations can submit applications to the FAS through the Unified Export Strategy (UES) application Internet website. Applicants also have the option of submitting electronic versions in the UES format (along with two paper copies) of their applications to the FAS on diskette. However, the UES format is not required.

Applicants planning to use the UES Internet-based system must contact the FAS Marketing Operations Staff on (202) 720–4327 to obtain site access information including a user ID and password. The UES Internet-based application, including a Help file containing step-by-step instructions for its use, may be found at the following URL address: *http://www.fas.usda.gov/cooperators.html.*

Applicants who choose to submit applications on diskette can obtain an application format by contacting the Marketing Operations Staff, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.*

2. Content and Form of Application Submission. To be considered for the QSP, an applicant must submit to the FAS information detailed in this notice. In addition, in accordance with the Office of Management and Budget's issuance of a final policy (68 FR 38402) regarding the need to identify entities that are receiving government awards, all applicants must submit a Dun and Bradstreet Data Universal Numbering System (DUNS) number. An applicant may request a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711. Incomplete applicants and applications which do not otherwise conform to this announcement will not be accepted for review.

Applicants to the QSP are not required to submit proposals in any specific format; however, FAS recommends that proposals contain, at a minimum, the following: (a) Organizational information, including:

• Organization's name, address, Chief Executive Officer (or designee), Federal Tax Identification Number (TIN), and DUNS number;

• Type of organization;

• Name, telephone number, fax number, and e-mail address of the primary contact person;

• A description of the organization and its membership;

• A description of the organization's prior export promotion experience; and

• A description of the organization's experience in implementing an appropriate trade/technical assistance component;

(b) Market information, including:

• An assessment of the market;

• A long-term strategy in the market; and

• U.S. export value/volume and market share (historic and goals) for 2000–2005;

(c) Project information, including:

• A brief project title;

• Amount of funding requested;

• A brief description of the specific market development trade constraint or opportunity to be addressed by the project, performance measures for the years 2004–2006 which will be used to measure the effectiveness of the project, a benchmark performance measurer for 2003, the viability of long term sales to this market, the goals of the project, and the expected benefits to the represented industry;

• A description of the activities planned to address the constraint or opportunity, including how the sample will be used in the end-use performance trial, the attributes of the sample to be demonstrated and its end-use benefit, and details of the trade/technical servicing component (including who will provide and who will fund this component);

• A sample description (*i.e.*, commodity, quantity, quality, type, and grade), including a justification for selecting a sample with such characteristics (this justification should explain in detail why the project could not be effective with a smaller sample);

• An itemized list of all estimated costs associated with the project for which reimbursement will be sought; and

• The importer's role in the project regarding handling and processing the commodity sample; and

(d) information indicating all funding sources and amounts to be contributed by each entity that will supplement implementation of the proposed project. This may include the organization that submitted the proposal, private industry entities, host governments, foreign third parties, CCC, FAS, or other Federal agencies. Contributed resources may include cash or goods and services.

3. Submission Dates and Times. All applications must be received by 5 p.m. eastern standard time, March 15, 2004. Applications received after this date will be considered only if funds are still available.

4. Funding Restrictions. Proposals which request more than $75,000 of CCC funding for individual projects will not be considered. Projects comprised of technical preparation seminars will be limited to $15,000 in QSP funding. CCC will not reimburse expenditures made prior to approval of a proposal or unreasonable expenditures.

5. Other Submission Requirements. All applications on diskette (with two accompanying paper copies) and any other form of application must be received by 5 p.m. eastern standard time, March 15, 2004, at one of the following addresses:

Hand Delivery (including FedEx, UPS, etc.): U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, Room 4932–S, 14th and Independence Avenue, SW., Washington, DC 20250–1042.

U.S. Postal Delivery: U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042.

V. Application Review Information

1. Criteria. FAS will use the following criteria in evaluating proposals:

- The ability of the organization to provide an experienced staff with the requisite technical and trade experience to execute the proposal;
- The extent to which the proposal is targeted to a market in which the United States is generally competitive;
- The potential for expanding commercial sales in the proposed market;
- The nature of the specific market constraint or opportunity involved and how well it is addressed by the proposal;
- The extent to which the importer's contribution in terms of handling and processing enhances the potential outcome of the project;
- The amount of reimbursement requested and the organization's willingness to contribute resources, including cash and goods and services of the U.S. industry and foreign third parties; and
- How well the proposed technical assistance component assures that performance trials will effectively demonstrate the intended end-use benefit.

Highest priority for funding under this announcement will be given to meritorious proposals that target countries that meet either of the following criteria:

- *Per capita* income less than $9,205 (the ceiling on upper middle income economies as determined by the World Bank [World Development Indicators 2003]); and population greater than 1 million. Proposals may address suitable regional groupings, for example, the islands of the Caribbean Basin; or
- U.S. market share of imports of the commodity identified in the proposal of 10 percent or less.

2. Review and Selection Process. Proposals will be evaluated by the applicable FAS commodity division. The divisions will review each proposal against the factors described above. The purpose of this review is to identify meritorious proposals, recommend an appropriate funding level for each proposal based upon these factors, and submit the proposals and funding recommendations to the Deputy Administrator, Commodity and Marketing Programs.

3. Anticipated Announcement Date. Announcements of funding decisions for the QSP are anticipated during June 2004.

VI. Award Administration Information

1. Award Notice. The FAS will notify each applicant in writing of the final disposition of its application. The FAS will send an approval letter and agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of QSP funding and any cost-share contribution requirements.

2. Administrative and National Policy Requirements. The agreements will incorporate the details of each project as approved by FAS. Each agreement will identify terms and conditions pursuant to which CCC will reimburse certain costs of each project. Agreements will also outline the responsibilities of the participant, including, but not limited to, procurement (or arranging for procurement) of the commodity sample at a fair market price, arranging for transportation of the commodity sample within the time limit specified in the agreement (organizations should endeavor to ship commodities within 6 months of effective date of agreement), compliance with cargo preference requirements (shipment on United States flag vessels, as required), compliance with the Fly America Act requirements (shipment on United States air carriers, as required), timely and effective implementation of technical assistance, and submission of a written evaluation report within 90 days of expiration of the agreement.

QSP agreements are subject to review and verification by the FAS Compliance Review Staff. Upon request, a QSP participant will provide to CCC the original documents which support the participant's reimbursement claims. CCC may deny a claim for reimbursement if the claim is not supported by adequate documentation.

3. Reporting. A written evaluation report must be submitted within 90 days of the expiration of each participant's QSP agreement. Evaluation reports should address all performance measures that were presented in the proposal.

VII. Agency Contact(s)

For additional information and assistance, contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932 South, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.*

Signed in Washington, DC on January 16, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.

[FR Doc. 04–1454 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability; Inviting Applications for the Technical Assistance for Specialty Crops Program

Announcement Type: New.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.604.

SUMMARY: The Commodity Credit Corporation (CCC) announces the availability of $2 million in funding for the 2004 Technical Assistance for Specialty Crops (TASC) Program. The intended effect of this notice is to solicit applications from the private sector and from government agencies for participation in the FY 2004 TASC Program. The TASC Program is administered by personnel of the Foreign Agricultural Service (FAS).

DATES: *See* paragraph IV.3 below for a detailed description of relevant dates.

FOR FURTHER INFORMATION CONTACT: Entities wishing to apply for funding assistance should contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932–S, Stop 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.* Information is also available on the Foreign Agricultural Service Web site at *http://www.fas.usda.gov/mos/tasc/tasc.html*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Authority: The TASC Program is authorized by section 3205 of Pub. L. 107–171. TASC regulations appear at 7 CFR part 1487.

Purpose: The TASC Program is designed to assist U.S. organizations by providing funding for projects that address sanitary, phytosanitary, and technical barriers that prohibit or threaten the export of U.S. specialty

crops. U.S. specialty crops, for the purpose of the TASC Program, are defined to include all cultivated plants, or the products thereof, produced in the U.S., except wheat, feed grains, oilseeds, cotton, rice, peanuts, sugar, and tobacco.

As a general matter, TASC Program projects should be designed to accomplish the following goals:

- Projects should address a sanitary, phytosanitary, or related technical barrier that prohibits or threatens the export of U.S. specialty crops;
- Projects should demonstrably benefit the represented industry and not a specific company or brand; and,
- Projects must address barriers to U.S. specialty crops the are currently available on a commercial basis and for which barrier removal would predominately benefit U.S. exports.

Examples of expenses that the CCC may agree to reimburse under the TASC Program include, but are not limited to: Initial pre-clearance programs, export protocol and work plan support, seminars and workshops, study tours, field surveys, development of pest lists, pest and disease research, database development, reasonable logistical and administrative support, and travel and per diem expenses.

II. Award Information

In general, all qualified proposals received before the specified application deadlines will compete for funding. The limited funds and the range of barriers affecting the exports of U.S. specialty crops worldwide preclude CCC from approving large budgets for individual projects. In prior years, the amount of funding per proposal has ranged from $13,000 to $250,000, the maximum allowed.

Applicants may submit multiple proposals, and applicants with previously approved TASC proposals may apply for additional funding. However, no TASC participant may have more than three approved projects underway at any given time.

The FAS will consider providing either grant funds at direct assistance to U.S. organizations or providing technical assistance on behalf of U.S. organizations, provided that the organization submits timely and qualified proposals. The FAS will review all proposals against the evaluation criteria contained in the program regulations.

Funding for successful proposals will be provided through specific agreements. These agreements will incorporate the proposal as approved by FAS. FAS must approve in advance any subsequent changes to the project. The FAS or another Federal agency may have involvement in the implementation of approved projects.

III. Eligibility Information

1. Eligible Applicants: Any United States organization, private or government, may apply to the program. Government organizations consist of federal, state, and local agencies. Private organizations include non-profit trade associations, universities, agricultural cooperatives, state regional trade groups, and private companies.

Foreign organizations, whether government or private, may participate as third parties in activities carried out by U.S. organizations, but are not eligible for funding assistance from the program.

2. Cost Sharing or Matching: Although a minimum level of cost share contribution is not required, it is very strongly encouraged in this highly competitive program. If provided, such support may be in the form of cash, good, or in-kind services which are dedicated to the project by the organization that submitted the proposal, private industry entities, host governments, or foreign third parties.

IV. Application and Submission Information

1. Address to Request Application Package: Organizations can submit applications to the FAS through the Unified Export Strategy (UES) application Internet website. Applicants also have the option of submitting electronic versions in the UES format (along with two paper copies) of their applications to the FAS on diskette.

Applicants planning to use the UES Internet-based system must contact the FAS Marketing Operations Staff on (202) 720–4327 to obtain site access information including a user ID and password. The UES Internet-based application, including a Help file containing step-by-step instructions for its use, may be found at the following URL address: *http://www.fas.usda.gov/cooperators.html*. Applicants are not required to use the UES, but are strongly encouraged to do so because it reduces paperwork and expedites the FAS processing and review cycle.

Applicants who choose to submit applications on diskette can obtain an application format by contacting the Marketing Operations Staff, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov*.

2. Content and Form of Application Submission: All TASC proposals must contain complete information about the proposed projects as described in section 1487.5(b) of the TASC Program regulations. In addition, in accordance with the Office of Management and Budget's issuance of a final policy (68 FR 38402) regarding the use of a universal identifier for all Federal grants and cooperative agreements, all applicants must submit a Dun and Bradstreet Data Universal Numbering System (DUNS) number. An applicant may request a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711. Incomplete applications and applications which do not otherwise conform to this announcement will not be accepted for review.

3. Submission Dates and Times: TASC funding is limited, and in order to assure sufficient resources are available to meet unanticipated needs during the fiscal year, TASC proposals will, generally, only be evaluated on a quarterly basis. That is:

- Proposals received prior to, but not later than 5 p.m. (local time Washington, DC) February 1, 2004, will only be considered for funding during the three month period beginning on that date;
- Proposals received prior to, but not later than 5 p.m. (local time Washington, DC) May 1, 2004, will only be considered for funding during the three month period beginning on that date;
- proposals received prior to, but not later than 5 p.m. (local time Washington, DC) August 1, 2004, will only be considered for funding during the three month period beginning on that date.
- Proposals not approved for funding during the applicable review period will only be considered for funding during a subsequent period, or after August 1, 2004, when the applicant specifically requests such consideration in writing. Proposals received after 5 p.m. August 1, 2004, or rejected proposals for which the applicant requests consideration after that date, will be considered if funding remains available at that time.

Notwithstanding the foregoing, a proposal may be submitted for expedited consideration under the TASC Quick Response process if, in addition to meeting all requirements of the TASC program, a proposal clearly identifies a time-sensitive activity. In these cases, a proposal may be submitted at any time for an immediate evaluation.

All proposals will be date stamped upon receipt.

4. Funding Restrictions: Proposals which request more than $250,000 of CCC funding in a given year will not be considered. Proposals to fund projects that exceed three years in duration will not be considered. No TASC participant

may have more than three approved projects underway at any given time. Although funded projects may take place in the United States, all eligible projects must specifically address sanitary, phytosanitary, or technical barriers to the export of U.S. specialty crops.

Certain types of expenses are not eligible for reimbursement by the program. For example, program funds shall not be used to reimburse the costs of market research, advertising, or other promotional expenses. CCC will not reimburse expenditures made prior to approval of a proposal or unreasonable expenditures.

5. Other Submission Requirements: All Internet-based applications must be properly submitted by 5 p.m. (local time in Washington, DC) on February 1, 2004; May 1, 2004; or August 1, 2004, in order to be considered during that quarter's review process.

All applications on diskette (with two accompanying paper copies) and any other applications must be received by 5 p.m. (local time in Washington, DC) on February 1, 2004; May 1, 2004; or August 1, 2004, at one of the following addresses:

Hand Delivery (including FedEx, DHL, UPS, etc.); U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, Room 4932–S, 14th and Independence Avenue, SW., Washington, DC 20250–1042.

U.S. Postal Delivery: U.S. Department of Agriculture, Foreign Agricultural Service, Marketing Operations Staff, STOP 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042.

V. Application Review Information

1. Criteria: The FAS follows the evaluation criteria set forth in § 1487.6 of the TASC regulations.

2. Review and Selection Process: The FAS will review proposals for eligibility and will evaluate each proposal against the factors described above. The purpose of this review is to identify meritorious proposals, recommend an appropriate funding level for each proposal based upoon these factors, and submit the proposals and funding recommendations to the Deputy Administrator, Commodity and Marketing Programs. The FAS may, when appropriate to the subject matter of the proposal, request the assistance of other U.S. government experts in evaluating the merits of a proposal.

VI. Award Administration Information

1. Award Notices: The FAS will notify all applicants in writing of the final disposition of its application. The FAS will send an approval letter and agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including levels of funding, timelines for implementation and written evaluation requirements.

2. Administrative and National Policy Requirements: The agreements will incorporate the details of each project as approved by FAS. Each agreement will identify terms and conditions pursuant to which CCC will reimburse certain costs of each project. Agreements will also outline the responsibilities of the participant. Interested parties should review the TASC Program regulations found at 7 CFR part 1478 in addition to this announcement.

3. Reporting: TASC participants are subject to the reporting and recordkeeping requirements described in 7 CFR part 3019. In addition, participants are required to submit a written report(s), on no less than an annual basis, and a final report, each of which evaluates their TASC project using the performance measures presented in the approved proposal.

VII. Agency Contact

For additional information or assistance, contact the Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, Room 4932–S, Stop 1042, 1400 Independence Ave., SW., Washington, DC 20250–1042, phone: (202) 720–4327, fax: (202) 720–9361, e-mail: *mosadmin@fas.usda.gov.*

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.

[FR Doc. 04–1452 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Analysis of the Summer Food Service Program and Food Needs of Nonparticipating Children—Data Collection Instruments

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Food and Nutrition Service's intention to request Office of Management and Budget approval of the data collection instruments for the Analysis of the Summer Food Service Program and Food Needs of Nonparticipating Children.

DATES: Written comments on this notice must be received by March 23, 2004.

ADDRESSES: Comments may be sent to: Alberta C. Frost, Director, Office of Analysis, Nutrition and Evaluation, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection instruments should be directed to Alberta C. Frost (703) 305–2117.

SUPPLEMENTARY INFORMATION:

Title: Analysis of the Summer Food Service Program and Food Needs of Nonparticipating Children—Data Collection Instruments.

OMB Number: Not yet assigned.

Expiration Date: N/A.

Type of Request: New collection of information.

Abstract: Section 13 of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1761, authorizes the Summer Food Service Program. The Summer Food Service Program (SFSP) provides assistance to States to initiate and maintain nonprofit food service programs for children in needy areas during the summer months and at other approved times. The food service to be provided under the Summer Food Service Program is intended to serve as a substitute for the National School Lunch Program and the School Breakfast Program during the times

when school is not in session. During the regular school year, the federally funded National School Lunch Program makes available nutritious meals to children attending elementary, middle and high schools. Children, who could not otherwise afford to pay full price, are able to receive their lunch for free or at a reduced price, depending on the economic status of their household. Breakfasts are also made available in most school districts during the school year to provide nutritious meals to children.

When school lets out for the summer, children from low-income areas can potentially participate in the SFSP. Meals available through the SFSP are often offered through various educational and recreational activities, including camps, sports and art/craft activities. The primary goal of SFSP is to provide nutritious meals to children in low-income areas when school is not in session during the summer. The summer food program for children operates in all 50 states, the District of Columbia, the Virgin Islands, and Puerto Rico. However, the number of children in the SFSP served in July 2001 (2.1 million per day) was only about 14 percent of the children who receive free or reduced-priced school lunches during the previous, regular school year.

The Food and Nutrition Service has a need for information on households' awareness of SFSP sites in their local communities, reasons why their children do not participate, and perceptions of food adequacy for their children during the summer compared to the regular school year. Telephone and in-depth personal interviews are to be conducted in English and Spanish, as needed, with an ethnic and racially diverse sample of parents/guardians of children in low-income areas who receive free and reduced lunches during the school year but who do not participate in the SFSP. Additional interviews will also be conducted for comparison purposes with the parents/guardians of qualifying children who do participate in the summer food program for children. The interviews will be held in four sites around the United States.

Respondents: Parents/guardians of children in low-income areas who qualify for free or reduced price lunches during the regular school year and who do not participate in the SFSP, as well as parents/guardians of children that do participate in SFSP.

Estimated Number of Respondents: A telephone screener survey will be administered to an estimated 400 households. Based on information obtained from the screener survey, 50 households will complete an extended telephone interview (40 households with elementary-grade children who did not participate in the SFSP and 10 households with children who did participate in SFSP) in each of the four sites for a total of 200 extended telephone interviews. Twenty-five in-person interviews will be conducted among the 50 households completing telephone interviews in each of the four sites for a total of 100 in-person interviews.

Estimated number of responses per Respondent: One response for the 100 households completing only the telephone interview, two responses for the 100 households who complete the telephone and the in-person interviews.

Estimate of Burden: Public reporting burden for parents/guardians is estimated to be 10 minutes for completing the telephone screener and 20 minutes for completing additional questions in the extended telephone interview. The in-person interview will require 30 minutes.

Estimate Total Annual Burden on Respondents: 183.4 hours.

Screener interview = 400 households × 10 minutes = 66.7 hours; extended telephone interview = 200 households × 20 minutes = 66.7 hours; in-person interview with respondents who have already completed the screener and the telephone survey = 100 households × 30 minutes = 50 hours.

Dated: January 16, 2004.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 04–1405 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–930–6334 DT–COMP, HA604–0068]

To Remove or Modify the Survey and Manage Mitigation Measure Standards and Guidelines

AGENCIES: Forest Service, USDA; Bureau of Land Management, USDI.

ACTION: Notice of availability of the Final Supplemental Environmental Impact Statement (FSEIS) to remove or modify the survey and manage mitigation measure standards and guidelines.

SUMMARY: The Forest Service and Bureau of Land Management (BLM) (collectively the Agencies) have prepared a FSEIS. The Agencies are supplementing the analyses contained in the FSEIS (2000) for amendment to the survey and manage, protection buffer, and other mitigation measures standards and guidelines, and the FSEIS (1994) for amendments to Forest Service and Bureau of Land Management planning documents within the range of the Northern Spotted Owl.

The FSEIS is now available to the public. Requests to receive copies of the FSEIS should be sent to the address listed below. Alternately, the FSEIS is available on the Internet at *www.or.blm.gov/nwfpnepa.*

DATES: Publication of the Environmental Protection Agency (EPA) notice of availability and filing of the FSEIS in the **Federal Register** initiates a 30-day availability period. This 30-day availability period is not a comment period.

ADDRESSES: To request copies of the document, or add your name to the mailing list, contact: Survey and Manage FSEIS, 333 SW., First Avenue, P.O. Box 2965, Portland, Oregon 97208; fax: (503) 326–2396 (please address fax to: "Survey and Manage FSEIS").

FOR FURTHER INFORMATION CONTACT: Jerry Hubbard, Survey and Manage FSEIS Team Logistics Coordinator; telephone (503) 326–2355; or e-mail: *oregon_smnepa_mail@or.blm.gov.*

SUPPLEMENTARY INFORMATION: A limited number of individual copies of the Draft SEIS may also be obtained by contacting Jerry Hubbard. Copies are also available for inspection at public libraries and Forest Service or BLM offices in western Washington, western Oregon, and northwestern California.

Three alternatives, including no action, are considered in detail in the FSEIS. The preferred alternative is Alternative 2. The preferred alternative would remove the survey and manage mitigation measure and the Agencies would rely on other elements of the Northwest Forest Plan and their existing Special Status Species Programs to conserve rare species. A decision to select one of the action alternatives would amend the management direction in all 28 Forest Service land and resource management plans and BLM resource management plans in the Northwest Forest Plan area.

Readers should note that the Secretary of Agriculture and the Secretary of the Interior are the responsible officials for this proposed action.

Therefore, no administrative review ("appeal") through the Forest Service will be available on the Record of Decision under 36 CFR part 217, and no administrative review ("protest")

through the BLM will be available on the proposed decision under 43 CFR 1610.5–2. Because there is no administrative review of the decision, the record of decision will not be signed for a minimum of 30 days after the EPA notice of availability of this FSEIS appears in the **Federal Register**.

Dated: January 14, 2004.

A. Barron Bail,

Associate State Director, Oregon and Washington, Bureau of Land Management.

Dated: January 14, 2004.

Linda Goodman,

Regional Forester, Pacific Northwest Region, Forest Service.

[FR Doc. 04–1293 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF AGRICULTURE

Forest Service

Fresno County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Fresno County Resource Advisory Committee will meet in Prather, California. The purpose of the meeting is to discuss and to approve project proposals for FY2004 funds regarding the Secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106–393) for expenditure of Payments to States Fresno County Title II funds.

DATES: The meeting will be held on February 3, 2004 from 6:30 p.m. to 9:30 p.m.

ADDRESSES: The meeting will be held at the High Sierra Ranger District Office, Sierra National Forest, 29688 Auberry Road, Prather, California, 93651. Send written comments to Robin Ekman, Fresno County Resource Advisory Committee Coordinator, c/o Sierra National Forest, High Sierra Ranger District, 29688 Auberry Road, Prather, CA 93651 or electronically to *reckman@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Robbin Ekman, Fresno County Resource Advisory Committee Coordinator, (559) 855–5355 ext. 3341.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring Payments to States Fresno County Title II project matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Public sessions will be provided and individuals who made written requests by January 13, 2004 will have the opportunity to address the Committee at those sessions. Agenda items to be covered include: (1) Call for new projects; (2) Status report from project recipients; and (3) Public comment.

Dated: January 16, 2004.

Ray Porter,

District Ranger.

[FR Doc. 04–1479 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Mississippi Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Meeting notice for the Southwest Mississippi Resource Advisory Committee under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393).

SUMMARY: This notice is published in accordance with section 10(a)(2) of the Federal Advisory Committee Act. Meeting notice is hereby given for the Southwest Mississippi Resource Advisory Committee pursuant to section 205 of the Secure Rural Schools and Community Self Determination Act of 2000, Public Law 106–393. Topics to be discussed include: general information, possible Title II projects, and next meeting dates and agendas.

DATES: The meeting will be held on February 10, 2004, from 6 p.m. and end at approximately 9 p.m.

ADDRESSES: The meeting will be held at the Franklin County Public Library, 381 First Street, Meadville, Mississippi.

FOR FURTHER INFORMATION CONTACT: Mary Bell Lunsford, Public Affairs Officer, USDA, Homochitto National Forest, 1200 Hwy. 184 East, Meadville, MS 39653 (601–384–2814) (601–660–6322)

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff, Committee members and elected officials. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. A public input session will be provided and individuals who made written requests by February 6, 2004, will have the opportunity to address the committee at that session. Individuals wishing to speak or propose agenda items must send their names and proposals to Glen Gaines, Acting District Ranger, DFO, 1200 Hwy. 184 East, Meadville, MS 39653.

Dated: January 9, 2004.

Glen Gaines,

Designated Federal Officer.

[FR Doc. 04–1483 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–52–M

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Assistance to High Energy Cost Rural Communities

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of funding availability (NOFA).

SUMMARY: The Rural Utilities Service (RUS) of the United States Department of Agriculture (USDA) announces the availability of $11.3 million in competitive grants to assist communities with extremely high energy costs. This grant program is authorized under section 19 of the Rural Electrification Act of 1936 (RE Act). The grant funds may be used to acquire, construct, extend, upgrade, or otherwise improve energy generation, transmission, or distribution facilities serving communities in which the average residential expenditure for home energy exceeds 275 percent of the national average. Eligible applicants include persons, States, political subdivisions of States, and other entities organized under State law. Federally-recognized Indian tribes and tribal entities are eligible applicants. This notice describes the eligibility and application requirements, the criteria that will be used by RUS to award funding and information on how to obtain application materials and how prior applicants may request reconsideration of existing applications under this program.

DATES: All applications must be postmarked or delivered to RUS or through Grants.gov no later than March 5, 2004. Applications will be accepted on publication of this notice. Comments regarding the information collection requirements under the Paperwork Reduction Act must be received on or before March 23, 2004, to be assured of consideration.

ADDRESSES: Paper applications are to be submitted to the Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1560, Room 5165, South Building, Washington, DC 20250–1560.

Applications should be marked "Attention: High Energy Cost Community Grant Program." Information on submitting applications electronically is available through *http://www.Grants.gov*. Applicants must successfully pre-register with Grants.gov to use the electronic applications option; application information may be downloaded without pre-registration.

FOR FURTHER INFORMATION CONTACT: Karen Larsen, Management Analyst, U.S. Department of Agriculture, Rural Utilities Service, Electric Program, 1400 Independence Avenue, SW., STOP 1560, Room 5165, South Building, Washington, DC 20250–1560. Telephone (202) 720–9545, Fax (202) 690–0717, e-mail *energy.grants@usda.gov*.

SUPPLEMENTARY INFORMATION:

Overview Information

Federal Agency Name: United States Department of Agriculture, Rural Utilities Service, Assistant Administrator, Electric Program.

Funding Opportunity Title: Assistance to High Energy Cost Rural Communities.

Announcement Type: Initial announcement.

Funding Opportunity Number: USDA–RD–RUS–HECG03–1

Catalog of Federal Domestic Assistance (CFDA) Number: 10.859. The CFDA title for this program is "Assistance to High Energy Cost Rural Communities."

Dates: Applications must be postmarked or filed with Grants.gov by March 5, 2004.

I. Funding Opportunity Description

RUS is making available $11.3 million in competitive grants under section 19 of the Rural Electrification Act of 1936 (the "RE Act") (7 U.S.C. 918a). Under section 19, RUS is authorized to make grants to "acquire, construct, extend, upgrade, and otherwise improve energy generation, transmission, or distribution facilities serving communities in which the average residential expenditure for home energy is at least 275 percent of the national average residential expenditure for home energy."

The purpose of this grant program is to provide financial assistance for a broad range of energy facilities, equipment and related activities to offset the impacts of extremely high residential energy costs on eligible communities. Grant funds may be used to "acquire, construct, extend, upgrade and otherwise improve energy generation, transmission, or distribution facilities" serving extremely high energy cost communities. Eligible facilities include on-grid and off-grid renewable energy systems and implementation of cost-effective demand side management and energy conservation programs that benefit eligible communities.

Eligible applicants include "persons, States, political subdivisions of States, and other entities organized under the laws of States." Under section 13 of the RE Act (7 U.S.C. 913) "the term person shall be deemed to mean any natural person, firm, corporation, or association." Indian tribes and tribal entities are eligible applicants and beneficiaries under this program.

No cost sharing or matching funds are required as a condition of eligibility under this grant program. However, RUS will consider other financial resources available to the grantee and any voluntary commitment of matching funds or other contributions in assessing the grantee's capacity to carry out the grant program successfully and will award additional evaluation points to proposals that include such contributions.

As a further condition of each grant, section 19 (b)(2) of the RE Act requires that planning and administrative expenses may not exceed 4 percent of the grant funds.

This NOFA provides an overview of the grant program, eligibility and application requirements, and selection criteria. Applicants should consult the detailed grant Application Guide for additional information on application requirements and copies of all required forms and certifications. The Application Guide is available on the Internet from the RUS Web site at *http://www.usda.gov/rus/electric*. The application guide may also be requested from the Agency contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Definitions

As used in this NOFA:

Administrator means the Administrator of the RUS.

Agency means the Rural Utilities Service.

Application Guide means the Application Guide prepared by RUS for the High Energy Cost Grant program containing detailed instructions for determining eligibility and preparing grant applications, and copies of required forms, questionnaires, and model certifications.

Census block means the smallest geographic entity for which the Census Bureau collects and tabulates decennial census information and which are defined by boundaries shown on census maps.

Census designated place (CDP) means a statistical entity recognized by the U.S. Census comprising a dense concentration of population that is not within an incorporated place but is locally identified by a name and with boundaries defined on census maps.

Extremely high energy costs means local community average residential energy costs that are at least 275 percent of one or more home energy cost benchmarks identified by RUS based on the national average residential energy expenditures as reported by the Energy Information Administration (EIA).

Home energy means any energy source or fuel used by a household including electricity, natural gas, fuel oil, kerosene, liquefied petroleum gas (propane), other petroleum products, wood and other biomass fuels, coal, wind, and solar energy. Fuels used for subsistence activities in remote rural areas are also included. Other transportation fuel uses are not included, however.

Home energy cost benchmarks means the criteria established by RUS for eligibility as an extremely high energy cost community. Home energy cost benchmarks are calculated for total annual household energy expenditures; total annual expenditures for individual fuels; annual average per unit energy costs for primary home energy sources at 275 percent of EIA estimates of national average residential energy expenditure.

Indian Tribe means a Federally recognized tribe as defined under section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) to include "* * * any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

Person means any natural person, firm, corporation, or association and for purposes of this notice, includes Indian tribes and tribal entities.

Primary home energy source means the energy source that is used for space heating or cooling, water heating, cooking, and lighting. A household or community may have more than one primary home energy source.

State rural development initiative means a rural economic development program funded by or carried out in cooperation with a State agency.

Target area means the geographic area to be served by the grant.

Target community means the unit or units of local government in which the target area is located.

Tribal entity means a legal entity that is owned, controlled, sanctioned, or chartered by the recognized governing body of an Indian tribe as defined in this NOFA.

II. Award Information

The total amount of funds available for grants under this notice is $11.3 million. The maximum amount of grant assistance that will be considered for funding in a grant application under this notice is $5,000,000. The minimum amount of assistance for a grant application under this program is $75,000. The number of grants awarded under this NOFA will depend on the number of applications submitted, the amount of grant funds requested, and the quality and competitiveness of applications submitted. In response to the NOFA published December 9, 2002 [67 FR 72904], RUS selected 9 projects for funding. The grant awards ranged from $173,000 to $3,775,000.

The funding instrument available under this NOFA will be a grant agreement. Grants awarded under this notice must comply with all applicable USDA and Federal regulations concerning financial assistance, with the terms of this notice, and with the requirements of section 19 of the RE Act. Grants made under this NOFA will be administered under and are subject to USDA financial assistance regulations at 7 CFR parts 3015, 3016, 3017, 3018, 3019, and 3052, as applicable. The award period will generally be for 36 months, however, longer periods may be approved depending on the project involved.

Projects that were selected for funding under the December 9, 2002, NOFA will not be considered for additional funding under this Notice. Applicants that submitted project application packages during the prior round that were not selected for funding may request reconsideration of their proposals under this NOFA.

All timely submitted and complete applications will be reviewed for eligibility and rated according to the criteria described in this NOFA. Applications will be ranked in order of their numerical scores on the rating criteria and forwarded to the RUS Administrator. The Administrator will review the rankings and the recommendations of the rating panels. The RUS Administrator will then fund grant applications in rank order.

RUS reserves the right not to award any or all the funds made available under this notice, if in the sole opinion of the Administrator, the grant proposals submitted are not deemed feasible. RUS also reserves the right to partially fund grants if grant applications exceed the available funds. RUS will advise applicants if it cannot fully fund a grant request.

III. Eligibility Information

1. Eligible Applicants

Under Section 19 eligible applicants include "persons, States, political subdivisions of States, and other entities organized under the laws of States" (7 U.S.C. 918a). Under section 13 of the RE Act, the term "person" means "any natural person, firm, corporation, or association" (7 U.S.C. 913). Examples of eligible applicants include: for-profit and nonprofit organizations, including corporations, associations, partnerships (including limited liability partnerships), cooperatives, trusts, and sole proprietorships; State and local governments, counties, cities, towns, boroughs, or other agencies or units of State or local governments; Indian tribes, other tribal entities, Alaska Native Corporations; and individuals.

An individual is an eligible applicant under this program, however, the proposed grant project must provide community benefits and not be for the sole benefit of an individual applicant.

All applicants must demonstrate the legal capacity to enter into a binding grant agreement with the Federal Government at the time of the award and to carry out the proposed grant funded project according to its terms.

Effective October 1, 2003, all applicants for Federal grants with the exception of individuals other than sole proprietorships must have a Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number. Consistent with this new Federal policy directive, any organization that applies for an RUS high energy cost grant, including entities seeking reconsideration of prior applications, must use their DUNS number on the application and the revised SF 424, "Application for Federal Assistance." DUN's numbers are available without charge to Federal Grant applicants. Information on how to obtain a DUNS number and the new Federal requirement on DUNS numbers is available at *http://www.whitehouse.gov/omb/grants/duns_num_guide.pdf.*

If you already have obtained a DUNS number in connection with the Federal acquisition process or requested or had one assigned to you for another purpose, you should use that number on all of your applications. It is not necessary to request another DUNS number from D&B.

If you know you do not have a DUNS number or if you are not sure if you have a DUNS number, you should call D&B using the toll-free number, 1–866–705–5711 between the hours of 8 a.m. to 6 p.m. (local time of the caller when calling from within the continental United States) and indicate that you are a Federal grant applicant or prospective applicant. D&B will tell you if you already have a number. If you do not have a DUNS number, D&B will ask you to provide the information listed below and will immediately assign you a number, free of charge. The process to request a number over the telephone takes about 5–10 minutes. D&B will immediately assign you a number, free of charge at the conclusion of the call. You will need to provide the following information required to obtain a DUNS number:

- Legal name of your organization.
- Headquarters name and address for your organization.
- Doing business as (DBA) or other name by which your organization is commonly known or recognized.
- Physical address, city, State and zip code.
- Mailing address (if separate from headquarters and/or physical address).
- Telephone number.
- Contact name and title.
- Number of employees at your physical location.

You may also request a DUNS number over the Internet from *http://www.dnb.com,* however, it may take up to 30 days to process your request, and therefore it is strongly recommended that Federal grant applicants use the telephone application process.

2. Cost Sharing and Matching

No cost sharing or matching funds are required as a condition of eligibility under this grant program. However, RUS will consider other financial resources available to the grantee and any voluntary commitment of matching funds or other contributions in assessing the grantee's capacity to carry out the grant program successfully and will award additional evaluation points to proposals that include such contributions. If a successful applicant proposes to use matching funds in its project to obtain additional evaluation points, the grant agreement will include conditions requiring documentation of the availability of the matching funds and actual expenditure of matching funds.

3. Other Eligibility Requirements

A. Eligible Projects

Grantees must use grant funds to acquire, construct, extend, upgrade, or otherwise improve energy generation, transmission, or distribution facilities serving eligible communities. All energy generation, transmission, and distribution facilities, equipment, and associated services used to provide electricity, natural gas, home heating fuels, and other residential energy service are eligible. On-grid and off-grid renewable energy projects, and energy efficiency, and energy conservation projects that serve eligible communities are included.

Grants may cover up to the full costs of any eligible projects subject to the statutory condition that no more than 4 percent of grant funds may be used for the planning and administrative expenses of the grantee.

The project must serve communities that meet the extremely high energy cost eligibility requirements described in this NOFA. The grantee must demonstrate that the proposed project will benefit eligible communities. Additional information on eligible activities is contained in the Application Guide.

Grant funds cannot be used for: preparation of the grant application, fuel purchases, routine maintenance or other operating costs, and purchase of equipment, structures, or real estate not directly associated with provision of residential energy services. In general, grant funds may not be used to support projects that primarily benefit areas outside of eligible target communities. However, grant funds may be used to finance an eligible target community's proportionate share of a larger energy project.

Each grant applicant must demonstrate the economic and technical feasibility of its proposed project. Activities or equipment that would commonly be considered as research and development activities, or commercial demonstration projects for new energy technologies will not be considered as technologically feasible projects and would, thus, be ineligible grant purposes. However, grant funds may be used for projects that involve the innovative use or adaptation of energy-related technologies that have been commercially proven.

B. Eligible Communities

The grant project must benefit communities with extremely high energy costs. The RE Act defines an extremely high energy cost community as one in which "the average residential expenditure for home energy is at least 275 percent of the national average residential expenditure for home energy" as determined by the Energy Information Administration (EIA) using the most recent data available. 7 U.S.C. 918a.

The statutory requirement that community residential expenditures for home energy exceed 275 percent of national average establishes a very high threshold for eligibility under this program. RUS has calculated high energy cost benchmarks based on EIA national average home energy expenditure data. Communities must meet one or more high energy cost benchmarks to qualify as an eligible beneficiary of a grant under this program. Based on available published information on residential energy costs, RUS anticipates that only those communities with the highest energy costs across the country will qualify under this congressionally-mandated standard.

The EIA's Residential Energy Consumption and Expenditure Surveys (RECS) and reports provide the baseline national average household energy costs that were used by RUS for establishing extremely high energy cost community eligibility criteria for this grant program. The RECS data base and reports provide national and regional information on residential energy use, expenditures, and housing characteristics. The latest available RECS home energy expenditure estimates are based on 1997 survey data and are shown in Table 1.

TABLE 1.—EIA AVERAGE ANNUAL HOUSEHOLD ENERGY EXPENDITURES AND RUS EXTREMELY HIGH ENERGY COST ELIGIBILITY CRITERIA BENCHMARKS

Fuel	Average total consumption	National average	Extremely high energy cost benchmark
Average annual household expenditure:			
Electricity	10,219 kilowatt hours (kWh).	$871 per year	$2,341 per year.
Natural Gas	83 thousand cubic feet	$579 per year	$1,547 per year.
Fuel Oil	730 gallons	$714 per year	$1,870 per year.
LPG/Propane	488 gallons	$500 per year	$1,266 per year.
Total Household Energy Use	101 million Btus	$1,338 per year	$3,613 per year.
Annual average per unit residential energy costs:			
Electricity		$0.085 per kWh	$0.229 per kWh.
Natural Gas		$6.96 per thousand cubic feet.	$18.78 per thousand cubic feet.
Fuel Oil		$0.96 per gallon	$2.62 per gallon.
LPG/Propane		$1.03 per gallon	$2.72 per gallon.
Total Household Energy cost per Btus		$13.25 per million Btus	$36.10 per million Btus.

Sources: U.S. Department of Energy, Energy Information Administration, Residential Energy Consumption and Expenditure Surveys 1997. The RUS benchmarks calculations include adjustments to reflect the uncertainties inherent in EIA's statistical methodology for estimating home energy costs. The benchmarks are set based on the EIA's lower range estimates using the specified EIA methods.

Extremely high energy costs in rural and remote communities typically result from a combination of factors. The most prevalent include high energy consumption, high per unit energy costs in local markets, limited availability of energy sources, extreme climate conditions, and housing characteristics. The relative impacts of these conditions exhibit regional and seasonal diversity. Market factors have created an additional complication in recent years as the prices of the major commercial residential energy sources—electricity, fuel oil, natural gas, and LPG/propane—have fluctuated dramatically in some areas.

RUS has established community eligibility criteria based on EIA's estimates of national average residential energy expenditures. Table 1 shows the national averages and RUS benchmark criteria for extremely high energy costs.

The applicant must demonstrate that each community in the grant's proposed target area exceeds one or more of these high energy cost benchmarks to be eligible for assistance under this program.

C. RUS High Energy Cost Benchmarks

The benchmarks measure extremely high energy costs for residential consumers. These benchmarks were calculated using EIA's estimates of national average residential energy expenditures per household and by primary home energy source. The benchmarks recognize the diverse factors that contribute to extremely high home energy costs in rural communities. The benchmarks allow extremely high energy cost communities several alternatives for demonstrating eligibility. Communities may qualify based on: total annual household energy expenditures; total annual expenditures for commercially-supplied primary home energy sources, *i.e.*, electricity, natural gas, oil, or propane; or average annual per unit home energy costs. By providing alternative measures for demonstrating eligibility, the benchmarks reduce the burden on potential applicants created by the limited public availability of comprehensive data on local community energy consumption and expenditures.

RUS is adopting the following high energy cost benchmarks as eligibility criteria for competitive grant applications submitted in response to this NOFA. A target community or target area will qualify as an extremely high cost energy community if it meets one or more of the energy cost benchmarks described below.

1. *Extremely High Average Annual Household Expenditure for Home Energy.* The target area or community exceeds one or more of the following:

- Average annual residential electricity expenditure of $2,341 per household;
- Average annual residential natural gas expenditure of $1,547 per household;
- Average annual residential expenditure on fuel oil of $1,870 per household;
- Average annual residential expenditure on propane or liquefied petroleum gas (LPG) as a primary home energy source of $1,266 per household; or
- Average annual residential energy expenditure (for all non-transportation uses) of $3,613 per household.

2. *Extremely High Average per unit-energy costs.* The average residential per unit cost for major commercial energy sources in the target area or community exceeds one or more of the following:

- Annual average revenues per kilowatt hour for residential electricity customers of $0.229 per kilowatt hour (kWh);
- Annual average residential natural gas price of $18.78 per thousand cubic feet;
- Annual average residential fuel oil price of $2.62 per gallon;
- Annual average residential price of propane or LPG as a primary home energy source of $2.72 per gallon; or
- Total annual average residential energy cost on a Btu basis of $36.13 per million Btu.[1]

D. Supporting Energy Cost Data

The applicant must include information that demonstrates its eligibility under the RUS high energy cost benchmarks for the target communities and the target areas. The applicant must supply documentation or references for its sources for actual or estimated home energy expenditures or equivalent measures to support eligibility. Generally, the applicant will be expected to use historical residential energy cost or expenditure information for the local energy provider serving the target community or target area to determine eligibility. Other potential sources of home energy related information include Federal and State agencies, local community energy providers such as electric and natural gas utilities and fuel dealers, and commercial publications. The Application Guide includes a list of EIA resources on residential energy consumption and costs that may be of assistance.

The grant applicant must establish eligibility for each community in the project's target area. To determine eligibility, the applicant must identify each community included in whole or in part within the target areas and provide supporting actual or estimated energy expenditure data for each community. The smallest area that may be designated as a target area is a 2000 Census block. This minimum size is necessary to enable a determination of population size.

Potential applicants can compare the RUS benchmark criteria to available information about local energy use and costs to determine their eligibility. Applicants should demonstrate their eligibility using historical energy use and cost information. Where such information is unavailable or does not adequately reflect the actual costs of supporting average home energy use in a local community, RUS will consider estimated commercial energy costs. The Application Guide includes examples of circumstances where estimated energy costs are used.

EIA does not collect or maintain data on home energy expenditures in sufficient detail to identify specific rural localities as extremely high energy cost communities. Therefore, grant applicants will have to provide information on local community energy costs from other sources to support their applications

In many instances, historical community energy cost information can be obtained from a variety of public sources or from local utilities and other energy providers. For example, EIA publishes monthly and annual reports of residential prices by State and by service area for electric utilities and larger natural gas distribution companies. Average residential fuel oil and propane prices are reported regionally and for major cities by government and private publications. Many State agencies also compile and publish information on residential energy costs to support State programs.

E. Use of Estimated Home Energy Costs.

Where historical community energy cost data are incomplete or lacking or where community-wide data do not accurately reflect the costs of providing home energy services in the target area, the applicant may substitute estimates based on engineering standards. The estimates should use available community, local, or regional data on energy expenditures, consumption, housing characteristics and population. Estimates are also appropriate where the target area does not presently have centralized commercial energy services at a level that is comparable to other residential customers in the State or region. For example, local commercial energy cost information may not be available where the target area is without local electric service because of the high costs of connection. Engineering cost estimates reflecting the incremental costs of extending service could reasonably be used to establish eligibility for areas without grid-connected electric service. Estimates also may be appropriate where historical energy costs do not reflect the costs of providing a necessary upgrade

[1] *Note:* Btu is the abbreviation for British Thermal Unit, a standard energy measure. A Btu is the quantity of heat needed to raise the temperature of one pound of water 1 degree Fahrenheit at or near 39.2 degrees Fahrenheit. In estimating average household per unit energy cost on a Btu basis, the costs of different home energy sources are converted to a standard Btu basis. The Application Guide contains additional information on calculating per unit costs on a Btu basis for major home energy sources.

or replacement of energy infrastructure to maintain or extend service that would raise costs above one or more of benchmarks.

Information to support high energy cost eligibility is subject to independent review by RUS. Applications that contain information that is not reasonably based on credible sources of information and sound estimates will be rejected. Where appropriate, RUS may consult standard sources to confirm the reasonableness of information and estimates provided by applicants in determining eligibility, technical feasibility, and adequacy of proposed budget estimates.

F. Coordination With State Rural Development Initiatives

USDA encourages the coordination of grant projects under this program with State rural development initiatives. There is no requirement that the grant proposal receive the concurrence or approval of State officials as a condition of eligibility under this program. RUS will, however, award additional priority points to proposals that are coordinated with and support rural development initiatives within a State. The Applicant should describe how the proposed project will support State rural development initiatives and provide documentation evidencing any concurrence or endorsement by State rural development officials.

If an Applicant is an entity directly involved in rural development efforts, such as a State, local, or tribal rural development agency or a participant in an existing USDA Rural Development program, the Applicant may qualify for additional points by describing how its proposed project supports its efforts.

G. Limitations on Grant Awards

1. Statutory limitation on planning and administrative expenses.

Section 19 of the RE Act provides that no more than 4 percent of the grant funds for any project may be used for the planning and administrative expenses of the grantee.

2. Ineligible Grant Purposes.

Grant funds cannot be used for: preparation of the grant application, fuel purchases, routine maintenance or other operating costs, and purchase of equipment, structures, or real estate not directly associated with provision of residential energy services. In general, grant funds may not be used to support projects that primarily benefit areas outside of eligible target communities. However, grant funds may be used to finance an eligible target community's proportionate share of a larger energy project.

Consistent with USDA policy, grant funds awarded under this program generally cannot be used to replace other USDA assistance or to refinance or repay outstanding RUS loans. Grant funds may, however, be used in combination with other USDA assistance programs including RUS loans. Grants may be applied toward grantee contributions under other USDA programs depending on the terms of those programs. For example, an applicant may propose to use grant funds to offset the costs of electric system improvements in extremely high cost areas and as a cost contribution as part of the utility's expansion of its distribution system financed in whole or part by an RUS electric loan. An applicant may propose to finance a portion of an energy project for an extremely high energy cost community through this grant program and secure the remaining project costs through a loan or loan guarantee or grant from RUS or other sources.

3. Maximum and minimum awards.

The maximum amount of grant assistance that will be considered for funding in a grant application under this notice is $5,000,000. The minimum amount of assistance for a competitive grant application under this program is $75,000.

IV. Application and Submission Information

All applications must be prepared and submitted in compliance with this NOFA and the Application Guide. The Application Guide contains additional information on the grant program and sources of information for use in preparing applications and copies of the required application forms or requested from RUS.

1. Address To Request an Application Package

Applications materials and the Application Guide are available for download through *http://www.Grants.gov* (under CFDA No. 10.859) and on the RUS Web site at *http://www.usda.gov/rus/electric.*

Application packages, including required forms, may be also be requested from: Karen Larsen, Management Analyst, U.S. Department of Agriculture, Rural Utilities Service, Electric Program, 1400 Independence Avenue SW., STOP 1560, Room 5165 South Building, Washington, DC 20250–1560. Telephone (202) 720–9545, Fax (202) 690–0717, e-mail: *energy.grants@usda.gov.*

2. Content and Form of Application Submission

There are different application requirements for first time applicants and for prior applicants requesting reconsideration. First time applicants are those that did not submit a timely application in response to the December 9, 2002 (67 FR 72904), NOFA. Prior applicants are those that (1) submitted timely and complete applications under the December 9, 2002, NOFA, (2) were not selected for a grant award, and (3) would like to request consideration of their proposal under this notice. First time applicants should follow the directions in this notice and the Application Guide in preparing their applications and narrative proposals. The completed application package should be assembled in the order specified with all pages numbered sequentially or by section.

Prior applicants should follow the special instructions for reconsideration and submit a revised SF Form 424, a letter requesting reconsideration, and any supplemental material by the deadline.

Application Contents for First Time Applicants

First time applicants must submit the following information for the application to be complete and considered for funding:

Part A. A Completed SF 424, "Application for Federal Assistance." This form must be signed by a person authorized to submit the proposal on behalf of the applicant. Note: SF 424 has recently been revised to include new required data elements, including a DUNS number. You must submit the revised form. Copies of this form are available in the application package available on line through RUS or through Grants.gov, through the Office of Management and Budget at *http://www.whitehouse.gov/omb/grants/grants_forms.html*, or by request from the Agency contact listed above.

Part B. Grant Proposal. The grant proposal is a narrative description prepared by the applicant that establishes the applicant's eligibility, identifies the eligible extremely high energy cost communities to be served by the grant, and describes the proposed grant project, the potential benefits of the project, and a proposed budget. The grant proposal should contain the following sections in the order indicated.

1. Executive Summary. The Executive Summary is a one to two page narrative summary that: (a) Identifies the applicant, project title, and the key

contact person with telephone and fax numbers, mailing address and e-mail address; (b) specifies the amount of grant funds requested; (c) provides a brief description of the proposed program including the eligible rural communities and residents to be served, activities and facilities to be financed, and how the grant project will offset or reduce the target community's extremely high energy costs; and (d) identifies the associated rural development initiative that the project supports. The Executive Summary should also indicate whether the applicant is claiming additional points under any of the criteria designated as USDA priorities under this NOFA.

2. Table of Contents. The application package must include a table of contents immediately after the Executive Summary with page numbers for all required sections, forms, and appendices.

3. Applicant Eligibility. This section includes a narrative statement that identifies the applicant and supporting evidence establishing that the applicant has or will have the legal authority to enter into a financial assistance relationship with the Federal Government. Examples of supporting evidence of applicant's legal existence and eligibility include: a reference to or copy of the relevant statute, regulation, executive order, or legal opinion authorizing a State, local, or tribal government program, articles of incorporation or certificates of incorporation for corporate applicants, partnership or trust agreements, board resolutions. Applicants must also be free of any debarment or other restriction on their ability to contract with the Federal Government.

4. Community Eligibility. This section provides a narrative description of the community or communities to be served by the grant and supporting information to establish eligibility. The narrative must show that the proposed grant project's target area or areas are located in one or more communities where the average residential energy costs exceed one or more of the benchmark criteria for extremely high energy costs as described in this NOFA. The narrative should clearly identify the location and population of the areas to be aided by the grant project and their energy costs and the population of the local government division in which they are located. Local energy providers and sources of high energy cost data and estimates should be clearly identified. Neither the applicant nor the project must be physically located in the extremely high energy cost community, but the funded project must serve an eligible community.

The population estimates should be based on the results of the 2000 Census available from the U.S. Census Bureau. Additional information and exhibits supporting eligibility may include maps, summary tables, and references to statistical information from the U.S. Census, the Energy Information Administration, other Federal and State agencies, or private sources. The Application Guide includes additional information and sources that the applicant may find useful in establishing community eligibility.

5. Coordination with State Rural Development Initiatives. In this section the applicant must describe how the proposed grant will be coordinated with rural development efforts. The Applicant should provide supporting references or documentation.

6. Project Overview. This section includes the applicant's narrative overview of its proposed project. The narrative must address the following:

a. *Project Design:* This section must provide a narrative description of the project including a proposed scope of work identifying major tasks and proposed schedules for task completion, a detailed description of the equipment, facilities and associated activities to be financed with grant funds, the location of the eligible extremely high energy cost communities to be served, and an estimate of the overall duration of the project. The Project Design description should be sufficiently detailed to support a finding of technical feasibility. Proposed projects involving construction, repair, replacement, or improvement of electric generation, transmission, and distribution facilities must generally be consistent with the standards and requirements for projects financed with RUS loans and loan guarantees as set forth in RUS Electric Program Regulations and Bulletins and may reference these requirements.

b. *Project Management:* This section must provide a narrative describing the applicant's capabilities and project management plans. The description should address the applicant's organizational structure, method of funding, legal authority, key personnel, project management experience, staff resources, the goals and objectives of the program or business, and any related services provided to the project beneficiaries. A current financial statement and other supporting documentation may be referenced here and included under the Supplementary Material section. If the applicant proposes to use affiliated entities, contractors, or subcontractors to provide services funded under the grant, the applicant must describe the identities, relationship, qualifications, and experience of these affiliated entities. The experience and capabilities of these entities will be reviewed by the rating panel. If the applicant proposes to secure equipment, design, construction, or other services from non-affiliated entities, the applicant must briefly describe how it plans to procure and/or contract for such equipment or services. The Applicant should provide information that will support a finding that the combination of management team's experience, resources and project structure will enable successful completion of the project.

c. *Regulatory and other approvals:* The applicant must identify any other regulatory or other approvals required by other Federal, State, local, or tribal agencies, or by private entities as a condition of financing that are necessary to carry out the proposed grant project and its estimated schedule for obtaining the necessary approvals.

d. *Benefits of the proposed project.* The applicant should describe how the proposed project would benefit the target area and eligible communities. The description must specifically address how the project will improve energy generation, transmission, or distribution facilities serving the target area. The applicant should clearly identify how the project addresses the energy needs of the community and include appropriate measures of project success such as, for example, expected reductions in household or community energy costs, avoided cost increases, enhanced reliability, or economic or social benefits from improvements in energy services available to the target community. The applicant should include quantitative estimates of cost or energy savings and other benefits. The applicant should provide documentation or references to support its statements about cost-effectiveness savings and improved services. The applicant should also describe how it plans to measure and monitor the effectiveness of the program in delivering its projected benefits.

7. Proposed Project Budget. The applicant must submit a proposed budget for the grant program on SF 424A, "Budget Information—Non-Construction Programs" or SF–424C, "Standard Form for Budget Information-Construction Programs," as applicable. The budget must document that planned administrative and other expenses of the project sponsor will not total more than 4 percent of grant funds. The applicant must also identify the source and amount of any other

contributions of funds or services that will be used to support the proposed project. This program does not require supplemental or matching funds for eligibility, however, RUS will award additional rating points for programs that include a match of other funds or like-kind contributions to support the project.

8. *Supplementary Material.* The applicant may append any additional information relevant to the proposal or which may qualify the application for extra points under the evaluation criteria described in this NOFA.

Part C. Additional Required Forms and Certifications. In order to establish compliance with other Federal requirements for financial assistance, the Applicant must execute and submit with the initial application the following forms and certifications:

- SF 424B, "Assurances—Non-Construction Programs" or SF 424D, "Assurances—Construction Programs" (as applicable).
- SF LLL, "Disclosure of Lobbying Activities."
- "Certification Regarding Debarment, Suspension and Other Responsibility Matter—Primary Covered Transactions" as required under 7 CFR part 3017, Appendix A. Certifications for individuals, corporations, nonprofit entities, Indian tribes, partnerships.
- Environmental Profile. The environmental profile template included in the Application Guide solicits information about project characteristics and site-specific conditions that may involve environmental, historic preservation, and other resources. The profile will be used by RUS to identify selected projects that may require additional environmental reviews, assessments, or environmental impact statements before a final grant award may be approved. A copy of the environmental profile and instructions for completion are included in the Application Guide and may be downloaded from the RUS website.

Special Requirements for Prior Applicants

Prior applicants that wish to request reconsideration of their application packages in this round of competitive funding must submit a revised SF 424, including new mandatory data elements (DUNS number, fax number, and email address) along with a brief signed letter request for reconsideration identifying any additional information that they wish to be considered by the rating panel in reviewing their application along with supporting documentation. The required application package will consist of the original signed SF 424, the request for reconsideration, and supporting documents. RUS has maintained prior application materials on file and will add the newly submitted material to the existing applications for review by the rating panel. Because this abbreviated application package differs from the general application package for first time applicants available through Grants.gov, applicants requesting reconsideration should submit their requests directly to RUS by the application deadline and not through Grants.gov.

Additional Information Requests

In addition to the information required to be submitted in the application package, RUS may request that successful grant applicants provide additional information, analyses, forms and certifications as a condition of pre-ward clearance, including any environmental reviews or other reviews or certifications required under USDA and Government-wide assistance regulations. RUS will advise the applicant in writing of any additional information required.

Submitting the Application

Applicants that are submitting hard or paper copies of their application package directly to RUS must submit one original application package that includes original signatures on all required forms and certifications and two copies. Applications should be submitted on 8½ by 11 inch white paper. Supplemental materials, such as maps, charts, plans, and photographs may exceed this size requirement.

A completed application must contain all required parts in the order indicated in the above section on "Content and Form of Application Submission." The application package should be paginated either sequentially or by section.

Disclosure of Information

All material submitted by the applicant may be made available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552) and USDA's implementing regulations at 7 CFR Part 1.

3. Submission Dates and Times

Applications must be postmarked or delivered to RUS or to grants.gov by March 5, 2004. RUS will begin accepting applications on the date of publication of this NOFA. RUS will accept for review all applications postmarked or delivered to RUS by this deadline. Late applications will not be considered and may be returned to the Applicant.

For the purposes of determining the timeliness of an application RUS will accept the following as a valid postmarks: the date stamped by the United States Postal Service on the outside of the package containing the application delivered by U.S. Mail; the date the package was received by a commercial delivery service as evidenced by the delivery label; the date received via hand delivery to RUS; and the date an electronic application was posted for submission to Grants.gov.

4. Intergovernmental Review

This program is not subject to the requirements of Executive Order 12372, "Intergovernmental Review of Federal Programs," as implemented under USDA's regulations at 7 CFR part 3015.

5. Funding Restrictions

Section 19 of the RE Act provides that no more than 4 percent of the grant funds may be used for the planning and administrative expenses of the grantee.

6. Other Submission requirements

Applicants that are submitting hard or paper copies of their application package directly to RUS must submit one original application package that includes original signatures on all required forms and certifications and two copies. Applications should be submitted on 8½ by 11 inch white paper. Supplemental materials, such as maps, charts, plans, and photographs may exceed this size requirement.

A completed application for first time applicants must contain all required parts in the order indicated in the above section on "Content and Form of Application Submission." The application package should be paginated either sequentially or by section. Applicants seeking reconsideration should follow the special instructions above.

The completed paper application package and two copies must be delivered to RUS headquarters in Washington, DC using United States Mail, overnight delivery service, or by hand to the following address: Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1560, Room 5165 South Building, Washington, DC 20250–1560. Applications should be marked "Attention: High Energy Cost Community Grant Program." Applicants should be advised that regular mail deliveries to Federal Agencies, especially of oversized packages and envelopes, continue to be delayed because of increased security screening

requirements. Applicants may wish to consider using Express Mail or a commercial overnight delivery service instead of regular mail. Applicants wishing to hand deliver or use courier services for delivery should contact the Agency representative in advance to arrange for building access. RUS advises applicants that because of intensified security procedures at government facilities that any electronic media included in an application package may be damaged during security screening. If an applicant wishes to submit such materials, they should contact the agency representative for additional information.

At this time, RUS is not able to accept applications directly online, by email, or fax. Applicants that wish to submit applications electronically must do so through the Federal web portal at *http://www.Grants.gov*. Applicants wishing to submit electronic applications through the new government-wide grants portal Grants.gov must follow the application procedures and submission requirements detailed on that Web site at *http://www.Grants.gov*. RUS will accept electronic applications through Grants.gov only. Applicants that elect this option will receive electronic confirmation that their applications have been received.

Applicants should be aware that Grants.gov requires that applicants complete several preliminary registrations and e-authentication requirements before being allowed to submit applications electronically. Applicants should consult the Grants.gov website and allow ample time to complete the steps required for registration before submitting their applications. Applicants may download application materials and complete forms online through Grants.gov without completing the registration requirements.

7. Multiple Applications

Eligible applicants may submit only one application per project. Multiple tasks and localities may be included in a single proposed grant project. No more than $5 million in grant funds will be awarded per project. Applicants may, however, submit applications for more than one project.

V. Application Review Information

All applications for grants must be delivered to RUS at the address listed above or postmarked no later than March 5, 2004 to be eligible for grant funding. After the deadline has passed, RUS will review each application to determine whether it is complete and meets all of the eligibility requirements described in this NOFA.

After the application closing date, RUS will not consider any unsolicited information from the applicant. RUS may contact the applicant for additional information or to clarify statements in the application required to establish applicant or community eligibility and completeness. Only applications that are complete and meet the eligibility criteria will be considered. RUS will not accept or solicit any additional information relating to the technical merits and/or economic feasibility of the grant proposal after the application closing date.

RUS may establish one or more rating panels to review and rate the grant applications. These panels may include persons not currently employed by USDA.

The panel will evaluate and rate all complete applications that meet the eligibility requirements using the selection criteria and weights described in this NOFA. As part of the proposal review and ranking process, panel members may make comments and recommendations for appropriate conditions on grant awards to promote successful performance of the grant or to assure compliance with other Federal requirements. The decision to include panel recommendations on grant conditions in any grant award will be at the sole discretion of the Administrator.

All applications will be scored and ranked according to the evaluation criteria and weightings described in this Notice, which are identical to those used in the December 2002 [67 FR 72904], NOFA. For this reason, prior applicants that are being reconsidered will retain their prior rating scores, however, the rating panel may revise the score upward based on any updated information submitted by the applicant.

RUS will use the ratings and recommendations of the panel(s) to rank applicants against other applicants. All applicants will be ranked according to their scores in this round. The rankings and recommendations will then be forwarded to the Administrator for final review and selection.

Decisions on grant awards will be made by the RUS Administrator based on the application, and the rankings and recommendations of the rating panel. The Administrator will fund grant requests in rank order to the extent of available funds

1. Criteria

RUS will use the selection criteria described in this NOFA to evaluate and rate applications and will award points up to the maximum number indicated under each criterion. Applicants should carefully read the information on the rating criteria in this NOFA and the Application Guide and address all criteria. The maximum number of points that can be awarded is 100 points. RUS will award up to 65 points for project design and technical merit criteria and up to 35 points based on priority criteria for project or community characteristics that support USDA Rural Development and RUS program priorities.

Project Design and Technical Merit Criteria

Reviewers will consider the soundness of applicant's approach, the technical feasibility of the project, the adequacy of financial and other resources, the competence and experience of the applicant and its team, the project goals and objectives, and community needs and benefits. A total of 65 points may be awarded under these criteria.

A. Comprehensiveness and feasibility of approach. (Up to 30 points) Raters will assess the technical and economic feasibility of the project and how well its goals and objectives address the challenges of the extremely high energy cost community. The panel will review the proposed design, construction, equipment, and materials for the community energy facilities in establishing technical feasibility. Reviewers may propose additional conditions on the grant award to assure that the project is technically sound. Reviewers will consider the adequacy of the applicant's budget and resources to carry out the project as proposed. Reviewers will also evaluate how the applicant proposes to manage available resources such as grant funds, income generated from the facilities, and any other financing sources to maintain and operate a financially viable project once the grant period has ended.

B. Demonstrated experience. (Up to 10 points) Reviewers will consider whether the applicant and its project team have demonstrated experience in successfully administering and carrying out projects that are comparable to that proposed in the grant application. RUS supports and encourages emerging organizations that desire to develop the internal capacity to improve energy services in rural communities. In evaluating the capabilities of entities without extensive experience in carrying out such projects, RUS will consider the experience of the project team and the effectiveness of the program design in compensating for lack of extensive experience.

C. Community Needs. (Up to 15 points) Reviewers will consider the applicant's identification and documentation of eligible communities, their populations, and the applicant's assessment of community energy needs to be addressed by the grant project. Information on the severity of physical and economic challenges affecting eligible communities will be considered. Reviewers will weigh: (1) The applicant's analysis of community energy challenges and (2) why the applicant's proposal presents a greater need for Federal assistance than other competing applications. In assessing the applicant's demonstration of community needs, the rating panel will consider information in the narrative proposal addressing:

(a) the burden placed on the community and individual households by extremely high energy costs as evidenced by such quantitative measures as, for example, total energy expenditures, per unit energy costs, energy cost intensity for occupied space, or energy costs as a share of average household income, and persistence of extremely high energy costs compared to national or statewide averages.

(b) the hardships created by limited access to reliable and affordable energy services; and

(c) the availability of other resources to support or supplement the proposed grant funding.

D. Project Evaluation Methods. (Up to 5 points) Reviewers will consider the applicant's plan to evaluate and report on the success and cost-effectiveness of financed activities and whether the results obtained will contribute to program improvements for the applicant or for other entities interested in similar programs.

E. Coordination with Rural Development Initiatives. (Up to 5 points) Raters will assess how effectively the proposed project is coordinated with State rural development initiatives and is consistent with and supports these efforts. RUS will consider the documentation for coordination efforts, community support, and State or local government recommendations. Applicants should identify the extent to which the project is dependent on or tied to other rural development initiatives, funding, and approvals.

Priority Criteria

In addition to the points awarded for project design and technical merit, all proposals will be reviewed and awarded additional points based on certain characteristics of the project or the target community. USDA Rural Development policies generally encourage agencies to give priority in their programs to rural areas of greatest need and to support other Federal policy initiatives. In furtherance of these policies, RUS will award additional points to smaller communities and areas experiencing economic hardship, persistent poverty, or where community energy services are inadequate or the facilities present an imminent hazard to public health or safety. Priority points will also be awarded for proposals that include cost sharing, or that serve a Federally designated Empowerment Zone or Enterprise Community (EZ/EC) or a USDA Champion Community. A maximum of 35 total points may be awarded under priority criteria.

1. Economic Hardship. (Up to 10 points) The community experiences one or more economic hardship conditions that impair the ability of the community and/or its residents to provide basic energy services or to reduce or limit the costs of these services. Economic hardship will be assessed using either the objective measure of county median income under A below or subjectively under B based on the Applicant's description of the community's economic hardships and supporting materials. Applicants may elect either measure, but not both.

A. Economically Distressed Communities. (up to 10 points) The target community is an economically distressed county where the median household income is significantly below the State average. Points will be awarded based on the county percentage of State median household income (or reservation percentage of State median household income in the case of Federally-cognized Indian reservations) according to the following:

(1) Less than 70 percent of the State median household income—10 points;

(2) 70 to 80 percent of the State median household income—8 points;

(3) 80 to 90 percent of the State median household income—5 points;

(4) 90 to 95 percent of the State median household income—2 points; or

(5) Over 95 percent of the State median household income—0 points.

Information on State and county median income is available online from the USDA Economic Research Service at *http://www.ers.usda.gov/data/unemployment/*. Information on Indian reservations is available through the U.S. Census at *http://www.census.gov*.

B. Other Economic Hardship. (up to 10 points) The community suffers from other conditions creating a severe economic hardship that is adequately described and documented by the Applicant. Examples include but are not limited to natural disasters, financially distressed local industry, loss of major local employer, outmigration, or other condition adversely affecting the local economy, or contributing to unserved or underserved energy infrastructure needs that affect the economic health of the community.

2. Persistent Poverty Community. (3 points) Persistent poverty counties are those where poverty continues to be a long-term problem. The Economic Research Service (ERS) of USDA has defined a persistent poverty county as a nonmetropolitan county in which more than 20 percent of the population falls below the poverty level in each of the last 4 census years. ERS has made a preliminary identification of over 300 nonmetropolitan counties in which more than 20 percent of the population was below the poverty level in 1970, 1980, 1990, and 2000. A list of the ERS persistent poverty counties can be found in the online Application Guide or requested from the agency contact. In support of USDA policy, raters will award 3 points to any proposal in which the target area or project is located in a persistent poverty county.

3. Rurality. (Up to 12 points) Consistent with the USDA Rural Development policy to target resources to rural communities with significant needs and recognizing that smaller communities are often comparatively disadvantaged in seeking assistance, RUS reviewers will award additional points based on the rurality (as measured by population) of the target communities to be served with grant funds. Applications will be scored based on the population of the largest incorporated cities, towns, or villages, or census designated places included within the grant's proposed target area.

If the largest target community within the proposed target area has a population of:

(A) 2,500 or less—12 points;

(B) Between 2,501 and 5,000, inclusive 10 points;

(C) Between 5,001 and 10,000, inclusive 8 points;

(D) Between 10,001 and 15,000, inclusive 5 points;

(E) Between 15, 001 and 20,000, inclusive 2 points;

(F) Above 20,000, 0 points.

Applicants must use the latest available population figures from Census 2000 available at <*http://www.census.gov/main/www/cen2000.html*> for every incorporated city, town, or village, or Census designated place included in the target area.

4. Unserved Energy Needs (2 points) Consistent with the purposes of the RE Act, projects that meet unserved or

underserved energy needs will be eligible for 2 points. Examples of proposals that may qualify under this priority include projects that extend or improve electric or other energy services to communities and customers that do not have reliable centralized or commercial service or where many homes remain without such service because the costs are unaffordable.

5. Imminent hazard (2 points) If the grant proposal involves a project to correct a condition posing an imminent hazard to public safety, welfare, the environment, or to a critical community or residential energy facility, raters may award 2 points. Examples include community energy facilities in immediate danger of failure because of deteriorated condition, capacity limitations, damage from natural disasters or accidents, or other conditions where failure would create a substantial threat to public health or safety, or to the environment.

6. Cost Sharing (2 points) This grant program does not require any cost contribution. In addition to their assessment of the economic feasibility and sustainability of the project under the project evaluation factors above, raters may award 2 points for cost sharing. These points will be awarded when the proposal documents that supplemental contributions of funds, property, equipment, services, or other in kind contributions that support the project and demonstrate the applicant's and/or community's commitment to the project exceed 10 percent of project costs.

7. Empowerment Zone and Enterprise Community (EC/EZ) or Champion Community (up to 4 points) If the proposed project serves at least one community that is a Federally-identified Empowerment Zone and Enterprise Community (EC/EZ Community), 4 points will be awarded. The list of currently approved EC/EZ communities may be found at the EZ/EC Web site at: *http://www.ezec.gov* or may be requested from the agency contact.

If the proposed project serves at least one community that is a USDA identified "Champion Community," 2 points will be awarded. The list of currently approved USDA champion communities may be found at the EZ/EC Web site at: *http://www.ezec.gov* or may be requested from the agency contact.

2. Review and Selection Process

Scoring and Ranking of Applications

Following the evaluation and rating of individual applications under the above criteria, the rating panels will rank the applications in order according to their total scores. The scored and ranked applications and the raters' comments will then be forwarded to the Administrator for review and selection of grant awards.

Selection of Grant Awards and Notification of Applicants

The RUS Administrator will review the rankings and recommendations of the applications provided by the rating panels for consistency with the requirements of this NOFA. The Administrator may return any application to the rating panel with written instruction for reconsideration if, in her sole discretion, she finds that the scoring of an application is inconsistent with this NOFA and the directions provided to the rating panel.

Following any adjustments to the project rankings as a result of reconsideration, the Administrator will select projects for funding in rank order. If funds remain after funding the highest ranking application, RUS may fund all or part of the next highest ranking application. RUS will advise an applicant if it cannot fully fund a grant request.

The Administrator may decide based on the recommendations of the rating panel or in her sole discretion that a grant award may be made fully or partially contingent upon the applicant satisfying certain conditions or providing additional information and analyses. For example, RUS may defer approving a final award to a selected project—such as projects requiring more extensive environmental review and mitigation, preparation of detailed site specific engineering studies and designs, or requiring local permitting, or availability of supplemental financing—until any additional conditions are satisfied. In the event that a selected applicant fails to comply with the additional conditions within the time set by RUS, the selection will be vacated and the next ranking project will be considered.

If a selected applicant turns down a grant award offer, or fails to conclude a grant agreement acceptable to RUS, or to provide required information requested by RUS within the time period established in the notification of selection for grant award, the RUS Administrator may select for funding the next highest ranking application submitted in response to this NOFA. If funds remain after all selections have been made, remaining funds will be carried over and made available in future awards under the High Energy Cost Grant Programs.

RUS will notify each Applicant in writing whether or not it has been selected for an award. RUS's written notice to a successful applicant of the amount of the grant award based on the approved application will constitute RUS's preliminary approval, subject to compliance with all post-selection requirements including but not limited to completion of any environmental reviews and negotiation and execution of a grant agreement satisfactory to RUS. Preliminary approval does not bind the Government to making a final grant award. Only a final grant award and agreement executed by the Administrator will constitute a binding obligation and commitment of Federal funds. Funds will not be awarded or disbursed until all requirements have been satisfied. RUS will advise selected applicants of additional requirements or conditions.

Adjustments to Funding

RUS reserves the right to fund less than the full amount requested in a grant application to ensure the fair distribution of the funds and to ensure that the purposes of a specific program are met. RUS will not fund any portion of a grant request that is not eligible for funding under Federal statutory or regulatory requirements; that does not meet the requirements of this NOFA, or that may duplicate other RUS funded activities, including electric loans. Only the eligible portions of a successful grant application will be funded.

Grant assistance cannot exceed the lower of:

(a) The qualifying percentage of eligible project costs requested by the Applicant; or

(b) The minimum amount sufficient to provide for the economic feasibility of the project as determined by RUS.

VI. Award Administration Information

1. Award Notices

RUS will notify all applicants in writing whether they have been selected for an award. Successful applicants will be advised in writing of their selection as award finalists. Successful applicants will be required to negotiate a grant agreement acceptable to RUS and complete additional grant forms and certifications required by USDA as part of the pre-award process.

Depending on the nature of the activities proposed by the application, the grantee may be asked to provide information and certifications necessary for compliance with RUS environmental policy regulations and procedures at 7 CFR 1794. Following completion of the environmental review, selected applicants will receive a letter of conditions establishing any project-

specific conditions to be included in the grant agreement and asked to execute a letter of intent to meet the grant conditions or to detail why such conditions can't be met and to propose alternatives. Grant funds will not be advanced unless and until the applicant has executed a grant agreement acceptable to RUS.

RUS will require each successful applicant to agree to the specific terms of each grant agreement, a project budget, and other RUS requirements. In cases where RUS cannot successfully conclude negotiations with a selected applicant or a selected applicant fails to provide RUS with requested information within the time specified, an award will not be made to that applicant. The selection will be revoked and RUS may offer an award to the next highest ranking applicant, and proceed with negotiations with the next highest ranking applicant.

2. Administrative and National Policy Requirements

Environmental Review and Restriction on Certain Activities

Grant awards are required to comply with 7 CFR part 1794, which sets forth RUS regulations implementing the National Environmental Policy Act (NEPA). Grantees must also agree to comply with any other Federal or State environmental laws and regulations applicable to the grant project.

If the proposed grant project involves physical development activities or property acquisition, the Applicant is generally prohibited from acquiring, rehabilitating, converting, leasing, repairing or constructing property, or committing or expending RUS or non-RUS funds for proposed grant activities until RUS has completed any environmental review in accordance with 7 CFR part 1794 or determined that no environmental review is required. Successful applicants will be advised whether additional environmental review and requirements apply to their proposals.

Other Federal Requirements

Other Federal statutes and regulations apply to grant applications and to grant awards. These include, but are not limited to, requirements under 7 CFR part 15, subpart A—Nondiscrimination in Federally Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964.

Certain OMB circulars also apply to USDA grant programs and must be followed by a grantee under this program. The policies, guidance, and requirements of the following, or their successors, may apply to the award, acceptance and use of assistance under this program and to the remedies for noncompliance, except when inconsistent with the provisions of the Agriculture, Rural Development and Related Agencies Appropriations Acts, other Federal statutes or the provisions of this NOFA:

- OMB Circular No. A–87 (Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments);
- OMB Circular A–21 (Cost Principles for Education Institutions);
- OMB Circular No. A–122 (Cost Principles for Nonprofit Organizations);
- OMB Circular A–133 (Audits of States, Local Governments, and Non-Profit Organizations);
- 7 CFR part 3015 (Uniform Federal Assistance Regulations);
- 7 CFR part 3016 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally recognized Indian tribal governments);
- 7 CFR part 3017 (Governmentwide debarment and suspension (non-procurement) and governmentwide requirements for drug-free workplace (grants));
- 7 CFR part 3018 (New restrictions on Lobbying);
- 7 CFR part 3019 (Uniform administrative requirements for grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations); and
- 7 CFR part 3052 (Audits of States, local governments, and non-profit organizations).

Compliance with additional OMB Circulars or government-wide regulations may be specified in the grant agreement.

3. Reporting

The grantee will be required to provide periodic financial and performance reports under USDA grant regulations and RUS rules and to submit a final project performance report The nature and frequency of required reports are established in USDA grant regulations and the project-specific grant agreements.

VII. Agency Contact

The Agency Contact for this grant announcement is Karen Larsen, Management Analyst, U.S. Department of Agriculture, Rural Utilities Service, Electric Program, 1400 Independence Avenue, SW., STOP 1560, Room 5165 South Building, Washington, DC 20250–1560. Telephone (202) 720–9545, Fax 202–690–0717, e-mail mail to: *Karen.Larsen@usda.gov.*

Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), RUS invites comments on this information collection for which RUS intends to request approval from the Office of Management and Budget (OMB). These requirements are pending emergency clearance by OMB.

Comments on this notice must be received by March 23, 2004.

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 will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Richard Annan, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Stop 1522, Room 5168 South Building, Washington, DC 20250–1522. Comments may also be submitted via e-mail to *RUSComments@usda.gov* and must contain the phrase "High Energy Information Collection" in the subject line.

Title: Assistance to High Energy Cost Rural Communities.

Type of Request: New collection.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 7 hours per response.

Respondents: For profit and not-for-profit entities; State, Local or Tribal Governments.

Estimated Number of Respondents: 25.

Estimated Number of Responses per Respondent: 3.

Estimated Total Annual Burden on Respondents: 514 hours.

Copies of this information collection can be obtained from Michele Brooks, Program Development and Regulatory Analysis, at (202) 690–1078.

All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: January 20, 2004.

Hilda Gay Legg,

Administrator, Rural Utilities Service.

[FR Doc. 04–1471 Filed 1–22–04; 8:45 am]

BILLING CODE 3410–15–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee is proposing to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received on or Before: February 22, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions. If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each product or service will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to Procurement List for production by the nonprofit agency listed:

Services

Service Type/Location: Custodial Services, Harley O. Staggers Federal Building, 75 High Street, Morgantown, West Virginia.
NPA: PACE Training and Evaluation Center, Inc., Star City, West Virginia.
Contract Activity: GSA, Public Buildings Service, Region 3 (3PMT), Philadelphia, Pennsylvania.
Service Type/Location: Janitorial/Custodial, Naval & Marine Corps Reserve Center, 995 E. Mission Street, San Jose, California.
NPA: Social Vocational Services, Inc., Torrance, California.
Contract Activity: Naval Facilities Engineering Command, Alameda, California.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–1480 Filed 1–22–04; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket No. 040114017–4017–01]

2003 Company Organization Survey

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of determination.

SUMMARY: The Bureau of the Census (Census Bureau) is conducting the 2003 Company Organization Survey. The survey's data are needed, in part, to update the multiestablishment companies in the Business Register. The survey, which has been conducted annually since 1974, is designed to collect information on the number of employees, payroll, geographic location, current operational status, and kind of business for the establishments of multilocation companies. We have determined that annual data collected from this survey are needed to aid the efficient performance of essential governmental functions and have significant application to the needs of the public and industry. The data derived from this survey are not available from any other source.

FOR FURTHER INFORMATION CONTACT: Paul Hanczaryk, Economic Planning and Coordination Division, U.S. Census Bureau, Room 2747, Federal Building 3, Washington, DC 20233–6100, telephone (301) 763–4058.

SUPPLEMENTARY INFORMATION: Title 13, United States Code, sections 182, 195, 224, and 225 authorize the Census Bureau to undertake surveys necessary to furnish current data on the subjects covered by the major censuses. This survey will provide continuing and timely national statistical data for the period between economic censuses. The next economic censuses will be conducted for the year 2007. The data collected in this survey will be within the general scope, type, and character of those that are covered in the economic censuses. Form NC–99001 will be used to collect the desired data.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a current, valid Office of Management and Budget (OMB) control number. In accordance with the Paperwork Reduction Act, 44 U.S.C., chapter 35, the OMB approved Form NC–99001 on October 9, 2003, under OMB Control Number 0607–0444. We will furnish report forms to organizations included in the survey, and additional copies will be available upon written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

I have, therefore, directed that the 2003 Company Organization Survey be conducted for the purpose of collecting these data.

Dated: January 16, 2004.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. 04–1392 Filed 1–22–04; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on February 9 and 10, 2004, 9 a.m., Building 128, 53560 Hull Street, Space and Naval Warfare Systems Command (SPAWAR), San Diego, California. The

Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

January 9

Public Session

1. Opening remarks and introductions.
2. Comments or presentations by the public.
3. Discussion on semiconductor manufacturing equipment controls.
4. Discussion on microprocessor roadmap and trends.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2, sections 10(a)(1) and 10(a)(3).

January 10

Public Session

6. Presentation on high-performance computer market trends.
7. Second presentation on microprocessor roadmap and trends.

Closed Session

8. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2, sections 10(a)(1) and 10(a)(3).

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to the address listed below:

Ms. Lee Ann Carpenter, Advisory Committees MS: 1099D, U.S. Department of Commerce, 14th St. & Constitution Ave, NW., Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 20, 2004, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2, section (10)(d)), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2, sections 10(a)(1) and 10(a)(3).

For more information, contact Lee Ann Carpenter on 202–482–2583.

Dated: January 21, 2004.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 04–1533 Filed 1–22–04; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C-122–841]

Carbon and Certain Alloy Steel Wire Rod from Canada: Final Results of Countervailing Duty Changed Circumstances Review and Revocation of Countervailing Duty Order, in Whole

AGENCY: Import Administration, International Trade Administration, Department of Commerce

ACTION: Notice of Final Results of Changed Circumstances Review of the Countervailing Duty Order and Revocation of Countervailing Duty Order, in Whole.

SUMMARY: On November 3, 2003, in response to a request by domestic producers of the subject merchandise, the Department of Commerce (the "Department") published a notice of initiation of a changed circumstances review with the intent to revoke, in whole, the countervailing duty order on carbon and certain alloy steel wire rod from Canada. *See Carbon and Certain Alloy Steel Wire Rod from Canada: Initiation of Countervailing Duty Changed Circumstances Review*, 68 FR 62282 (November 3, 2003) ("*Initiation Notice*").

On December 12, 2003, the Department published the preliminary results of the changed circumstances review of the countervailing duty order preliminarily finding that there was a reasonable basis to believe that changed circumstances exist sufficient to warrant revocation of the CVD order because domestic producers expressed no interest in continuation of the order. Therefore, the Department preliminarily revoked the order, in whole. *See Carbon and Certain Alloy Steel Wire Rod from Canada: Preliminary Results of Countervailing Duty Changed Circumstances Review and Intent to Revoke Order*, 68 FR 69384 (December 12, 2003) ("Preliminary Results"). We did not receive any comments on the *Preliminary Results* objecting to the revocation of this order, in whole, and thus conclude that substantially all domestic producers lack interest in the relief provided by this order. Accordingly, we are revoking the countervailing duty order on carbon and certain alloy steel wire rod from Canada.

DATES: January 23, 2004.

FOR FURTHER INFORMATION CONTACT: S. Anthony Grasso, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–3853.

SUPPLEMENTARY INFORMATION:

Background

The Department published the countervailing duty ("CVD") order on carbon and certain alloy steel wire rod from Canada on October 22, 2002. *See Notice of Countervailing Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil and Canada*, 67 FR 64871 (October 22, 2002). On October 1, 2003, the Department received a request from Georgetown Steel Company (formerly GS Industries), Gerdau Ameristeel US Inc. (formerly Co-Steel Raritan), Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc., the petitioners in the original investigation, that the Department initiate a changed circumstances review for purposes of revoking the CVD order. The basis for the petitioners' request is that they are no longer interested in maintaining the CVD order or in the imposition of CVD duties on the subject merchandise from Canada.

On November 3, 2003, the Department published a notice of initiation of a changed circumstances review of the CVD order on carbon and certain alloy steel wire rod products from Canada. *See Initiation Notice*, 68 FR 62282. In the *Initiation Notice*, we provided interested parties an opportunity to submit comments for consideration in the Department's preliminary results. The Department did not receive any comments within the time limits established. On November 18, 2003, a respondent to the original proceeding, Ispat Sidbec, Inc. ("Ispat"), submitted a letter to the Department stating that "all three parties wish to advise the Department that they agree to the outcome of the review and, further, request that, pursuant to 19 CFR 351.216(e), the Department render its final results of review within 45 days of initiation of the review or sooner." Ispat claimed its letter represented the position of the only parties to the proceeding, namely, Ispat, the Government of Quebec, and the U.S.

producers that filed the original petition.

On December 12, 2003, the Department published the *Preliminary Results* of the changed circumstances review. In the *Preliminary Results*, we afforded interested parties an opportunity to submit comments for consideration in the Department's *Final Results*. We did not receive any comments following the publication of the *Preliminary Results*.

Scope of the Order

The merchandise covered by this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.[1]

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the *Harmonized Tariff Schedule of the United States* ("HTSUS") definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. Grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

Grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

The designation of the products as "tire cord quality" or "tire bead quality" indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under investigation are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Final Results of Review and Revocation of the Countervailing Duty Order, in Whole

Pursuant to section 751(d)(1) of the 1930 Tariff Act, as amended (the "Act"), and 19 CFR 351.222(g), the Department may revoke an antidumping or CVD order, in whole or in part, based on a review under section 751(b) of the Act (*i.e.*, a changed circumstances review). Section 751(b)(1) of the Act requires a changed circumstances review to be conducted upon receipt of a request that shows changed circumstances sufficient to warrant a review. Section 782(h)(1) of the Act gives the Department the authority to revoke an order if producers accounting for substantially all of the production of the domestic like product have expressed a lack of interest in the continuation of the order. Section 351.222(g) of the Department's regulations provides that the Department will conduct a changed circumstances administrative review under 19 CFR 351.216, and may revoke an order (in whole or in part), if it concludes that (i) producers accounting for substantially all of the production of the domestic like product to which the order pertains have expressed a lack of interest in the relief provided by the order, in whole or in part, or (ii) if other changed circumstances sufficient to warrant revocation exist. The Department has interpreted "substantially all" production normally to mean at least 85 percent of domestic production of the like product. *See Certain Tin Mill Products From Japan: Final Results of Changed Circumstances Review*, 66 FR 52109 (October 12, 2001); *see also*, 19 CFR 351.208(c).

As noted above and in the *Preliminary Results*, the petitioners requested this changed circumstances review on the basis that they are no longer interested in maintaining the CVD order or in the imposition of CVD duties on the subject merchandise. Because the Department did not receive any comments in

[1] On November 12, 2003, the Department published the final results of a changed circumstances review modifying the scope to exclude certain grade 1080 tire cord quality wire rod and grade 1080 tire bead quality wire rod. This modification is for all entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after July 24, 2003. We note that for the purposes of this changed circumstances review, the revocation of the order would be based on the original scope. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of Changed Circumstances Review*, 68 FR 64079 (November 12, 2003).

response to the *Initiation Notice* or the *Preliminary Results* opposing this changed circumstances review or the decision to revoke the CVD order, in whole, we find that producers accounting for substantially all of the production of the domestic like product to which this order pertains, lack interest in the relief provided by the order. In accordance with sections 751(b), 751(d), and 782(h) of the Act and 19 CFR 351.216, the Department determines that there is a reasonable basis to believe that changed circumstances exist sufficient to warrant revocation of the order. Therefore, the Department is revoking the order on carbon and certain alloy steel wire rod from Canada, in whole, with regard to the products described above under the "Scope of the Order" section.

Instructions to Customs

In accordance with 19 CFR 351.222, the Department will instruct U.S. Customs and Border Protection ("CBP") to liquidate without regard to applicable countervailing duties, and refund any estimated countervailing duties collected on, all unliquidated entries of the merchandise subject to the order, as described above under the "Scope of the Order" section, entered, or withdrawn from warehouse, for consumption on or after February 8, 2002, *i.e.*, the publication date of the Department's preliminary determination (*see Preliminary Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 FR 5984). In accordance with section 778 of the Act, we will also instruct CBP to pay interest on such refunds with respect to the subject merchandise entered, or withdrawn from warehouse, for consumption on or after October 22, 2002, the date of publication in the **Federal Register** of the CVD order.

The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.306. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections 751(b)(1) and 777(i)(1) of the Tariff Act and sections 351.216, 351.221, and 351.222 of the Department's regulations.

Dated: January 16, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–1470 Filed 1–22–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.121103B]

Endangered Species; File No. 1448

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Northeast Fisheries Science Center, National Marine Fisheries Service, 166 Water Street, Woods Hole, MA 02543–1097 has been issued a permit to take loggerhead (Caretta caretta), leatherback (Dermochelys coriacea), Kemp's ridley (Lepidochelys kempii), green (Chelonia mydas), and hawksbill (Eretmochelys imbricata) sea turtles for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9200; fax (978)281–9371.

FOR FURTHER INFORMATION CONTACT: Patrick Opay, (301)713–1401 or Sarah Wilkin, (301)713–2289.

SUPPLEMENTARY INFORMATION: On October 14, 2003, notice was published in the **Federal Register** (68 FR 59163) that a request for a scientific research permit to take loggerhead, leatherback, Kemp's ridley, green, and hawksbill sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The applicant will handle, measure, flipper tag, scan for Passive Integrated Transponder (PIT) tags, biopsy sample and photograph a total of 1,500 loggerhead, 50 green, 250 leatherback and 50 hawksbill sea turtles and handle, measure, flipper tag, scan for PIT tags and photograph a total of 50 Kemp's ridley sea turtles over the duration of the permit. Seventy-five of the loggerheads and 20 of the Kemp's ridleys will also be dip-netted. This research will be conducted on animals that have been already incidentally captured in commercial fisheries operating in state waters and the Exclusive Economic Zone in the Northwest Atlantic Ocean. The purpose of the research is to determine the size and composition of populations of sea turtles found in the commercial fishing areas of the Northwest Atlantic Ocean and to establish individual identities of turtles which will permit subsequent determination of growth rates, possible stock origins and movement patterns. The research will contribute to the understanding of the pelagic ecology of these species, permit more complete models of their population dynamics, and allow more reliable assessments of commercial fishery impacts.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: January 14, 2003.

Carrie W. Hubard,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–1482 Filed 1–22–04; 8:45 am]

BILLING CODE 3510–22–S

PATENT AND TRADEMARK OFFICE

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) 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: United States Patent and Trademark Office (USPTO).

Title: Deposit of Biological Materials.

Form Number(s): N/A.

Agency Approval Number: 0651–0022.

Type of Request: Extension of a currently approved collection.

Burden: 3,501 hours annually.

Number of Respondents: 3,500 responses per year. The USPTO expects that 3,500 patent applications on inventions dealing with deposits of biological materials will be filed each year. It is estimated by the USPTO that one depository will seek recognition every four years, or 0.25 depositories will seek recognition annually.

Avg. Hours Per Response: The USPTO estimates that it takes an average of one (1) hour for the average patent applicant respondent to collect and submit the necessary deposit information to the USPTO. The USPTO estimates that it will take the average depository seeking approval to store biological material an average of 15 minutes (.25 hours) to gather and submit the necessary approval information to the USPTO.

Needs and Uses: Information on the deposit of biological materials in depositories is required for (a) the USPTO determination of compliance with 35 U.S.C. 2(b)(2), 35 U.S.C. 112, and 37 CFR Ch. 1, Subpart G, 1.801–1.809, where inventions sought to be patented rely on biological material subject to the deposit requirement, including notification to the interested public on where to obtain samples of deposits; and (b) in compliance with 37 CFR Ch. 1, Subpart G, 1.803 to demonstrate that the depositories are qualified to store and test the biological material submitted to them under patent applications. This information is used by the USPTO to determine whether or not the applicant has met the requirements of the patent regulations. In addition, the USPTO uses this information to determine the suitability of a respondent depository based upon administrative and technical competence, and the depository's agreement to comply with the requirements set forth by the USPTO. There are no forms associated with this collection of information.

Affected Public: Individuals or households, businesses or other for-profit, not-for-profit institutions, and the Federal Government.

Frequency: 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 Susan K. Brown, Records Officer, Office of the Chief Information Officer, Office of Data Architecture and Services, (703) 308–7400, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313, Attn: CPK 3 Suite 310, or by e-mail at *susan.brown@uspto.gov*.

Written comments and recommendations for the proposed information collection should be sent on or before February 23, 2004 to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 16, 2004.

Susan K. Brown,

Records Officer, USPTO, Office of the Chief Information Officer, Office of Data Architecture and Services, Data Administration Division.

[FR Doc. 04–1475 Filed 1–22–04; 8:45 am]

BILLING CODE 3510–16–P

UNITED STATES PATENT AND TRADEMARK OFFICE

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) 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: United States Patent and Trademark Office (USPTO).

Title: Post Allowance and Refiling.

Form Number(s): PTO/SB/44/50/51/51S/52/53/56/57/58 and PTOL–85B.

Agency Approval Number: 0651–0033.

Type of Request: Revision of a currently approved collection.

Burden: 67,261 hours annually.

Number of Respondents: 223,411 responses per year.

Avg. Hours Per Response: The USPTO estimates that it will take the public approximately 1.8 minutes (0.03 hours) to 2 hours to read the instructions, gather the necessary information, prepare the appropriate form or other document, and submit the information to the USPTO.

Needs and Uses: The USPTO is required by 35 U.S.C. §§ 131 and 151 to examine applications and issue them as patents when appropriate. The applicant must then pay the required issue fee to receive the patent and avoid abandonment of the application. The USPTO can also correct errors in patents and reissue patents as appropriate. Under 37 CFR 1.510–1.570 and 37 CFR 1.902–1.997, the USPTO may grant requests for *ex parte* and *inter partes* reexamination proceedings. The public uses this collection to request corrections of errors in issued patents, to request reissue patents, to request reexamination proceedings, and to ensure that the necessary fees and documentation are submitted to the USPTO. The USPTO is adding two petitions, the Petition to Review Refusal to Grant *Ex Parte* Reexamination and the Petition to Review Refusal to Grant *Inter Partes* Reexamination, to this information collection. These petitions are not new requirements but were not previously covered in this collection.

Affected Public: Individuals or households, businesses or other for-profits, not-for-profit institutions, farms, the Federal Government, and state, local or tribal governments.

Frequency: 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 Susan K. Brown, Records Officer, Office of the Chief Information Officer, Office of Data Architecture and Services, Data Administration Division, 703–308–7400, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313, Attn: CPK 3 Suite 310; or by e-mail at *susan.brown@uspto.gov*.

Written comments and recommendations for the proposed information collection should be sent on or before February 23, 2004 to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street NW., Washington, DC 20503.

Dated: January 15, 2004.

Susan K. Brown,

Records Officer, USPTO, Office of the Chief Information Officer, Office of Data Architecture and Services, Data Administration Division.

[FR Doc. 04–1406 Filed 1–22–04; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Removal of Export Visa and ELVIS Requirements for Certain Cotton and Man-Made Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China

January 20, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and

Border Protection removing visa and ELVIS requirements.

EFFECTIVE DATE: January 23, 2004.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection Web site at *http://www.cbp.gov*. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel Web site at *http://otexa.ita.doc.gov*.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

On December 24, 2003, as provided for under paragraph 242 of the Report of the Working Party on the Accession of China to the World Trade Organization (Accession Agreement), the United States requested consultations with the Government of the People's Republic of China with respect to imports of Chinese origin products in Categories 222, 349/649 and 350/650. Through a letter published on December 29, 2003, the Chairman of CITA directed the Commission, U.S. Customs and Border Protection, to establish a twelve-month limit on these products, beginning on December 24, 2003, and extending through December 23, 2004. 68 FR 74944, 74945, and 74947. At the same time, the Chairman of CITA directed the Commissioner to require that shipments of these products be accompanied by an export visa and Electronic Visa Information System (ELVIS) transmission issued by the Government of the People's Republic of China; this requirement did not apply to shipments exported prior to January 23, 2004. During consultations, the Government of the People's Republic of China objected to the requirement that shipments of these products be accompanied by an export visa and ELVIS transmission. Therefore, effective on January 23, 2004, the United States is rescinding the visa and ELVIS requirements for products in these categories; the quota limits remain in effect. CITA will revisit this issue if the situation warrants.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 68 FR 1599, published on January 13, 2003). Information regarding the availability of the 2004 CORRELATION will be published in the **Federal Register** at a later date. Also see 62 FR 15465, published on April 1, 1997.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

The Committee for the Implementation of Textile Agreements

January 20, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the 3 directives issued to you on December 23, 2003. Those directives concern the establishment of quota and visa requirements for certain cotton and man-made fiber textiles and textile products in Categories 222, 349/649, and 350/650, produced or manufactured in China and exported during the period beginning on December 24, 2003 and extending through December 23, 2004.

Effective on January 23, 2004, you are directed to remove the visa and ELVIS requirements for textile products in Categories 222, 349/649, and 350/650. However, the quota limits remain in effect.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
James C. Leonard III,
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–1509 Filed 1–21–04; 9:57 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Removal of Export Visa and Folklore Certification Requirements for Certain Wool and Man-Made Fiber Textile Products Produced or Manufactured in the United Mexican States

January 21, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection removing visa and folklore certification requirements.

EFFECTIVE DATE: January 23, 2004.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

Pursuant to the North American Free Trade Agreement, the existing export visa and folklore certification requirements are being canceled for textile products no longer subject to restrictions or consultations levels which are exported from Mexico on and after January 1, 2004.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 68 FR 1599, published on January 13, 2003). Information regarding the availability of the 2004 CORRELATION will be published in the **Federal Register** at a later date. Also see 58 FR 69350, published on December 30, 1993.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

The Committee for the Implementation of Textile Agreements

January 21, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This amends, but does not cancel, the directive issued to you on December 27, 1993, as amended, by the Chairman, Committee for the Implementation of Textile Agreements. That directive directed you to prohibit entry of certain cotton, wool and man-made fiber textile products, produced or manufactured in Mexico for which the government of the United Mexican States has not issued an appropriate visa.

Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854) and Executive Order 11651 of March 3, 1972, as amended; and pursuant to the North America Free Trade Agreement (NAFTA) between the Governments of the United States, the United Mexican States and Canada, effective on January 23, 2004, the visa and folklore certification requirements in the above referenced directive will not apply to Categories 410, 433, 443 and 611, as they are no longer subject to restrictions or consultation levels. Therefore, effective on January 23, 2004, you are directed to cancel the visa and folklore certification requirements for goods in these categories exported on and after January 1, 2004.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James C. Leonard III,
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–1560 Filed 1–21–04; 2:14 pm]

BILLING CODE 3510–DR–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Draft Selection Criteria for Closing and Realigning Military Installations Inside the United States

AGENCY: Office of the Deputy Under Secretary of Defense (Installations and Environment), DoD.

ACTION: Extend comment period on draft selection criteria.

SUMMARY: In the December 23, 2003, issue of the **Federal Register** (68 FR 74221), the Department of Defense published the draft selection criteria to be used by the Department in making recommendations for the closure or realignment of military installations inside the United States. This notice extends the comment period beyond the deadline previously published and clarifies that those comments must be received at the address shown below by 5 p.m. Eastern Standard Time (EST) on January 30, 2004, to be considered in the formulation of the final criteria.

DATES: Comments should be received at the Department of Defense at the address shown below by 5 p.m. on January 30, 2004, to be considered in the formulation of the final criteria.

ADDRESSES: Interested parties should submit written comments to: Office of the Deputy Under Secretary of Defense (Installations & Environment), Attn: Mr. Peter Potochney, Director, Base Realignment and Closure, Room 3D814, The Pentagon, Washington, DC 20301–3300. Please cite this **Federal Register** announcement in all correspondence. Interested parties may also forward their comments via facsimile at 703–695–1496.

FOR FURTHER INFORMATION CONTACT: Mr. Mike McAndrew, Base Realignment and Closure Office, ODUSD(I&E), (703) 614–5356.

Dated: January 24, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–1588 Filed 1–21–04; 3:37 pm]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for Kentucky River Lock and Dam 10 Stabilization and Renovation Project Boonesborough, KY

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: Authorized by the U.S. Congress for the planning, design and construction assistance for the stabilization and renovation of Kentucky River Lock and Dam 10. Specific language for the work was published in the 106th Congress, 2nd Session, House of Representatives Conference Report (106–1005), 26 October 2000, Section 631. This section authorized the Secretary of the Army to take all necessary measures to further stabilize and renovate Lock and Dam 10 at Boonesborough, Kentucky. The Draft Environmental Impact Statement (DEIS) will assess the potential impacts of the alternatives being considered upon the social, economic and natural resources of the project area.

FOR FURTHER INFORMATION CONTACT: Robert C. Kanzinger at U.S. Army Corps of Engineers, Louisville District, ATTN: CELRL–PM–PE (Kanzinger), P.O. Box 59, Louisville, KY 40201–0059 or email at *Robert.C.Kanzinger@lrl02.uasce.army.mil.* Telephone (502) 315–6873 or facsimile (502) 315–6864.

SUPPLEMENTARY INFORMATION:

1. *Background:* Lock and Dam 10 was built between 1902 and 1907. During its construction, in 1905, a storm event washed out the left-descending bank (west bank) at the abutment of the lock. To close the gap created by this washout, an auxiliary dam was built between the outer lock wall and the new bank. That auxiliary dam was built on a timber cribbing foundation, with the intention of replacing the facility in the near future. The timber cribbing remains at the base of the auxiliary dam today, but has been strengthened with brick and concrete toppings. The main dam has been subjected to base degradation due to the erosive force of the spill water. That damage will be repaired in the near future, as part of a separate project, with the addition of reinforcement materials at its base. The lock has not operated since July 2000, when it was closed because of leaking gates. The facility was maintained and operated by the U.S. Army Corps of Engineers (Corps) until 1985, when Kentucky River Locks and Dams 5 through 14 were leased to the Commonwealth of Kentucky. In December 1996, the facility ownership was transferred to the Commonwealth of Kentucky and has been managed since then by the Kentucky River Authority (KPA).

2. *Proposed Action:* The Corps, in cooperation with the local sponsor, KRA, is conducting this DEIS under guidelines set forth by the National Environmental Policy Act (NEPA) of 1970. The Corps and KRA propose to stabilize and renovate Lock and Dam 10 and to raise the main and auxiliary dams, which would increase water storage capacity of the pool. Water supply has become an increasingly important issue in the growing metropolitan area that the pool water resources serve.

3. *Action Alternatives Considered:* Considered action alternatives include: Replace the existing dam with a new dam four feet higher than the existing dam in close proximity and upstream of the existing dam; and, replace the existing dam with a new dam six feet higher in close proximity and upstream of the existing dam.

4. *The No-Action Alternative:* The consequences of taking no action will also be considered.

5. *Scoping Process:* The Corps and KRA is asking, herein and elsewhere, for public input regarding pertinent issues that need to be addressed in the DEIS. The first public scoping meeting was held in November 2002 at Boonesborough State Park, and additional scooping meetings will be held in the project are for the purpose of obtaining input from public officials and citizens. A comprehensive mailing list has been assembled, including Federal, state and local agencies, offices and individuals. The list has been and will be used to notify interested parties of opportunities to provide input to the scoping process. Pertinent issues identified, thus far, include the potential for increased frequency of flooding of small agricultural fields along the river, loss of raparian habitat areas, effects to the aquatic habitat, and potential increased frequency of flooding of nearby roads and bridges. A 45-day public review period will be provided for individuals and agencies to review and comment on the DEIS. All interested parties are encouraged to respond to this notice and provide a current address should they wish to be notified of the date of scoping meetings and for receipt of the DEIS for review and comment.

6. *Availability:* The DEIS is expected to be available for public review and

comment by May 2005. Notice of availability will be published in the **Federal Register**, as well as mailed to all recipients on the mailing list.

Robert A. Rowlette, Jr.,

Colonel, Corps of Engineers, Commander and District Engineer.

[FR Doc. 04–1403 Filed 1–22–04; 8:45 am]

BILLING CODE 3710–JB–M

DEPARTMENT OF EDUCATION

President's Board of Advisors on Historically Black Colleges and Universities, Meeting

AGENCY: President's Board of Advisors on Historically Black Colleges and Universities; Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and agenda of the meeting of the President's Board of Advisors on Historically Black Colleges and Universities. This notice also describes the functions of the Board. Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend.

DATES: Wednesday, February 11, 2004

TIME: 9 a.m.–3 p.m.

ADDRESSES: The Board will meet in Washington, DC at the Hilton Washington Hotel, 1919 Connecticut Avenue, NW., Washington, DC. Phone: 202–483–3000. Fax: 202–232–0438.

FOR FURTHER INFORMATION CONTACT: Dr. Leonard Dawson, Deputy Counselor, White House Initiative on Historically Black Colleges and Universities, 1990 K Street, NW., Washington, DC 20202; telephone: (202) 502–7889.

SUPPLEMENTARY INFORMATION: The President's Board of Advisors on Historically Black Colleges and Universities is established under Executive Order 13256, dated February 12, 2002. The Board is established (a) to report to the President annually on the results of the participation of historically black colleges and universities (HBCUs) in Federal programs, including recommendations on how to increase the private sector role, including the role of private foundations, in strengthening these institutions, with particular emphasis on enhancing institutional planning and development, strengthening fiscal stability and financial management, and improving institutional infrastructure, including the use of technology, to ensure the long-term viability and enhancement of these institutions; (b) to advise the President and the Secretary of Education (Secretary) on the needs of HBCUs in the areas of infrastructure, academic programs, and faculty and institutional development; (c) to advise the Secretary in the preparation of an annual Federal plan for assistance to HBCUs in increasing their capacity to participate in Federal programs; (d) to provide the President with an annual progress report on enhancing the capacity of HBCUs to serve their students; and (e) to develop, in consultation with the Department of Education and other Federal agencies, a private sector strategy to assist HBCUs.

The purpose of the meeting is to discuss plans for submission of the Board's 2002–2003 Annual Report: to develop strategies for the Private Sector Initiative; and to provide input for planning activities to be held during National Historically Black Colleges and Universities Week.

Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistive listening devices, or material in alternative format) should notify ReShone Moore at (202) 502–7893 no later than Friday, February 6, 2004. Will will attempt to meet requests for accommodations after this date, but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

An opportunity for public comment is available on Wednesday, February 11, 2004, between 2 p.m.–3 p.m. Those members of the public interested in submitting written comments may do so at the address indicated above by Friday, February 6, 2004.

Records are kept of all Board proceedings and are available for public inspection at the Office of the White House Initiative on Historically Black Colleges and Universities, U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006, during the hours of 9 a.m. to 5 p.m.

Rod Page,

Secretary of Education, U.S. Department of Education.

[FR Doc. 04–1491 Filed 1–22–04; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF EDUCATION

Meeting of the President's Board of Advisors on Tribal Colleges and Universities

AGENCY: White House Initiative on Tribal Colleges and Universities (WHITCU), Department of Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the President's Board of Advisors on Tribal Colleges and Universities (the Board) and is intended to notify the general public of their opportunity to attend. This notice also describes the functions of the Board. Notice of the Board's meetings is required under Section 10(a)(2) of the Federal Advisory Committee Act and by the Board's charter.

AGENDA: The purpose of the meeting will be to review the first draft of the Board's report to the President, discuss the first draft of the Strategic Plan of the White House Initiative on Tribal Colleges and Universities, and visit Tohono O'odham Community College in Sells, AZ.

DATE AND TIME: February 18 and 19, 2004—8 a.m. to 4 p.m.

LOCATION: Four Points by Sheraton Tucson University Plaza, 1900 East Speedway Boulevard, Tucson, AZ 85719.

FOR FURTHER INFORMATION CONTACT: Toney Begay, Special Assistant, White House Initiative on Tribal Colleges and Universities, U.S. Department of Education, Suite 408, 555 New Jersey Avenue, NW., Washington, DC 20208. Telephone (202) 219–2181. Fax: (202) 208–2174.

SUPPLEMENTARY INFORMATION: The Board is established by Executive Order 13270, dated July 3, 2002, and Executive Order 13316 of September 17, 2003, to provide advice regarding the progress made by Federal agencies toward fulfilling the purposes and objectives of the first order. The Board also provides recommendations to the President through the Secretary of Education on ways the Federal government can help tribal colleges: (1) Use long-term development, endowment building and planning to strengthen institutional viability; (2) improve financial management and security, obtain private sector funding support, and expand and complement Federal education initiatives; (3) develop institutional capacity through the use of new and emerging technologies offered by both the Federal and private sectors; (4) enhance physical infrastructure to facilitate more efficient operation and effective recruitment and retention of students and faculty; and (5) help implement the No Child Left Behind Act of 2001 and meet other high standards of educational achievement.

The general public is welcome to attend the February 18–19, 2004, meeting. However, space is limited and is available on a first-come, first-served

basis. Individuals who need accommodations for a disability in order to attend the meeting (*i.e.*, interpreting services, assistive listening devices, materials in alternative format) should notify Toney Begay at (202) 219–2181 no later than February 4, 2004. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

A summary of the activities of the meeting and other related materials that are informative to the public will be available to the public within 14 days after the meeting. Records are kept of all Board proceedings and are available for public inspection at the White House Initiative on Tribal Colleges and Universities, United States Department of Education, Suite 408, 555 New Jersey Avenue NW., Washington, DC 20208.

Rod Paige,

Secretary, Department of Education.

[FR Doc. 04–1413 Filed 1–22–04; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Energy Information Administration

Notice To Withdraw Proposal for New Survey Form EIA–913, "Monthly and Annual Liquefied Natural Gas (LNG) Storage Reports"

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice to Withdraw Proposal for New Survey Form EIA–913, "Monthly and Annual Liquefied Natural Gas (LNG) Storage Reports."

SUMMARY: The EIA announces that it is withdrawing its proposal for new survey Form EIA–913, "Monthly and Annual Liquefied Natural Gas (LNG) Storage Reports." The decision was made after considering both the public comments submitted regarding the proposed form as well as the most efficient and effective allocation of EIA resources directed toward EIA's mission of providing policy-independent data, forecasts, and analyses to promote sound policy making, efficient markets, and public understanding regarding energy and its interaction with the economy and the environment.

DATES: This notice becomes effective January 23, 2004.

ADDRESSES: Inquiries about this decision should be directed to Ms. Elizabeth Campbell. Contact by FAX (202–586–4420), e-mail (*elizabeth.campbell@eia.doe.gov*), or telephone (202–586–5590). Submission of requests by e-mail is preferred and recommended to expedite receipt and response. The mailing address is: Natural Gas Division (Attn: Elizabeth Campbell), EI–44, Forrestal Building, U.S. Department of Energy, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Elizabeth Campbell at the address listed above.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. No. 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. No. 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer-term domestic demands.

The EIA provides the public and other Federal agencies with opportunities to comment on collections of energy information conducted by EIA. As appropriate, EIA also requests comments on important issues relevant to the dissemination of energy information. Comments received help the EIA when preparing information collections and information products necessary to support EIA's mission.

On September 16, 2003, EIA issued a **Federal Register** notice (68 FR 54215) requesting public comments on the proposed new survey Form EIA–913, "Monthly and Annual Liquefied Natural Gas (LNG) Storage Reports." The purpose of the survey would be to collect data on the inventory levels of LNG and operational capacities of active LNG storage facilities in the United States.

In the September 16, 2003 notice, EIA discussed the proposed survey as well as EIA's reasons for proposing it. EIA received nine (9) comments. These comments are available for review at: *http://www.eia.doe.gov/oil_gas/natural_gas/survey_forms/eia913c.pdf.*

EIA reviewed the proposed survey in light of the comments. EIA also reconsidered whether the proposed survey was the optimal use of EIA resources available for collecting and analyzing information on U.S. natural gas supplies.

II. Current Actions

The EIA announces its decision to withdraw its proposal for new survey Form EIA–913, "Monthly and Annual Liquefied Natural Gas (LNG) Storage Reports." The decision was made after considering both the public comments submitted regarding the proposed form as well as the most efficient and effective allocation of EIA resources directed toward EIA's mission of providing policy-independent data, forecasts, and analyses to promote sound policy making, efficient markets, and public understanding regarding energy and its interaction with the economy and the environment. EIA will monitor the LNG market on an ongoing basis. If conditions change and EIA reconsiders proposing an LNG storage survey in the future, a **Federal Register** notice will be issued to request public comments.

Statutory Authority: Section 52 of the Federal Energy Administration Act (Pub. L. No. 93–275, 15 U.S.C. 790a).

Issued in Washington, DC, January 16, 2004.

Jay H. Casselberry,

Agency Clearance Officer, Energy Information Administration.

[FR Doc. 04–1439 Filed 1–22–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99–3822–004, et al.]

Casco Bay Energy Company, LLC, *et al.*; Electric Rate and Corporate Filings

January 14, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Casco Bay Energy Company, LLC, Duke Energy Fayette, LLC, Duke Energy Hanging Rock, LLC, Duke Energy Washington, LLC, Duke Energy Lee, LLC, Duke Energy Vermiliion, LLC, Duke Energy St. Francis, LLC, Duke Energy Enterprise, LLC, Duke Energy Murray, LLC, Duke Energy Sandersville, LLC, Duke Energy Hinds, LLC, Duke Energy Hot Spring, LLC, Duke Energy Southaven, LLC, Duke Energy Marshall County, LLC, Duke Energy New Albany, LLC, Duke Energy Moapa, LLC, Duke Energy Mohave, LLC, Duke Energy Arlington Valley, LLC, Duke Energy Grays Harbor, LLC, Duke Energy Morro Bay, LLC, Duke Energy Moss Landing, LLC, Duke Energy South Bay, LLC, and Duke Energy Oakland, LLC

[Docket Nos. ER99–3822–004, ER03–185–002, ER03–17–002, ER02–795–003, ER01–545–004, ER00–1783–005, ER99–3118–004, ER02–565–003, ER02–302–004, ER02–1024–004. ER01–691–004, ER02–694–003, ER02–583–003, ER02–530–004, ER02–171–003, ER01–1208–004, ER01–1619–005, ER02–443–003, ER02–2426–002, ER98–2681–005, ER98–2680–005, ER99–1785–004, and ER98–2682–005]

Take notice that on January 5, 2004, the above-captioned companies (collectively, the Duke Energy Entities) tendered for filing their triennial market-power analyses in compliance with the Commission orders granting them market-based rate authority.

Comment Date: January 26, 2004.

2. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER02–1963–002]

Take notice that on December 2, 2003, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing a refund report with respect to refunds made on November 17, 2003, pursuant to the Commission's Order, issued October 17, 2003, 105 FERC ¶ 61,073 (2003).

The Midwest ISO has requested waiver of the service requirements set forth in 18 CFR 385.2010. The Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, Policy Subcommittee participants, as well as all state commissions within the region and in addition, the filing has been electronically posted on the Midwest ISO's Web site at *www.midwestiso.org* under the heading "Filings to FERC" for other interested parties in this matter. The Midwest ISO further states that it will provide hard copies to any interested parties upon request.

Comment Date: January 22, 2004.

3. ISG Sparrows Point Inc., Palama, LLC, Alabama Electric Marketing, LLC, Susquehanna Energy Products, LLC, RAM Energy Products, LLC, Onondaga Cogeneration Limited Partnership, Three Rivers Energy, LLC, Global Advisors Power Marketing LP, Condon Wind Power, LLC, Wayne-White Counties Electric Coop., Louisville Gas & Electric Company, Kentucky Utilities Company, CPV Milford, LLC, WCW International, Inc., Bridgeport Energy, LLC, Duke Energy Marketing America, LLC, Casco Bay Energy Company, LLC, Duke Energy Fayette, LLC, Duke Energy Hanging Rock, LLC , Duke Energy Washington, LLC, Duke Energy Lee, LLC, Duke Energy Vermillion, LLC, Duke Energy St. Francis LLC, Duke Energy Enterprise, LLC, Duke Energy Murray, LLC, Duke Energy Sandersville, LLC, Duke Energy Hinds, LLC, Duke Energy Hot Spring, LLC, Duke Energy Southaven, LLC, Duke Energy Marshall County, LLC, Duke Energy New Albany, LLC, Duke Energy Moapa, LLC, Duke Energy Mohave, LLC, Duke Energy Arlington Valley, LLC, Duke Energy Grays Harbor, LLC, Duke Energy Morro Bay, LLC, Duke Energy Moss Landing, LLC, Duke Energy South Bay, LLC, Duke Energy Oakland, LLC, and Duke Energy Trading and Marketing, LLC

[Docket Nos. ER03–693–002, ER03–1316–002, ER01–596–001, ER03–768–003, ER03–1012–001, ER00–895–003, ER04–88–001, ER02–1812–001, ER02–305–002, ER00–320–002, ER99–1623–002, ER04–222–003, ER04–214–001, ER98–2783–005, ER03–956–001, ER99–3822–003, ER03–185–001, ER03–17–001, ER02–795–002, ER01–545–003, ER00–1783–004, ER99–3118–003, ER02–565–002, ER02–302–002, ER02–1024–003, ER01–691–003, ER02–694–002, ER02–583–002, ER02–530–003, ER02–171–002, ER01–1208–003, ER01–1619–004, ER02–443–002, ER02–2426–001, ER98–2681–004, ER98–2680–004, ER99–1785–003, ER98–2682–004, ER99–2774–003]

Take notice that on January 5, 7, 8, and 9, 2004, the above referenced companies submitted a compliance filing in response to the Commission's November 17, 2003, Order Amending Market-based Rate tariffs and Authorizations, in Docket Nos. EL01–118–000 and 001.

Comment Date: January 30, 2004.

4. Carolina Power & Light Company

[Docket No. ER03–1156–002]

Take notice that on January 9, 2004, Carolina Power & Light Company (CP&L) tendered for filing Second Revised Rate Schedule No. 121, the Power Coordination Agreement between CP&L and North Carolina Eastern Municipal Power Agency. CP&L request an effective date of January 1, 2004.

CP&L states that copies of this filing were served upon the public utility's jurisdictional customers and the North Carolina Utilities Commission.

Comment Date: January 30, 2004.

5. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER04–255–001]

Take notice that on January 9, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) pursuant to section 205 of the Federal Power Act and section 35.13 of the Commission's regulations, 18 CFR 35.13 (2002), submitted for filing a revised Interconnection and Operating Agreement among LJ Trust, LLC, the Midwest ISO and Interstate Power and Light Company, a wholly-owned subsidiary of Alliant Energy Corporation.

Midwest ISO states that a copy of this filing was served on all parties.

Comment Date: January 30, 2004.

6. Southern California Edison Company

[Docket No. ER04–383–000]

Take notice that on January 9, 2004, Southern California Edison Company (SCE) tendered for filing the Eucalyptus Avenue Wholesale Distribution Load Interconnection Facilities Agreement (Interconnection Agreement) and the Service Agreement for Wholesale Distribution Service (Service Agreement) between SCE and the City of Moreno Valley, California (Moreno Valley). SCE requests the Interconnection Agreement and the Service Agreement become effective on January 10, 2004.

SCE states that copies of this filing were served upon the Public Utilities Commission of the State of California, and Moreno Valley.

Comment Date: January 30, 2004.

7. Southern California Edison Company

[Docket No. ER04–384–000]

Take notice, that on January 9, 2004, Southern California Edison Company (SCE) tendered for filing the Cactus Avenue Wholesale Distribution Load Interconnection Facilities Agreement (Interconnection Agreement) and the Service Agreement for Wholesale Distribution Service (Service Agreement) between SCE and the City of Moreno Valley, California. SCE requests the Interconnection Agreement and the Service Agreement become effective on January 10, 2004.

SCE states that copies of this filing were served upon the Public Utilities

Commission of the State of California, and Moreno Valley.

Comment Date: January 30, 2004.

8. Southern California Edison Company

[Docket No. ER04–385–000]

Take notice, that on January 9, 2004, Southern California Edison Company (SCE) tendered for filing the Iris Avenue Wholesale Distribution Load Interconnection Facilities Agreement (Interconnection Agreement) and the Service Agreement for Wholesale Distribution Service (Service Agreement) between SCE and the City of Moreno Valley, California. SCE requests the Interconnection Agreement and the Service Agreement become effective on January 10, 2004.

SCE states that copies of this filing were served upon the Public Utilities Commission of the State of California, and Moreno Valley.

Comment Date: January 30, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–98 Filed 1–22–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6647–7]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 04, 2003 (68 FR 16511).

Draft EISs

ERP No. D–AFS–H65015–NE Rating LO, Pine Ridge Geographic Area Rangeland Allotment Management Planning, To Permit Livestock Grazing on 34 Allotments, Nebraska National Forest, Pine Ridge Ranger District, Dawes and Sioux Counties, NE.

Summary: EPA recommended that protection of aquatic resources remain a priority and that mitigation contingencies be explored should there be impacts to paleoentological resources during soil disturbance activities.

ERP No. D–AFS–L65442–OR Rating EC2, Baked Apple Fire Salvage Project, Salvaging Fire Killed Trees in the Matrix Portion of the 2002 Apple Fire, Umpqua National Forest, Umpqua Ranger District, Douglas County, OR.

Summary: EPA expressed environmental concerns with permitting timber harvesting in riparian reserves resulting in potential adverse impacts to the aquatic system and Northern Spotted Owl. The final EIS should include mitigation for timber harvest impacts and post-logging road densities to improve the condition of the sub-watershed.

Summary: ERP No. D–BLM–K08028–CA Rating EC2, Desert Southwest Transmission Line Project, New Substation/Switching Station, Construction, Operation and Maintenance, Right-of-Way Grant and US Army COE Section 10 and 404 Permits Issuance, North Palm Springs and Blythe, CA.

Summary: EPA expressed environmental concerns with potential impacts to air quality and waters of the U.S. The DEIS indicates that the project does not conform with the State implementation Plan. EPA recommends the FEIS include a conformity determination, and additional information on the project's potential impacts to the waters of the U.S. and cultural resources, and mitigation measures for these impacts.

ERP No. D–COE–E32082–AL Rating EC2, Arlington and Garrows Bend Channels and Adjacent Area Restoration and Maintenance Dredging, City of Mobile, Mobile County, AL.

Summary: EPA expressed environmental concerns regarding the proposal, with a special emphasis on the impacts to wetlands and water quality. EPA raised concerns over the proposal to convert shallow water habitat and/or emergent marsh to uplands as the preferred means of isolating contaminated sediments. EPA requested further information regarding impacts and proposed mitigation measures.

ERP No. D–COE–E39063–AL Rating EC2, Choctaw Point Terminal Project, Construction and Operation of a Container Handling Facility, Department of the Army (DA) Permit Issuance, Mobile County, AL.

Summary: EPA expressed environmental concerns regarding the proposed project, including potential impacts to wetlands and water quality. EPA raised questions regarding the ability of mitigation measures to offset environmental impacts, and requested additional information.

ERP No. D–DOI–J39030–UT Rating EC1, Lower Duchesne River Wetlands Mitigation Project (LDWP), To Implement Restoration Measures in the Lower Duchesne River Area, Strawberry Aqueduct and Collection System (SACS) on portions of the, Strawberry Reservoir, Ute Indian Tribe, NPDES and U.S. Army COE Section 404 Permits, Duchesne, Utah, Uintah Counties, UT.

Summary: EPA expressed environmental concerns with potential adverse impacts to wetlands and water quality. EPA suggested that the final EIS include in-kind mitigation to offset the previous habitat losses.

ERP No. D–FHW–F40418–IL Rating LO, Macomb Area Study, Construction from U.S. Route 67 (FAP–310) and Illinois Route 336 (FAP–315), City of Macomb, McDonough County, IL.

Summary: EPA lacks objections regarding the proposed project. However, EPA does recommend that additional clarification regarding storm water management, use of native vegetation, and the selection criteria for wildlife underpass locations be included in the FEIS.

ERP No. D–FHW–H40180–00 Rating EC2, Interstate 74 Quad Cities Corridor Study, Improvements to I–74 between

23rd Avenue in Moline, Il and 53rd Street in Davenport, IA, NPDES, Rivers and Harbors Act Section 9 and US Army COE Section 404 Permits, Scott County, IA and Rock Island County, IL.

Summary: EPA expressed environmental concerns with the proposed project relating to the level of information provided on the final disposition of the existing bridge. EPA also recommended that the FEIS include the mitigation strategy for impacted mussel species and recommends that the mussel relocation site be determined with due regard for cumulative impacts.

ERP No. D–FRC–L05231–AK Rating EC2, Glacier Bay National Park and Preserve, Falls Creek Hydroelectric Project (FERC. NO. 11659) and Land Exchange Project, Issuance of License and Land Exchange, Kahtaheena River (Falls Creek) near Gustavus in Southeastern, AK.

Summary: EPA expressed environmental concerns with the lack of operation, mitigation and monitoring plans that are proposed to be developed after the issuance of the license for the project. EPA recommended that these plans be developed and included in the FEIS and that the developmental analysis and recommendations be made consistent with the rest of the EIS. EPA also recommended that additional information be included in the EIS related to the need for power, continued use of diesel generators and access to the project.

ERP No. DS–FTA–D54041–VA Rating LO, Dulles Corridor Rapid Transit Project, Additional Information to Assist Decision-Makers, Area Residents and the Business Community in the Evaluation of High Quality and High-Capacity Transit Service in the Dulles Corridor, West Falls Church Metrorail Station in Fairfax County to the vicinity of Route 772 in Loudoun County, VA.

Summary: EPA lacks objections to the proposed project. EPA encourages the development of the full Metrorail alternative which is expected to have the greatest impact on reducing congestion and air pollution.

Final EISs

ERP No. F–HHS–D81034–MD Integrated Research Facility (IRF) at Fort Detrick Construction and Operation, Adjacent to Existing U.S. Army Medical Research Institute of Infectious Diseases Facilities, City of Frederick, Frederick County, MD.

Summary: EPA has determined that the National Institutes of Health has adequately addressed its comments within the FEIS.

Dated: January 20, 2004.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 04–1484 Filed 1–22–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6647–6]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/*. Weekly receipt of Environmental Impact Statements Filed January 12, 2004 Through January 16, 2004 Pursuant to 40 CFR 1506.9.

EIS No. 040013, Final EIS, SFW, CA, Programmatic EIS—San Francisco Estuary Invasive Spartina Project, Spartina Control Program to Preserve and Restore Ecological Integrity of the Estuary's Intertidal Habitats, Alameda, Contra Costa, Marin, Napa, San Francisco and San Mateo, CA, Wait Period Ends: February 23, 2004, Contact: Mark Littlefield (916) 414–6581.

EIS No. 040014, Draft EIS, AFS, PA, Spring Creek Project Area (SCPA), To Achieve and Maintain Desired Conditions, Allegheny National Forest, Marienville Ranger District, Elk and Forest Counties, PA, Comment Period Ends: March 8, 2004, Contact: John Weyant (814) 776–6172 Ext.138

EIS No. 040015, Draft EIS, AFS, WY, Tongue Allotment Management Plan, Proposal to Continue Livestock Grazing on All or Portions of the 22 Allotment, Bighorn National Forest, Tongue and Medicine Wheel/Paintrock Ranger Districts, Johnson, Sheridan and Bighorn Counties, WY, Comment Period Ends: March 08, 2004, Contact: Craig L. Yancey (307) 674–2600.

EIS No. 040016, Final Supplement, AFS, CA, OR, Siskiyou National Forest, Land and Resource Management Plan, Implementation, Curry, Coos and Josephine Counties, OR and Del Norte County, CA, Wait Period Ends: February 23, 2004, Contact: Kenneth Denton (503) 326–2368.

The U.S. Department of Agriculture, Forest Service and the U.S. Department of the Interior, Bureau of Land Management are Joint Lead Agencies on the above Project.

This document is available on the Internet at: *http://www.or.blm.gov/planning/port-orford-cedar_seis/*.

EIS No. 040017, Draft EIS, SFW, CA, South Bay Salt Ponds Initial Stewardship Plan, To Maintain and Enhance the Biological and Physical Conditions, South San Francisco Bay, CA, Comment Period Ends: March 8, 2004, Contact: Margaret Kolar (510) 792–0222.

EIS No. 040018, Draft Supplement, BOP, CA, Fresno Federal Correctional Facility Development, Additional Information, Orange Cove, Fresno County, CA, Comment Period Ends: March 8, 2004, Contact: David J. Dorworth (202) 514–6470.

EIS No. 040019, Final EIS, BLM, CO, Gunnison Gorge National Conservation Area Resource Management Plan, Implementation, Montrose and Delta Counties, CO, Wait Period Ends: February 23, 2004, Contact: Bill Bottomly (970) 240–5337.

EIS No. 040020, Draft Supplement, AFS, AK, Kensington Gold Project, Proposed Modifications of the 1998 Approved Plan Operation, NPDES, ESA and U.S. COE Section 10 and 404 Permits, Tongass National Forest, City of Juneau, AK, Comment Period Ends: March 8, 2004, Contact: Steve Hohensee (907) 586–8800.

EIS No. 040021, Draft Supplement, NOA, HI, GU, AS, Pelagic Fisheries of the Western Pacific Region, Fishery Management Plan, Regulatory Amendment, Management Measures to Implement New Technologies for the Western Pacific Pelagic Longline Fisheries, Hawaii, American Samoa, Guam and Commonwealth of the Northern Mariana Island, Comment Period Ends: February 23, 2004, Contact: Alvin Katekaru (808) 973–2937. Under Section 1506.10(d) of the Council on Environmental Quality Regulations for Implementating the Procedural Provisions of the National Environmental Policy Act the U.S. Environmental Protection Agency has Granted a 15-Day Wavier for the above EIS.

This document is available on the Internet at: *http://www.swr.nmfs.noaa.gov/pir/*.

EIS No. 0240022, Draft EIS, AFS, AK, Commercially Guided Helicopter Skiing on the Kena, Peninsula, Issuance of a Five Year Special Use Permit, Chugach National Forest, Kenai Peninsula, AK, Comment Period Ends: March 23, 2004, Contact: Teresa Paquet (907) 754–2314. This document is available on the Internet at: *http://www.fs.fed.us/r10/chugach*.

EIS No. 040023, Final EIS, DOA, HI, Lahaina Watershed Flood Control Project, To Reduce Flooding and Erosion Problems, U.S. Army COE Section 404 and NPDES Permits, County of Maui, HI. Wait Period Ends: February 23, 2004, Contact: Lawrence T. Yamamoto (808) 541–2600.

EIS No. 040024, Final Supplement, AFS, CA, WA, OR, Northern Spotted Owl Management Plans, Removal or Modification of the Survey and Manage Mitigation Measure Standards and Guidelines in the Final Supplemental EIS (1994) and Final Supplement EIS (2002) for Amendments, Northwest Forest Plan, WA, CA and OR, Wait Period Ends: February 23, 2004, Contact: Jerry Hubbard (503) 326–2354.

This document is available on the Internet at: *http://www.or.blm.gov/surveyandmanage/.*

Amended Notices

EIS No. 030429, Draft EIS, FHW, TN, Appalachian Development Highway System Corridor K (Relocated Highway U.S. 64), Improvements from West of the Ocoee River to TN–68 near Ducktown, Funding, U.S. Army Corps Section 10 and 404 Permits, Polk County, TN, Comment Period Ends: February 16, 2004, Contact: Bobby W. Blackmon (615) 781–5770. Revision of FR Notice Published on 10/03/2003: CEQ Comment Period Ending on 01/15/2004 has been Extended to 2/16/2004.

EIS No. 0230544, Draft EIS, AFS, AZ, Bar T Bar Anderson Springs Allotment Management Plans, To Authorize Permitted Livestock Grazing for a 10-Year Period, Coconino National Forest, Mogollon Rim and Mormon Lake Ranger District, Coconino County, AZ, Comment Period Ends: February 4, 2004, Contact: Jerry Gonzales (928) 354–2216. Revision of FR Notice Published on 12/05/03: CEQ Comment Period Ending 01/24/2004 has been Extended to 02/04/2004.

EIS No. 030548, Final EIS, BLM, AZ, Dos Pobres/San Juan Mining Plan and Land Exchange, Implementation of two Open Pit Copper Mines and one Central Ore Facility, NPDES and COE Section 404 Permits, Graham County, AZ, Wait Period Ends: February 12, 2004, Contact: Scott Evans (928) 348–4400. Revision of FR Notice Published on 12/12/2004: CEQ Wait Period Ending 1/12/2004 has been Corrected to 2/12/2004.

Dated: January 20, 2004.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 04–1485 Filed 1–22–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0014; FRL–7343–1]

Pesticide Program Dialogue Committee, Registration Review Work Group; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's Pesticide Program Dialogue Committee (PPDC), Registration Review Work Group will hold public meetings on February 2, 2004, and March 2, 2004. Agendas for these meetings are being developed and will be posted on EPA's website. The workgroup is developing advice and recommendations on topics related to EPA's registration review program.

DATES: The first meeting will be held on Monday, February 2, 2004, from 1 p.m to 5 p.m. The second meeting will be held on Tuesday, March 2, 2004, from 1 p.m. to 5 p.m.

ADDRESSES: The meetings will be held at EPA's offices at 1921 Jefferson Davis Hwy., Crystal Mall #2, Rm. 1110 (the Fishbowl), Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Vivian Prunier, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9341; fax number: (703) 305–5884; e-mail address: *prunier.vivian@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of particular interest to persons who are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act (FFDCA), and the amendments to both of these major pesticide laws by the Food Quality Protection Act (FQPA) of 1996. Other potentially affected entities may include but are not limited to agricultural workers and farmers; pesticide industry and trade associations; environmental, consumer, and farmworker groups; pesticide users and growers; pest consultants; State, local, and Tribal governments; academia; public health organizations; food processors; and the public. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have questions about the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0014. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

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

II. Background

The Office of Pesticide Programs (OPP) is entrusted with the responsibility of ensuring the safety of the American food supply, the protection and education of those who apply or are exposed to pesticides

occupationally or through use of products, and the general protection of the environment and special ecosystems from potential risks posed by pesticides.

PPDC was established under the Federal Advisory Committee Act (FACA), Public Law 92–463, in September 1995 for a 2–year term and has been renewed every 2 years since that time. PPDC provides advice and recommendations to OPP on a broad range of pesticide regulatory, policy, and program implementation issues that are associated with evaluating and reducing risks from use of pesticides. The following sectors are represented on the PPDC: Pesticide industry and trade associations; environmental/public interest and consumer groups; farm worker organizations; pesticide user, grower, and commodity groups; Federal and State/local/Tribal governments; the general public; academia; and public health organizations.

Copies of the PPDC charter are filed with appropriate committees of Congress and the Library of Congress and are available upon request.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: January 16, 2004.

Jim Jones,

Director, Office of Pesticide Programs.

[FR Doc. 04–1449 Filed 1–22–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0369; FRL–7342–7]

Oryzalin; Availability of Risk Assessment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of documents that were developed as part of EPA's process for making pesticide reregistration eligibility decisions and tolerance reassessments consistent with the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). These documents are the human health risk assessment and related documents for oryzalin. This notice also starts a 60–day public comment period for the risk assessment. Comments are to be limited to issues directly associated with oryzalin and raised by the risk assessment or other documents placed in the docket. By allowing access and opportunity for comment on the risk assessment, EPA is seeking to strengthen stakeholder involvement and help ensure that our decisions under FQPA are transparent and based on the best available information. The tolerance reassessment process will ensure that the United States continues to have the safest and most abundant food supply. The Agency cautions that the risk assessment for oryzalin is preliminary and that further refinements may be appropriate. Risk assessments reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

DATES: Comments, identified by the docket ID number OPP–2003–0369, must be received on or before March 23, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kylie Rothwell, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8055; fax number: (703) 308–8005; e-mail address: *rothwell.kylie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general but may be of interest to a wide range of stakeholders, including environmental, human health, and agricultural advocates; the agrochemical industry; pesticide users; and members of the public interested in pesticide use on food. This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. If you have any questions regarding the applicability of this action to you or a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0369. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view 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 ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

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, 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. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, 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. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2003–0369. 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 e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2003–0369. 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.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0369.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP-2003–0369. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

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

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the notice.

7. Make sure to submit your comments by the deadline in this document.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

A. What Action is the Agency Taking?

EPA is making available risk assessments that have been developed as part of the Agency's public participation process for making reregistration eligibility and tolerance reassessment decisions for the organophosphate and other pesticides consistent with FFDCA, as amended by FQPA. The Agency's human health risk assessment and other related documents for oryzalin are available in the individual pesticide docket. As additional comments, reviews, and risk assessment modifications become available, these will also be docketed for oryzalin.

The Agency cautions that the oryzalin risk assessment is preliminary and that further refinements may be appropriate. These documents reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

EPA is providing an opportunity, through this notice, for interested parties to provide written comments and input to the Agency on the risk assessment for the pesticide specified in this notice. Such comments and input could address, for example, the availability of additional data to further refine the risk assessment, such as percent crop treated information or submission of residue data from food processing studies, or could address the Agency's risk assessment methodologies and assumptions as applied to this specific chemical. Comments should be limited to issues raised within the risk assessment and associated documents. EPA will provide other opportunities for public comment on other science issues associated with the pesticide tolerance reassessment program. Failure to comment on any such issues as part of this opportunity will in no way prejudice or limit a commenter's opportunity to participate fully in later notice and comment processes. All comments should be submitted by [*insert date 60 days after date of publication in the* **Federal Register**] using the methods in Unit I. of the **SUPPLEMENTARY INFORMATION.** Comments will become part of the Agency record for oryzalin.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: January 16, 2004.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 04–1450 Filed–1–22–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2004–0004]; FRL–7342–8]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSC, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from December 1, 2003 to December 24, 2003, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the docket ID number OPPT–2003–0004 and the specific PMN number or TME number, must be received on or before February 23, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPPT–2003–0004. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

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

Certain types of information will not be placed in the EPA Dockets.

Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

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, 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. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number and specific PMN number or TME number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, 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. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPPT–2003–0004. 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 e-mail to *oppt.ncic@epa.gov*, Attention: Docket ID Number OPPT–2003–0004 and PMN Number or TME Number. 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.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *By hand delivery or courier.* Deliver your comments to: OPPT Document Control Office (DCO) in EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number OPPT–2003–0004 and PMN Number or TME Number. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

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

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice or collection activity.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action and the specific PMN number you are commenting on in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from December 1, 2003 to December 24, 2003, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 50 PREMANUFACTURE NOTICES RECEIVED FROM: 12/01/03 TO 12/24/03

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–04–0153	12/01/03	02/28/04	CBI	(G) Phosphor	(G) Rare earth phosphate
P–04–0154	12/01/03	02/28/04	NA Industries, Inc.	(S) A binder resin for plastics coating	(G) 2-propenoic acid, 2-methyl-, polymer with 2-hydroxypropyl 2-propenoate, 2-propenenitrile, alkyl 2-methyl-2-propenoate and 1-propene,homopolymer, chlorinated
P–04–0156	12/03/03	03/01/04	CBI	(G) Contained use	(G) Cobalt catalyst
P–04–0157	12/03/03	03/01/04	CBI	(S) A monomer for the production of specialty polymers; export	(G) Diaryl carbonate
P–04–0159	12/04/03	03/02/04	CBI	(G) By product	(S) Phosphonoacetic acid
P–04–0160	12/04/03	03/02/04	Biolab, Inc.	(S) Scale/corrosion control agent for cooling water systems	(G) Derivative of acrylic acid copolymer
P–04–0161	12/05/03	03/03/04	Great Lakes Chemical Corporation	(G) Lubricant additive	(S) Phosphonic acid, di-C_{12-14}-alkyl esters
P–04–0162	12/05/03	03/03/04	CBI	(G) Processing acid	(G) Salt of a copolymer of acrylic acid and acrylic acid derivatives
P–04–0163	12/05/03	03/03/04	CBI	(G) open, non-dispersive use	(G) Amine prepolymer
P–04–0164	12/05/03	03/03/04	CBI	(G) Manufacturing of protective devices	(G) Urethane polymer
P–04–0165	12/04/03	03/02/04	CBI	(G) Additive flame retardant resin component for molding electrical and automotive electronics parts	(S) Phenol, 4,4′-(1-methylethylidene)bis[2,6-dibromo-, polymer with (chloromethyl)oxirane, 2,4,6-tribromophenyl ethers
P–04–0166	12/08/03	03/06/04	CBI	(S) Crosslinker for polyurethane dispersions; crosslinker for acrylic latexes	(G) Carbodiimide crosslinker, polycarbodiimde crosslinker
P–04–0167	12/09/03	03/07/04	Meadwestvaco Corporation - Specialty Chemicals Division	(S) Asphalt emulsifier salt	(G) Amides, from aliphatic and cycloaliphatic acids, polyamines, hydrochlorides
P–04–0168	12/09/03	03/07/04	Meadwestvaco Corporation - Specialty Chemicals Division	(S) Asphalt emulsifier salt	(G) Amides, from oil-based fatty acids, polyamines, hydrochlorides
P–04–0169	12/09/03	03/07/04	Meadwestvaco Corporation - Specialty Chemicals Division	(S) Asphalt emulsifier salt	(G) Amides, from glycerides, polyamines, hydrochlorides
P–04–0170	12/09/03	03/07/04	Meadwestvaco Corporation - Specialty Chemicals Division	(S) Asphalt emulsifier salt	(G) Amides, from fatty acids, polyamines, hydrochlorides

I. 50 PREMANUFACTURE NOTICES RECEIVED FROM: 12/01/03 TO 12/24/03—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–04–0171	12/09/03	03/07/04	Meadwestvaco Corporation - Specialty Chemicals Division	(S) Asphalt emulsifier salt	(G) Amides, from plant drived fatty acids, polyamines, hydrochlorides
P–04–0172	12/09/03	03/07/04	CIBA Specialty Chemicals Corporation	(S) Oxidative catalyst for use in multi-purpose stain removers	(G) Organo-manganese complex
P–04–0173	12/10/03	03/08/04	CBI	(G) Additive in radiation cured coatings, adhesives and inks.	(G) Metallic acrylate
P–04–0174	12/10/03	03/08/04	3M	(G) Protective coating	(G) Fluoroacrylate modified urethane
P–04–0175	12/11/03	03/09/04	CBI	(G) Surfactant/wetting agent	(G) Alkyl alkoxylate
P–04–0176	12/11/03	03/09/04	3M	(S) Chemical intermediate	(G) Fluorinated oligomer alcohol
P–04–0177	12/11/03	03/09/04	Dynea USA	(S) Adhesive for wood products	(G) Melamine resin
P–04–0178	12/12/03	03/10/04	CBI	(G) Radiation cured coatings and inks	(G) Polyester acrylate
P–04–0179	12/15/03	03/13/04	CBI	(S) Urethane foam catalyst	(G) Tertiary amine carboxylic acid compound
P–04–0180	12/15/03	03/13/04	CBI	(G) An open non-dispersive use	(G) Rosin modified phenolic resin
P–04–0181	12/16/03	03/14/04	CBI	(G) Additive for electrical insulating coatings	(G) Phenolic resin
P–04–0182	12/16/03	03/14/04	CBI	(G) Water reducer in concrete	(G) Polyglycolether-polycarboxylate
P–04–0183	12/17/03	03/15/04	Eastman Kodak Company	(G) Chemical intermediate, destructive use	(G) Heterocyclic substituted nitrobenzenecarboxamide
P–04–0184	12/17/03	03/15/04	Croda Inc.	(S) Irritancy mitigator for household and industrial specialty products; solubilizer for semi-polar and non-polar compounds into polar media; skin emollient for household and industrial specialty products; pigment wetting agent and dispersant for coatings	(S) Oxirane, methyl-, polymer with oxirane, hexanedioate (2:1), ditetradecyl ether
P–04–0185	12/18/03	03/16/04	CBI	(G) Polymeric admixture for cements (open, non-dispersive use)	(G) Sulfonated ketone resin
P–04–0186	12/17/03	03/15/04	CBI	(G) Thermal transfer ink ribbon	(S) 2-propenoic acid, 2-methyl-, 1,1-dimethylethyl ester, polymer with ethenylbenzene, 2-hydroxyethyl 2-methyl-2-propenoate and methyl 2-methyl-2-propenoate, 2,2′-azobis[2-methylpropanenitrile]-initiated
P–04–0187	12/18/03	03/16/04	CBI	(G) Packaging and bottle application	(G) Modified polyester
P–04–0188	12/19/03	03/17/04	Eastman Kodak Company	(G) Chemical intermediate, destructive use	(G) Heterocyclic substituted sulfonyloxybenzenecarboxamide
P–04–0189	12/19/03	03/17/04	Eastman Kodak Company	(G) Chemical intermediate, destructive use	(G) Alkyl substituted acid chloride
P–04–0190	12/22/03	03/20/04	CBI	(S) Inks; coatings	(G) Polyester acrylate
P–04–0191	12/22/03	03/20/04	CBI	(S) Automotive industry	(G) Cycloaliphaticdiisocyanate, homopolymer, compound with alkanedioic acid ester
P–04–0192	12/22/03	03/20/04	CBI	(G) Ingredients for use in consumer products: highly dispersive	(G) Alkylthioalkane
P–04–0193	12/22/03	03/20/04	CBI	(G) Chemical intermediate	(S) Hydroxylamine, 0-[(2e)-3-chloro-2-propenyl]-
P–04–0194	12/22/03	03/20/04	CBI	(G) Highly dispersive use	(G) Dioxacycloheptanone
P–04–0195	12/23/03	03/21/04	Lonza Inc.	(G) As a polymer aid processing	(G) Alkyldimethylbenzylammonium alkylsulfate
P–04–0196	12/23/03	03/21/04	CBI	(G) Wear resistant additive	(G) Silane reaction products with alumina
P–04–0197	12/23/03	03/21/04	CBI	(G) Industrial structural materials	(G) Telechelic polyacrylates
P–04–0198	12/23/03	03/21/04	CBI	(G) Industrial structural materials	(G) Telechelic polyacrylates
P–04–0199	12/23/03	03/21/04	Cht r. Beitlich Corporation	(S) Hydrophilic silicone softner for textile finishing; hair conditioning agent	(S) Siloxanes and silcones, 3-[3-(C_{12-16}-aklyldimethylammonio)-2-hydroxypropoxy]-propyl me, di-me, [[[3-[3-(C_{12-16}-aklyldimethtylammnonio)-2-hydroxy]propyl]-dimethylsilyl]oxy]-terminated, acetates (salts)

I. 50 PREMANUFACTURE NOTICES RECEIVED FROM: 12/01/03 TO 12/24/03—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–04–0200	12/23/03	03/21/04	Cht r. Beitlich Corporation	(S) Hydrophilic silicone softner for textile finishing; hair conditioning agent	(S) Siloxanes and silicones, 3-[3-[[3-(coco acylamin-o)propyl]dimethylammonio]-2-hydroxyproxy]propyl me, 3-(2,3-dihydroxypropy)propyl me. di-me, mixed[[[3-[3-[[3-(coco acylamin-o)propyl]dimethylammonio]-2-hydroxypropyl] propyl]-dimethylsilyl]oxy]- and [[[3-(2,3-dihydroxypropx-y)propyl]dimethylsilyl]oxy]- terminated, acetates (salts)
P–04–0201	12/23/03	03/21/04	CBI	(G) Destructive use for resins.	(G) Substituted norbornene
P–04–0202	12/24/03	03/22/04	CBI	(G) Resin for protective inductrial coating	(G) Water based acrylic dispersion
P–04–0203	12/24/03	03/22/04	Reichhold, Inc.	(G) Polyester base resin	(G) Alkanediols, polymer with carboxylic acid anhydrides, reacted with branched alcohol and carboxylic acid.
P–04–0235	12/22/03	03/20/04	ConocoPhillips Company	(S) Olefin manufacturing feedstock; specialty solvents; alcohol denaturant; fuel blendstock	(S) Naphtha, C_{4-11}-alkane, branched and linear

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

II. 37 NOTICES OF COMMENCEMENT FROM:12/01/03 TO 12/24/03

Case No.	Received Date	Commencement Notice End Date	Chemical
P–01–0688	12/17/03	12/11/03	(G) Alkyl aryl sulfonate, calcium salt
P–01–0900	12/18/03	12/05/03	(G) Carboxylic acid salt
P–01–0904	12/09/03	11/15/03	(S) Silane, ethenyltriethoxy-, reaction products with silica
P–02–0404	12/09/03	11/19/03	(G) Aliphatic polyester polyurethane with tertiary amine
P–02–0816	12/03/03	11/20/03	(G) Polyaromatic urethane
P–03–0046	12/11/03	11/25/03	(S) 1-propanaminium, 3-amino-n-(carboxymethyl)-n,n-dimethyl-, n-soya acyl derivs., inner salts
P–03–0419	12/10/03	12/02/03	(G) Substituted cuprate [triazin-hydroxy-.alpha.o][[(hydroxy-.alpha.o) sulfophenyl]azo-.alpha.n1]-methoxyphenyl]azo-.alpha.n1] naphthalenedisulfonato-, sodium salt
P–03–0420	12/08/03	11/21/03	(G) N,n-alkenebis-n-fatty acid amide
P–03–0489	12/08/03	11/13/03	(G) Poly (dimethyl) siloxane
P–03–0490	12/08/03	11/13/03	(G) Poly (dimethyl) siloxane
P–03–0491	12/08/03	11/13/03	(G) Poly(dimethyl) siloxane
P–03–0533	12/18/03	11/25/03	(S) 2-propenoic acid, 2-methyl-, (trimethoxysilyl)methyl ester
P–03–0560	12/15/03	12/03/03	(G) Macrocyclic alkoxy ether
P–03–0567	12/05/03	11/05/03	(G) Phosphonium salt of substituted alkylsulfonate
P–03–0578	12/15/03	11/21/03	(G) Acrylic solution polymer
P–03–0589	12/16/03	11/19/03	(G) Polyurethane prepolymer
P–03–0605	12/22/03	11/26/03	(G) Styrene acrylic copolymer
P–03–0615	12/10/03	12/02/03	(G) Hydrolyzed silane
P–03–0620	12/05/03	11/17/03	(G) Aminocarboxylic acid, alkaline salt
P–03–0621	12/05/03	11/17/03	(G) Aminocarboxylic acid, alkaline salt
P–03–0622	12/18/03	11/28/03	(G) Substituted alkanediol diacrylate
P–03–0637	12/08/03	10/31/03	(G) Polysiloxane
P–03–0665	12/02/03	10/27/03	(G) Alkyd resin
P–03–0668	12/08/03	11/19/03	(G) Acrylic solution polymer
P–03–0672	12/17/03	11/11/03	(S) Boron, trifluoro(tetrahydrofuran)-, (t-4)-, polymer with 3-methyl-3-[(2,2,2-trifluoroethoxy)methyl]oxetane, ether with 2,2-dimethyl-1,3-propanediol (2:1), bis(hydrogen sulfate), diammonium salt
P–03–0673	12/17/03	11/11/03	(S) Boron, trifluoro(tetrahydrofuran)-, (t-4)-, polymer with 3-methyl-3-[(2,2,3,3,3-pentafluoropropoxy)methyl]oxetane, ether with 2,2-dimethyl-1,3-propanediol (2:1), bis(hydrogen sulfate), diammonium salt

II. 37 NOTICES OF COMMENCEMENT FROM:12/01/03 TO 12/24/03—Continued

Case No.	Received Date	Commencement Notice End Date	Chemical
P–03–0697	12/11/03	11/05/03	(G) Rosin, polymer with a monocarboxylic acid, alkylphenol, formaldehyde, maleic anhydride and pentaerythritol.
P–03–0705	12/02/03	11/02/03	(G) Polycarboxylate polymer with alkenyloxyalkylol modified poly(oxyalkylenediyl), calcium potassium salt
P–03–0723	12/18/03	12/09/03	(G) Substituted alkylamino phenyl azo substitute isoindole
P–03–0746	12/23/03	11/26/03	(G) Polymeric aromatic amine colorant
P–03–0754	12/02/03	11/10/03	(G) Telechelic polyacrylates
P–03–0760	12/19/03	12/11/03	(S) 1-octanesulfonic acid
P–03–0765	12/18/03	12/06/03	(G) Phenol, 4,4′-(1-methylethylidene)bis, polymer with (chloromethyl)oxirane, reaction products with a cycloaliphatic amine
P–03–0766	12/15/03	11/14/03	(G) Alkoxysilyldiesteramine
P–03–0768	12/18/03	12/08/03	(G) Reactive azo dye
P–96–0434	12/02/03	11/19/03	(G) Isocyanate-terminated polyester polyurethane prepolymer
P–97–1087	12/10/03	11/17/03	(G) Alkyl me siloxanes

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: January 16, 2004

Carolyn Thornton,

Acting, Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 04–1448 Filed 1–22–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket Numbers 96–45 and 97–21; FCC 03–313]

Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al.

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission affirmed the Schools and Libraries Division's decisions and denied the Requests for Review filed by Ysleta Independent School District, El Paso, Texas, *et al.* However, the Commission waived the filing window for Funding Year 2002 to permit the above-captioned schools to resubmit requests for eligible products and services for Funding Year 2002.

DATES: The Commission's decisions on the Requests for Review addressed in this order were effective December 8, 2003.

FOR FURTHER INFORMATION CONTACT: Andy Firth, Attorney, Telecommunications Access Policy Division, Wireline Competition Bureau, (202) 418–7400, TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in CC Docket Nos. 96–45 and 97–21 released on December 8, 2003. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC 20554.

I. Introduction

1. In this Order, before the Commission is a Request for Review by the Ysleta Independent School District (Ysleta), El Paso, Texas, and similar Requests for Review filed by seven other schools. International Business Machines, Inc. (IBM) also files a Request for Review in most of the appeals. The schools and IBM seek review of decisions of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), denying $250,977,707.08 in schools and libraries universal service support mechanism discounts to the schools for Funding Year 2002. Because each appeal raises very similar issues, we consolidate our review here. We affirm SLD's decisions and deny the Requests for Review. Under the terms, however, we waive the filing window for Funding Year 2002 to permit the above-captioned schools to resubmit requests for eligible products and services for Funding Year 2002 under the terms.

2. The Commission is deeply concerned about a number of practices that undermine the framework of the competitive bidding process established by the Commission's *Universal Service Order*, 62 FR 32862 (June 17, 1997). If allowed to persist, the practices that we address in this Order could suppress fair and open competitive bidding, and ultimately thwart the goal of effective, efficient, and equitable distribution of universal service support to eligible schools and libraries. The Commission has directed program applicants to take full advantage of the competitive market to obtain cost-effective services and to mininize waste, fraud, and abuse. Reliance on competitive markets also assures that program funds can be distributed as widely and as equitably as possible among the applicants. To enhance competitive-market processes, the Commission has developed a process in which applicants first develop detailed technology plans that describe their technology needs and goals in a manner consistent with their educational or informational objectives. Having determined the services for which they would seek E-rate discounts, applicants would then submit for posting on the Administrator's website an FCC Form 470, listing the desired services, consistent with the technology plan, with sufficient specificity to enable potential bidders to submit bids for E-rate eligible services. Applicants could indicate on the FCC Form 470 if they also had a Request for Proposal (RFP) providing additional detail on the services sought. Once an applicant received bids with specific prices quoted for eligible services, it would select the most cost-effective services, with price as the primary factor. Where consistent with these practices, applicants would rely on state and local procurement processes. This is the foundation upon which the Commission's rules and orders are based.

3. The procurement processes presented in the instant Requests for Review thwart the Commission's competitive bidding policies. The factual scenarios of the different applicants vary to some degree, but all present troubling conduct or outcomes that are inconsistent with the competitive bidding procedures required by our rules and orders. Most of the above-captioned applicants selected a Systems Integrator to provide

millions of dollars worth of services, but chose the Systems Integrator without seeking bids on any of the prices of the specific E-rate-funded services sought. Most of the applicants also submitted FCC Forms 470 expressing interest in purchasing a catalogue of virtually every eligible service, rather than developing a list of services actually desired, based on their technology plans, with sufficient specificity to enable bidders to submit realistic bids with prices for specified services. Some applicants also stated on their FCC Forms 470 that they did not have an RFP relating to the E-rate eligible services, and then subsequently released such an RFP just a few days later.

4. These practices are contrary to our rules and policies and create conditions for considerable waste of funds intended to promote access to telecommunications and information services. Such waste harms individual applicants that do not receive the most cost-effective services. If allowed to continue, the practices identified here would harm other applicants who may be under-funded because funds needlessly have been diverted to these excessive program expenditures. Further, it would damage the integrity of the program, which to date has successfully provided discounts enabling millions of school children and library patrons, including those in many of the nation's poorest and most isolated communities, to obtain access to modern telecommunications and information services for educational purposes, consistent with the statute.

II. Discussion

5. We have reviewed the records in the above-captioned Requests for Review. Upon careful review, and for the reasons discussed below, we conclude that Ysleta and the similarly situated applicants set forth in the caption violated our rules regarding competitive bidding, our requirements governing the weighting of price in selecting bidders, and the requirement that applicants submit bona fide requests for services. In light of the circumstances presented, however, we conclude that waiving our filing deadlines in order to permit Ysleta and similarly situated applicants that have appealed SLD's denial of funding to re-bid for services for Funding Year 2002 is in the public interest.

6. *Competitive Bidding Violations.* Ysleta and IBM argue that Ysleta did not violate any Commission competitive bidding rules. They argue that Ysleta did competitively bid for services, by filing an FCC Form 470 in accordance with program rules that listed eligible services sought, and which indicated that Ysleta was seeking a partnership with a Systems Integrator. They also note that Ysleta thereafter published an RFP seeking the services of a Systems Integrator, and received five competing bids for those services. We are not persuaded by these arguments, however, because the competitive bidding in which Ysleta engaged was carried out without regard to the products and services eligible for discounts, such that the prices of actual services were never compared.

7. We conclude that the type of procurement practiced by each school in these cases violates our competitive bidding rules, because it effectively eliminates competitive bidding for the products and services eligible for discounts under the support mechanism. Section 54.504(a) of the Commission's rules specifically states that "an eligible school or library shall seek competitive bids * * * for all services eligible for support * * *" As the Commission has previously observed:

> Competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them. Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal service support mechanisms would be needlessly great.

Competitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds.

8. Ysleta engaged in a two-step procurement process, but only the first step, at which it selected the service provider, involved competitive bidding, and only in a limited fashion. First, Ysleta sought competitive bids for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism. Second, Ysleta negotiated with the Systems Integrator it had selected regarding the scope and prices of E-rate eligible products and services, but it never sought competing bids for those products and services, as required by our rules. Thus, Ysleta never received a single competing bid for the $2,090,400 in Cabling Services, $965,500 in Network Electronics, $3,945,320 in Network File and Web Servers, $968,600 in Basic Unbundled Internet Access, or $12,409,811 it requested in Technical Support Services. Instead, the only dollar figures that Ysleta compared in its determination of cost effectiveness were the hourly rates of IBM employees (*e.g.*, $394 per hour for a Project Executive, with no estimate of the number of hours projected to complete specific projects) versus the hourly rates of competitors' employees. These hourly rates are so unrepresentative of and unrelated to the large amounts of E-rate funding requested by Ysleta as to render the application of competitive bidding under the program virtually meaningless.

9. The Commission's rules and orders require competitive bidding on the actual products and services supported by the program, rather than merely on the basis of a vendor's hourly rates, reputation and experience. The Commission's orders state that "an eligible school [or] library * * * shall seek competitive bids * * * for *all services eligible for support* * * *" Ysleta did not seek competitive bids for such services. Furthermore, in the *Universal Service Order,* the Commission directed that applicants must "submit a complete description of services they seek so that it may be posted for competing providers to evaluate." Our rules therefore contemplate that applicants will compare different providers' prices for actual services eligible for support. Only by doing so can applicants ensure that, in accordance with our rules, they are receiving the most cost-effective services. As the Commission stated in its 1999 *Tennessee Order,* 14 FCC Rcd 25, 13734, "We certainly expect that schools will evaluate the actual dollar cost proposed by a bidder * * *" The context of that statement makes clear that the Commission expected schools to evaluate the actual dollar amount of eligible services during the bidding process. From the evidence before us, we find that Ysleta did not comply with this requirement.

10. Because Ysleta failed to seek competitive bids for specific eligible services, it violated § 54.504(a) of our rules. Moreover, we cannot find Ysleta satisfied this requirement through the posting of its FCC Form 470. Although the posting of a FCC Form 470 will generally satisfy § 54.504(a), Ysleta's does not here because Ysleta made clear through its RFP, which was released almost simultaneously with its FCC Form 470, that Ysleta was actually seeking bids for a vendor to serve as the Systems Integrator in a two-step procurement process and was not seeking bids for all of the services outlined on its FCC Form 470.

11. Although we do not hold that the FCC Form 470 presented here violated

our competitive bidding rules, in light of the actions of Ysleta and the other similarly situated applicants, we reiterate the importance of the FCC Form 470 to the competitive bidding process. The applicant's FCC Form 470, based on the applicant's technology plan, puts potential bidders on notice of the applicant's specific needs to encourage competitive bids, so that the applicant may avail itself of the growing competitive marketplaces for telecommunications and information services. The fact that these certifications on the FCC Form 470, all of which relate to the actual products and services for which the applicant will seek discounts, are required on the FCC Form 470, indicates that the Commission's rules and procedures contemplate that providers will bid on the cost of the specific products and services eligible for discounts, based on the applicant's technology plan. Our rules and procedures do not contemplate that potential providers will bid solely on Systems Integration services, with the expectation that the applicant will decide on specific products and services after the applicant has selected a provider.

12. We are troubled that Ysleta submitted an FCC Form 470 listing virtually every possible product and service for which it could conceivably seek discounts. Rather than representing the outgrowth of a carefully designed technology plan as required under our rules, offering potential bidders specific information on which to submit bids, Ysleta's FCC Form 470 failed to "describe the services that the schools and libraries seek to purchase *in* sufficient detail to enable potential providers to formulate bids * * *"

13. An applicant's FCC Form 470 must be based upon its carefully thought-out technology plan and must detail specific services sought in a manner that would allow bidders to understand the specific technologies that the applicant is seeking. Thus, a Form 470 that sets out virtually all elements that are on the eligible services list would not allow a bidder to determine what specific services the applicant was seeking. The Form 470 should not serve as a planning device for applicants trying to determine what is available or what possible solutions might meet the applicant's specified curriculum goals. A Form 470 should not be a general, open-ended solicitation for all services available on the eligible services list, with the hope that bidders will present more concrete proposals. The research and planning for technology needs should take place when the applicant drafts its technology plan, with the applicant taking the initiative and responsibility for determining its needs. The applicant should not post a broad Form 470 and expect bidders to do the "planning" for its technological needs.

14. Some applicants have simple, straightforward requests, such as discounts on telephone lines to each of their classrooms or dial-up Internet access for several computers in a library. Other applicants seek discounts on highly complex and substantial systems that span multiple sites and utilize highly advanced equipment and services. The FCC Forms 470 developed from an applicant's technology plans should mirror the level of complexity of the services and products for which discounts are being sought.

15. The Commission has recognized that the applicant is the best entity to determine what technologies are most suited to meet the applicant's specific educational goals. The applicant's specific goals and technology plans are therefore unique to the applicant. While we recognize that some states may, for valid reasons, want all applicants to have some level of uniformity in technological development, in cases where the Administrator finds "carbon copy" technology plans and Forms 470 across a series of applications, especially where the services and products requested are complex or substantial, and when the same service provider is involved, it is appropriate for the administrator to subject such applications to more searching scrutiny to ensure there has been no improper service provider involvement in the competitive bidding process.

16. On appeal, IBM raises several arguments concerning the Administrator's findings about the Ysleta FCC Form 470. As we have explained above, our decision here does not rely on Ysleta's FCC Form 470. Instead we are clarifying on a going forward basis how an applicant's FCC Form 470 must be based upon its technology plan and must detail specific services sought in a manner that allows bidders to understand the specific technologies that the applicant is seeking. Thus, for purposes of this appeal, IBM's arguments concerning the Form 470 are inapposite. In the interest of clarity, however, we respond to its arguments so that applicants will understand more completely the Commission's requirements as they relate to the FCC Form 470.

17. IBM argues that the fact that five providers bid on Systems Integration services demonstrates that there was sufficient information to enable service providers to prepare bids for the provision of products and services eligible for discounts. Just as an FCC Form 470 may fail to provide sufficient information to potential bidders by not listing all the services for which the applicant may seek discounts, an applicant's FCC Form 470 may fail to provide sufficient information by virtue of its overbreadth, with so many services listed that it fails to indicate which services the applicant is likely to pursue. Potential vendors of specific services are less likely to respond to an all-inclusive FCC Form 470, concluding that the applicant does not realistically intend to order all services listed, and being unable to determine which services are actually being sought.

18. Similarly, IBM argues that interested providers may contact an applicant with a comprehensive FCC Form 470 to obtain additional information that would explain what the applicant seeks. But the purpose of the FCC Form 470 is not to allow an applicant to indicate its interest in E-rate services generally, with the burden being on potential bidders to find out whether the services they offer might be among those sought by an applicant. Otherwise, the FCC Form 470 would merely need to include a single box that an applicant could check if it anticipated receiving E-rate services, and there would be no need to list or describe those services. Rather, the FCC Form 470 is intended "to allow providers to reasonably evaluate the requests and submit bids." Ysleta's FCC Form 470, even if considered in conjunction with its RFP for Systems Integration, fails to provide the specificity necessary to place potential bidders on notice of the services actually sought by Ysleta.

19. IBM argues that Ysleta's FCC Form 470 contained sufficient information for potential service providers to identify potential customers. But in this instance, Ysleta's FCC Form 470 is simply too broad to provide useful guidance to any potential service provider. The fact that there may have been "nothing in the Form 470 that discouraged or prevented any potential services provider from using the contact information in the Form 470 to contact Ysleta regarding the subset of E-rate services Ysleta sought to procure" is irrelevant. Applicants must submit a "complete" description of services sought "for competing providers to evaluate." Service providers thus must have sufficient information to evaluate the services sought in order to formulate bids. Similarly, if an applicant on its FCC Form 470 refers potential bidders to an RFP it has released or will release, the applicant's RFP must provide

sufficiently detailed and specific information that potential bidders may evaluate the E-rate eligible services sought in order to formulate bids.

20. We recognize that some past practices arguably could be construed as permitting broad FCC Forms 470. Although we acknowledge that SLD has approved other funding requests in the past that utilized all-inclusive FCC Forms 470 similar to that submitted by Ysleta, we are concerned about the use of such broad listings of services. We also recognize that SLD cautioned applicants in the past to be expansive in listing services on an FCC Form 470, to provide applicants with greater flexibility to make service substitutions post-commitment. But our consideration of the facts of this case lead us to conclude such practices should not be permitted on a going-forward basis.

21. We therefore clarify prospectively that the requirement for a bona fide request means that applicants must submit a list of specified services for which they anticipate they are likely to seek discounts consistent with their technology plans, in order to provide potential bidders with sufficient information on the FCC Form 470, or on an RFP cited in the FCC Form 470, to enable bidders to reasonably determine the needs of the applicant. An applicant may, in certain circumstances, list multiple services on its FCC Form 470, knowing that it intends to choose one over another. However, all products and services listed on the FCC Form 470 must be linked in a reasonable way to the applicant's technology plan and not request duplicative services. The Commission has previously stated that we expect applicants to "do their homework" in determining which products and services they require, consistent with their approved technology plan. We clarify prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate program do not comply with the statutory mandate that applicants submit "bona fide requests for services."

22. We do not expect that this prospective clarification will affect the manner in which the vast majority of applicants complete their FCC Forms 470. For some applicants, however, it will require more careful consideration of their actual technology needs. We expect that this clarification will ensure that the integrity of the program and the purposes of our competitive bidding rules are met, while limiting waste, fraud, and abuse. Furthermore, we stress that our prospective clarification that "encyclopedic" FCC Forms 470 will not meet the requirements for a bona fide request for services does not alter our finding that Ysleta violated our competitive bidding requirement, because Yselta's all-inclusive FCC Form 470 was accompanied by a RFP that sought bids for a systems integrator, which, based on the facts before us, functionally supplanted the FCC Form 470.

23. We also take this opportunity to clarify the wording on the FCC Form 470 regarding RFPs that provide more detailed solicitations for bidders than the FCC Form 470. Blocks 8, 9, and 10 of the form ask the applicant, "Do you have a Request for Proposal (RFP) that specifies the services you are seeking?" If so, the applicant checks a box marked "Yes, I have an RFP" and indicates the Web site on which the RFP can be found, or the contact person from whom an applicant may obtain the RFP. If an applicant does not have an RFP, it selects the box identified as, "No, I do not have an RFP for these services."

24. Ysleta checked the boxes indicating it did "not have" an RFP. Five days later, it released a detailed RFP for Systems Integrator services. SLD found that Ysleta's statement that it did not "have" an RFP was misleading, because the fact that it released one less than a week later suggested that it did "have" an RFP at the time it submitted its FCC Form 470. Ysleta contends that it did not "have" the completed RFP until it was ready for release five days later. We recognize that due to the wording of that question, some applicants may have been unsure how to portray the fact that they had not yet released an RFP but intended to do so. On the other hand, the intent of the FCC Form 470 is to provide potential bidders with as much information as possible in order to maximize competition for applicant's contracts. We direct the Wireline Competition Bureau (WCB) to clarify on a revised FCC Form 470, before the start of Funding Year 2004, that an applicant shall certify either, "Yes, I have released or intend to release an RFP for these services" or "No, I have not released and do not intend to release an RFP for these services." We anticipate that applicants will know at the time that they submit their FCC Form 470 whether they intend to release an RFP relating to the services listed on the FCC Form 470. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days. This clarification will help to fulfill the purposes of the FCC Form 470 by informing potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form.

25. *State and Local Procurement Rules and Competitive Bidding.* Ysleta and IBM argue that because Ysleta complied with state and local procurement processes, the Commission must approve its selection of IBM. Ysleta states that the Commission has four competitive bidding requirements: the applicant must post an FCC Form 470, comply with state and local procurement laws, wait at least 28 days after posting the FCC Form 470 before signing a contract, and "possibly" consider price as the primary consideration. Ysleta argues that the requirement that applicants comply with state and local procurement laws "is the most important element." IBM contends that in the *Fourth Order on Reconsideration,* 67 FR 70702 (November 26, 2002), the Commission "confirmed the supremacy of state and local procurement rules" when it stated that it would look to state or local procurement laws to determine whether a contract modification was "minor," and that only where state procurement law was silent would the Commission apply a federal standard. Ysleta and IBM argue that our rules forbid us from preempting state and local procurement laws, and that because Ysleta's selection of IBM was consistent with Texas law, we must approve that selection. In addition, they argue that the fact that none of the other bidders filed complaints indicates that the bidding process was fair and open.

26. Although compliance with any applicable state and local procurement laws is one of the minimum requirements for selecting services under the E-rate program, there are also certain specific FCC requirements with which all E-rate applicants must comply, regardless of state and local law. Section 54.504(a) of the Commission's rules specifically states that the Commission's "competitive bid requirements apply in addition to state and local competitive bidding requirements * * *." For example, program rules require the posting of an FCC Form 470 and Form 471 in order to obtain funding under the program, and these constitute federal requirements that apply in all circumstances, regardless of state and local law. Similarly, even though a state or local procurement law may permit an applicant to forego competitive bidding for products and services under a certain dollar threshold, the Commission's rules require that applicants for E-rate services seek competitive bids on all such services, to the extent that the services covered by

the state law are eligible for discounts from the federal universal service fund.

27. Even if we assume that Ysleta's selection of IBM did not violate applicable state and local procurement law, such compliance would not automatically ensure compliance with our rules governing the selection of bidders in the E-rate program. The Commission has never recognized "the supremacy" of state and local laws over our competitive bidding requirements. The Commission's examination of state and local procurement laws to determine whether a proposed contract modification was minor has no bearing on our competitive bidding requirements. Such determinations regarding contractual interpretations are well within the purview of state and local procurement laws, where applicable. But we cannot rely solely upon state and local laws to effectuate our goals of ensuring support is provided without waste, fraud and abuse. The fact that there were four other bidders in this case and that none of them registered protests does not demonstrate that Ysleta's selection process met the requirements of our rules. Nor did the other bidders, all of whom were bidding for Systems Integration services, have any incentive to assert that this procurement process did not comply with our rules, because all stood to gain from being awarded the Systems Integration contract, either by Ysleta or in another case. Similarly, other bidders would appear unlikely to challenge the Systems Integration approach because in doing so they would run the risk of losing both the Systems Integration contract with a school, and also the likelihood of being picked by the successfully bidding Systems Integrator to serve as a subcontractor.

28. Nor has the Commission ever held that compliance with state and local laws is "the most important element" in our competitive bidding rules. The four steps cited by Ysleta, and other Commission-imposed requirements such as the approval of a technology plan, are designed to work in concert to promote competitive bidding and assist schools and libraries in procuring the most cost-effective and appropriate services under the program. Compliance with state and local procurement rules is necessary, but not to the exclusion of compliance with other Commission requirements.

29. Ysleta and IBM also misread the Commission's rules and orders to assume that any state or local procurement process complies with the Commission's rules. In the *Tennessee Order*, the Commission stated that it would "generally rely on local and/or state procurement processes *that* include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements." The two-step approach Ysleta utilized in procuring services fails to include a competitive bidding requirement for selecting specific E-rate eligible services. Therefore, it does not constitute a "state or local competitive bidding requirement" under our rules, even if such an approach may be a valid means of procurement under Texas law. Furthermore, as discussed below, while Texas law may permit competitive bidding, Texas law does not impose a competitive bidding requirement on eligible schools and libraries as was the case in the *Tennessee Order*. Our rules state that "an eligible school * * * shall seek competitive bids * * * for all services" and such services must be noticed with specificity. Although Ysleta sought competitive bids for the service of Systems Integration, its procurement process did not include an effective competitive bidding requirement with respect to the actual services eligible for funding, and therefore, under both § 54.504 and the Tennessee Order, Ysleta's procurement policies, even if consistent with state and/or local law, were not adequate to meet our requirements.

30. We find unconvincing IBM's argument that because our rules state that our competitive bidding requirements "apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements," if Texas law permits this two-step bidder selection and negotiation approach, then requiring competitive bidding of services under our program would constitute a federal preemption of state and local requirements in contravention of our rules. Texas law does not forbid E-rate applicants from complying with our minimal competitive bidding requirements. Section 44.031 of the Texas Code, which governs school district purchasing contracts, explicitly permits school districts to make contracts subject to competitive bidding. Texas law therefore does not preclude compliance with our threshold federal requirements.

31. Although we do not believe that preemption of state or local rules is necessary here, we note that the Commission has previously recognized that there may be circumstances where our requirements could preempt state or local competitive bidding requirements if schools or libraries wish to receive E-rate discounts. In the *Tennessee Order*, the Commission provided guidance regarding § 54.504(a) by stating that it would only "generally" rely on state and/or local procurement processes, giving notice that there may be circumstances where the Commission will not rely on such processes. The Commission stated that it did not need "in this instance" to make a separate finding of compliance with its competitive bidding requirements, because state and local "rules and practices will generally consider price to be a primary factor * * * and select the most cost-effective bid." But where the Commission determines from the specific circumstances that Commission rules were not met, *e.g.*, specific services were not subject to proper competitive bidding, the Commission need not and should not rely solely on state and/or local procurement processes to ensure compliance with our established regulatory framework. The Commission's responsibility to combat potential waste, fraud, and abuse in the Commission's program, while promoting goals such as having schools and libraries obtain the most cost-effective services, commands that the limited rules we impose regarding competitive bidding constitute a floor or minimum set of requirements. We will generally rely on state and/or local procurement processes, but there may be circumstances such as those presented here that require us to look beyond those processes to ensure that our threshold requirements are met.

32. *Violations of Requirements of Cost-effectiveness and Price as the Primary Factor.* The procurement process used by Ysleta also violates Commission requirements regarding the role of price in an applicant's determination of cost-effectiveness when evaluating bids. Applicants must select the most cost-effective offerings, and price must be the primary factor in determining whether a particular vendor is the most cost-effective. Price need not be the exclusive factor in determining cost-effectiveness, however, so that schools and libraries selecting a provider of eligible services "shall carefully consider all bids submitted and may consider relevant factors other than the pre-discount prices submitted by providers."

33. In the *Universal Service Order*, the Commission stated that "price should be the primary factor in selecting a bid," adding that other factors, particularly "prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objective" could "form a reasonable basis on which to evaluate

whether an offering is cost-effective." In *Tennessee Order*, the Commission provided additional "useful guidance with regard to our competitive bid requirements and factors that may be considered in evaluating competitive bids." The Commission specifically emphasized the significance of price of services as a factor in selecting bids. The Commission stated:

* * * [A] school should have the flexibility to select different levels of services, to the extent such flexibility is consistent with that school's technology plan and ability to pay for such services, but when selecting among comparable services, however, this does not mean that the lowest bid must be selected. Price, however, should be carefully considered at this point to ensure that any considerations between price and technical excellence (or other factors) are reasonable.

34. In discussing the role of state and local procurement processes, however, the Commission stated that price would be "a primary factor" rather than "the primary factor." However, in discussing the *Fourth Reconsideration Order*, the Commission stated that price would be "the primary factor" rather than "a primary factor."

35. We acknowledge that the Commission's use of varying phraseology in the same decision created some ambiguity on this issue. To strengthen the consideration of price as "the primary factor" in the competitive bidding process, we hereby depart from past Commission decisions to the contrary and clarify that the proper reading of our rule, in light of the Commission's longstanding policy to ensure the provision of discounts on cost-effective services, is that price must be the primary factor in considering bids. Applicants may also take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. When balancing the need for applicants to have flexibility to select the most cost-effective services and the limited resources of the program, we conclude that requiring price to be the single most important factor is a rational, reasonable, and justified requirement that will maximize the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse.

36. Ysleta and IBM offer a number of arguments supporting their position that, consistent with our rules, Ysleta selected the most cost-effective services with price as the primary factor with its "two-step" selection process. They argue that the bid responses by the five bidders for Systems Integration services "included substantial information regarding the bidders' experience and track record for efficient, successful performance of similar services."

They further aver that the prices of eligible services were determined through careful negotiations with IBM during the second step of the selection process, after IBM had been "recommended" by the Ysleta Board of Trustees over the other four bids, but before Ysleta "selected" IBM by signing the contract. During this negotiating phase, IBM argues, price was the "sole and exclusive factor that determined whether IBM would ultimately be selected as the service provider." Furthermore, IBM states, the RFP provided that if Ysleta could not negotiate "a fair and reasonable price with the offeror judged most highly qualified, negotiations will be made with the offer or judged next most highly qualified until a contract is entered into." Thus, before signing the contract, Ysleta could cease negotiations with IBM and start over with another provider. Additionally, under the contract Ysleta retained the right to review pricing on an on-going basis, to obtain IBM's own pricing information, to direct IBM to particular product vendors and require that products be acquired in accordance with Texas procurement law, and to modify or delete projects after funding was awarded. Ysleta and IBM argue that the emphasis on price in these provisions cumulatively reflect that Ysleta complied with the Commission's requirements in selecting the most cost-effective offering with price as the primary factor, in accordance with Texas "best value" practices. They contend that because Ysleta must contribute significant costs in order to receive E-rate discounts, it had a strong incentive to select the most cost-effective services.

37. We first address IBM's argument that the November 15, 2001 bid responses for Systems Integration services "included substantial information regarding the bidders' experience and track record for efficient, successful performance of similar services." Despite listing other E-rate projects it had completed, IBM's bid offered no specific pricing information regarding those projects to demonstrate to Ysleta that it had provided cost-effective services.

IBM's bid offered only general assurances relating to pricing, such as an explanation that IBM's profit margins "are consistent with our competitors," and the statement, "You are assured that IBM prices will always be market driven, competitive with other consulting firms of similar profile and skill levels, and within normal and customary charges for the type of services provided." But the prices relevant for our competitive bidding requirements are those of eligible services, rather than the hourly rate for Systems Integration services. While non-price-specific information that goes to a bidder's experience and reputation can be important for determining cost-effectiveness, our past decisions require that actual price be considered in conjunction with these non-price factors to ensure that any considerations between price and technical excellence or other factors are reasonable. As noted above, the Commission stated in the *Tennessee Order* that it "certainly expect[s] that schools will evaluate the actual dollar amount proposed by a bidder * * *" for eligible services during the bidding process. Yet the only specific pricing information proposed by IBM or the other bidders was an hourly rate schedule for various individuals' services. Ysleta fails to demonstrate that both price and non-price factors were reasonably considered at this point.

38. Ysleta and IBM argue that Ysleta did not "select" IBM until it signed the contract, following extensive negotiations where Ysleta asserts it relied on its extensive expertise and its knowledge of information technology and contracting to ensure that pricing would be fair and reasonable. They argue that Ysleta could obtain cost-effective services both by negotiating price before signing the contract, and by exerting pricing pressure thereafter through its contractual right to review IBM's prices and direct IBM to select particular vendors, and modify or delete particular projects. They assert that Ysleta could abandon negotiations with IBM before signing the contract, and even after signing the contract would continue to exert pressure thereafter to keep prices reasonable, which helped result in cost-effective services. However, the Commission has determined that seeking competitive bids for eligible services is the most efficient means for ensuring that eligible schools and libraries are fully informed of their choices and are most likely to receive cost-effective services. In a situation where several entities in fact are potentially interested in providing eligible services, we expect the applicant to make some effort to ascertain the proposed prices for the eligible services for each bidder. We do not think our goals of limiting waste are well served when an applicant merely compares the prices of one bidder

against its internal assessment of what a "reasonable" price would be.

39. Even if an applicant receives only one bid in response to an FCC Form 470 and/or RFP, it is not exempt from our requirement that applicants select cost-effective services. The Commission has not, to date, enunciated bright-line standards for determining when particular services are priced so high as to be considered not cost-effective under our rules. There may be situations, however, where the price of services is so exorbitant that it cannot, on its face, be cost-effective. For instance, a proposal to sell routers at prices two or three times greater than the prices available from commercial vendors would not be cost effective, absent extenuating circumstances. We caution applicants and service providers that we will enforce our rules governing cost-effectiveness in order to limit waste in the program.

40. As for Ysleta and IBM's argument that E-rate applicants have sufficient incentive to select the most cost-effective services because they must contribute a portion of the costs, the Commission stated previously in the *Tennessee Order* that because an applicant must contribute its share, the Administrator "generally" need not make a separate finding that a school has selected the most cost-effective bid, even where schools do not have established competitive bidding processes. It anticipated that a particular case may present evidence that even though an applicant followed state and local rules, the applicant did not select the most cost-effective services. Our de novo review standard provides an ample basis for examining the facts more closely when, as here, there are indications that the applicants did not contract for the most cost-effective services.

41. *Violation of Bona Fide Requirement.* Section 254(h)(1)(B) of the Telecommunications Act of 1934, as amended, states that E-rate applicants must submit a "*bona fide* request" for services. The Commission has stated that the *bona fide* requirement means that applicants must conduct internal assessments of the components necessary to use effectively the discounted services they order, submit a complete description of services they seek so that it may be posted for competing providers to evaluate, and certify to certain criteria under perjury. Further, applicants may violate the statutory *bona fide* requirement through conduct that undermines the fair and open competitive bidding process. In the *Mastermind Order*, 16 FCC Rcd 6, 4028, the Commission found that a violation of its competitive bidding rules had occurred where a service provider listed as the contact person on the Form 470 also participated in the competitive bidding process as a bidder. The Commission concluded that, even in the absence of a rule explicitly prohibiting such conduct, under such circumstances, a fair and open competitive bidding process had not occurred, and thus the requirement that an applicant make a *bona fide* request for services had been violated.

42. We conclude that Ysleta violated the statutory requirement that applicants submit a "*bona fide* request" for services under the E-rate program by using a two-step Systems Integration approach and by failing to use price of the actual services being sought as the primary factor in selecting IBM. Ysleta released an RFP in conjunction with its FCC Form 470, making it clear that it was seeking bids for a systems integrator, and not bids for the specific services listed in the FCC Form 470. As discussed above, the two-step Systems Integration approach is inconsistent with our competitive bidding requirements. Moreover, as discussed above, this procurement process violated Commission requirements regarding the role of price in determining the most cost-effective bid. Because Ysleta violated our competitive bidding requirements and failed to demonstrate that it selected IBM with price as the primary factor, we conclude that it also violated section 254's mandate that applicants submit a *bona fide* request for services.

43. *Retroactive Application of New Rules.* We reject the contention that the denial of discounts for the procurement practices utilized in these cases represents a retroactive application of new rules and procedures. Our rules cannot, and need not, address with specificity every conceivable factual scenario. As stated above, our rules require applicants to seek competitive bids on eligible services, and to consider price as the primary factor. These rules are not new. Rather, we are applying them to the facts at hand, as is appropriate in an adjudicatory context. The fact that in prior years, USAC did not disapprove applications that utilized the procurement processes at issue in no way limits our discretion to apply our existing rules.

44. *Other Rule Violations.* Because we conclude that Ysleta violated our rules regarding competitive bidding, the requirement that price be the primary factor in selecting bidders, and the requirement that it make a *bona fide* request for services, we need not address SLD's conclusions that Ysleta and/or IBM violated other rules. However, because we are remanding the instant appeals to SLD and permitting similarly situated applicants that have appealed to re-bid, we take this opportunity to provide specific guidance regarding practices that are inconsistent with our rules to provide greater clarity to those applicants re-bidding services and future applicants. We emphasize that we will remain vigilant to prevent waste, fraud, and abuse in this program to ensure that the statutory goals of section 254 are met.

45. We emphasize that applicants and service providers are prohibited from using the schools and libraries support mechanism to subsidize the procurement of ineligible or unrequested products and services, or from participating in arrangements that have the effect of providing a discount level to applicants greater than that to which applicants are entitled. The Administrator has implemented this Commission requirement by requiring that: (1) The value of all price reductions, promotional offers, and "free" products or services be deducted from the pre-discount cost of services indicated in funding requests; (2) costs, trade-in allowances, and discounts be fairly and appropriately derived, so that, for example, the cost for eligible components is not inflated in order to compensate for discounts of other components not included in funding requests; and (3) contract prices be allocated proportionately between eligible and ineligible components. We also stress that direct involvement in an application process by a service provider would thwart the competitive bidding process. These requirements are necessary to ensure that program funds are allocated properly, consistent with section 254.

46. We also emphasize that applicants may not contract for ineligible services to be funded through discounts under the E-rate program. In its response to Ysleta's RFP, IBM offered to provide as Ysleta's "Technology Partner" many apparently ineligible services, such as teacher and administrative personnel training, consulting services, and assistance in filling out forms. IBM and Ysleta assert that to the extent such services were proposed in IBM's bid, they were merely "generic descriptions of the global set of services the company is capable of providing" and were not included in the final contract. When Ysleta rebids for services, we direct SLD to carefully scrutinize the requests to ensure no funding is committed for ineligible services.

47. An analysis of Ysleta's application suggests that it sought support for "Help

Desk" services, as part of the Technical Support Statement of Work. A computer Help Desk accepts support calls from end users, and initiates action to resolve the problem. This action might involve initial diagnostics, creation of a Trouble Ticket, logging the support call, and alerting other personnel that a problem exists.

48. As a result of the complex and evolving nature of the E-rate program and the technologies it supports, our rules do not codify a precise list of products and services that are eligible. Instead, SLD has developed a generalized list of eligible services in an effort to provide clarity to applicants of which services are eligible under governing rules. Among other things, the Funding Year 2002 Eligible Services list defined as eligible: "Technical Support is the assistance of a vendor-provided technician. This support may include the installation, maintenance and changes to various services and equipment under contract. Technical support is only eligible if it is a component of a maintenance agreement or contract for an eligible service or product, and it must specifically identify the eligible services or products covered by the contract." The Eligible Services List thus implemented the Commission's holding in the *Universal Service Order* that support may be provided for "basic maintenance services" that are "necessary to the operation of the internal connections network."

49. When confronted with products or services that contain both eligible and ineligible functions, SLD in the past has utilized cost allocation to determine what portion of the product price may receive discounts. We generally endorse this practice as a reasonable means of addressing mixed use products and services. When SLD reviews the applications that are submitted after the rebidding occurs, it should ensure that discounts are provided only for "basic maintenance" and not for technical support that falls outside the scope of that deemed eligible in the *Universal Service Order*. For instance, calls from end-users may involve problems with end-user workstation operating systems and hardware, and Help Desks typically field questions about the operation and configuration of end-user software. Such end-user support is not eligible for E-rate funding. Even if the actual correction of a problem involves non-contractor personnel, and is therefore not reimbursed with E-rate funds, the routing and logging function of the comprehensive Help Desk activities would effectively support ineligible services, and therefore is ineligible for discounts.

50. We expect that following the re-bidding of contracts described below, SLD will carefully scrutinize applications to ensure that discounts are provided only for eligible services. For example, SLD will examine applications to ensure that if they include project management costs for Systems Integrators or others, such costs do not include the cost of ineligible consulting services. Our mandate is to ensure that the statutory goals of section 254 are met without waste, fraud, and abuse. We emphasize that competitive bidding is a key component of our effort to ensure that applicants receive the most cost-effective services based on their specific needs, while minimizing waste in the program. The various procurement practices described above (and described in the attached appendix) represent a significant departure from the competitive bidding practices envisioned by the Commission, which were designed to best fulfill the goals of section 254. Although aspects of particular approaches utilized by individual applicants may, taken out of context, appear not to constitute a significant violation of our rules, the practices in each of the above-captioned Requests for Review weaken, undercut, or even subvert the Commission's competitive bidding requirements. We clarify our rules concerning these competitive bidding requirements where such clarification is appropriate, and, as detailed below, allow for re-bidding of services because some applicants may have relied on past approval by the Administrator of some of these practices. Fundamentally, however, this Order confirms the competitive bidding framework the Commission established in the *Universal Service Order* and which has been clarified and upheld in subsequent Orders.

III. Re-Bidding of Services for Funding Year 2002

51. Although we conclude that the practices followed in these cases are not consistent with our rules, we find that there is good cause for a waiver of our rules regarding the filing window for Funding Year 2002. Under the unique circumstances presented here, we find that good cause exists to direct SLD to re-open the filing window for Funding Year 2002 in order to permit Ysleta, and similarly situated applicants listed in the caption who appealed SLD's denial of their funding requests, to re-bid for services, to the extent such services have not already been provided.

52. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or effective implementation of overall policy on an individual basis. In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

53. Although we affirm SLD's denial for the reasons set out above, we find that these applicants should be allowed to re-bid services in accordance with the terms set forth below. We exercise our discretion in this matter for the following reasons.

54. SLD could reasonably have been construed as sanctioning the two-step Systems Integration process by approving the El Paso Independent School District's application for the previous year, Funding Year 2001. Although the record is unclear, there are indications that other applicants may have engaged in similar procurement practices even prior to El Paso's Funding Year 2001 application. IBM marketed its success with the El Paso contract, as one approved by SLD. In its bid for Systems Integration services for Ysleta, IBM explained that the El Paso school district had received less than $2 million in E-rate funding in Funding Year 2000, but that after El Paso selected IBM as a Systems Integrator for Funding Year 2001, El Paso received over $70 million in funding under the program.

55. Ysleta maintains that it was strongly influenced by SLD's prior approval of the two-step Systems Integration approach used by El Paso to select IBM. As Ysleta states, [Ysleta] was well aware of the large program funding award to [El Paso] for [Funding Year 2001], through the local media and conversations with [El Paso] officials. Consequently, [Ysleta] was under the impression that [El Paso's] model of selection of a service provider was a more effective method in light of the large award, and that [Ysleta] has been unduly restrictive on its requests. [Ysleta] had no reason to believe that there was any actual or alleged problem with [El Paso's] methodology, since the SLD had approved the [El Paso] model for large [Funding Year 2001] funding. [Ysleta] requested the form of the request proposal directly from [El Paso], and made appropriate changes thereon, culminating in the Request for Proposal.

56. Similarly, a number of applicants point to SLD's past approval of funding requests that utilized all-inclusive FCC Forms 470. These applicants observe that the approved funding requests are

similar or identical to that submitted by Ysleta.

57. We recognize that in certain instances, our rules and past decisions did not expressly address the circumstances presented here. That, however, does not preclude a finding that there has been a violation of our competitive bidding rules. In considering how to remedy this violation, we seek to enforce our rules to prevent waste, fraud and abuse, while also considering factors of hardship, fairness, and equity. For the reasons described below, we find that waiver of our rules to permit applicants to rebid services in accordance with the terms below is in the public interest in light of the uncertain application of our rules to the novel situation presented. and the substantial and widespread reliance on prior SLD approval.

58. The Commission has previously granted a waiver of its rules where one factor that it took into account was confusion caused by the application of a new rule. We anticipate that we will rarely find good cause to grant a waiver of our rules based on confusion among applicants in applying them. We think that it is appropriate to consider this factor with regard to the instant appeals, however, as they involve the application of our rules to a unique situation, namely the two-step System Integration approach and related practices. The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules. Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.

59. We therefore direct the Administrator to re-open the Funding Year 2002 filing window for all of the applicants set forth in the caption. Applicants will have sixty days from the date of release of this Order to resubmit their FCC Forms 470. In order to receive full consideration as in-window applicants for Funding Year 2002, the affected applicants must comply with all stages of the original application process. Specifically, applicants must seek competitive bids for all services eligible for discounts, and submit to the Administrator completed FCC Forms 470 on or before February 6, 2004. The Administrator will post the FCC Forms 470 to its web site, and once the FCC Forms 470 have been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicants must then submit their FCC Forms 471. In all cases, the applicants must file their completed FCC Forms 471 on or before April 23, 2004.

60. In accordance with this Order, applicants will be required to submit FCC Forms 470 that set forth in sufficient detail the services requested, or that reference RFPs that do so. Applicants must seek competitive bids for eligible services, requiring potential bidders to submit proposed prices for specified services. Applicants may select a Systems Integrator for project management, but not without seeking bids from potential Systems Integrators that specify prices to be charged by the Systems Integrator for eligible services. Nothing in this Order prevents IBM from submitting new bids for services.

61. Re-submitted applications shall be capped at the amount of pre-discount funding that applicants originally sought. We direct the Administrator to ensure that no applicant receives funding in excess of the amount for which the applicant originally applied for each individual funding request. However, because many of the contracts at issue in the instant appeals may not have been the most cost-effective offerings for obtaining eligible services, we fully anticipate that applicants will obtain substantial savings over their original applications once they have re-bid for actual E-rate eligible services. As noted above, we direct the Administrator not to approve requests for discounts on maintenance costs that are not cost-effective.

62. To the extent an applicant proceeded to take service, particularly telecommunications services or Internet access, notwithstanding SLD's denial of discounts, we do not and will not provide funding to pay for such services. We therefore do not grant a waiver of the filing window with respect to any requests for services that have already been provided as of the date of this Order. We do not believe that such a conclusion is overly harsh, since applicants proceeded at their own risk to take service, and we would be remiss to permit discounts in a situation where parties assumed the risk of proceeding in the face of SLD's denial. The loss of discounts for such services is a fair and appropriate consequence of the actions of these applicants.

63. Applicants that sought funding in Funding Year 2003 for internal connections products or services for which SLD denied discounts in Funding Year 2002 for competitive bidding violations may not receive discounts for the identical products or services in both Funding Year 2002 and Funding Year 2003. After rebidding, if applicants receive funding commitments in both 2002 and 2003 for identical products and services, they must cancel the funding requests for one of the two years.

64. Although each application under the E-rate program is unique to some degree, we conclude that all of the appellants listed in the attached appendix demonstrate factual circumstances sufficiently similar to those in the instant appeal as to merit a denial and right to re-bid in accordance with the terms of this Order. Applicants who were denied by SLD under similar factual circumstances, but who elected not to file appeals with SLD or the Commission, may not re-bid, because they failed to preserve their rights on appeal.

65. The Commission remains staunchly committed to limiting waste, fraud, and abuse in the program. The Administrator's diligence in finding and addressing the problems cited in the instant Order for Funding Year 2002 are a reflection of that commitment. We direct the Administrator to carefully scrutinize the applications submitted following the re-bidding process, to ensure full compliance with all of our rules.

IV. Ordering Clauses

66. Pursuant to § 54.722(a) of the Commission's rules, that the following Requests for Review are denied: Request for Review filed by Ysleta Independent School District, El Paso, Texas, on January 30, 2003; Request for Review filed by International Business Machines, Inc., on behalf of Ysleta Independent School District, El Paso, Texas, filed on January 30, 2003; Request for Review of Donna Independent School District, Donna, Texas, filed on May 6, 2003; Request for Review of International Business Machines, Inc., on behalf of Donna Independent School District, Donna, Texas, filed May 9, 2003; Request for Review of Galena Park Independent School District, Houston, Texas, filed April 28, 2003; Request for Review of International Business Machines, Inc., on behalf of Galena Park Independent School District, Houston, Texas, filed May 9, 2003; Request for Review of Oklahoma City School District I–89, Oklahoma City, Oklahoma, filed May 8,

2003; Request for Review of International Business Machines, Inc., on behalf of Oklahoma City School District I–89, Oklahoma City, Oklahoma, filed May 9, 2003; Request for Review of El Paso Independent School District, El Paso, Texas, filed May 8, 2003; Request for Review of International Business Machines, Inc., on behalf of El Paso Independent School District, El Paso, Texas, filed May 9, 2003; Request for Review of Navajo Education Technology Consortium, Gallup, New Mexico, filed April 22, 2003; Request for Review of Memphis City School District, Memphis, Tennessee, filed May 27, 2003; Request for Review of International Business Machines, Inc., on behalf of Memphis City School District, Memphis, Tennessee, filed May 23, 2003; Request for Review of Albuquerque School District, Albuquerque, New Mexico, filed May 23, 2003; and Request for Review of International Business Machines, Inc., on behalf of Albuquerque School District, Albuquerque, New Mexico, filed May 23, 2003.

67. Pursuant to sections 1–4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. 151–54 and 254, and § 1.3 of the Commission's rules, that the Funding Year 2002 filing window deadline established by the Schools and Libraries Division of the Universal Service Administrative Company pursuant to § 54.507(c) of the Commission's rules is waived for the affected applicants listed in the Appendix of this Order, and the Schools and Libraries Division shall take the steps outlined to effectuate this Order.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Appendix A

REQUESTS DENIED

[Amount in dollars]

Entity name	Telecommunications services	Internet access	Internal connections
Ysleta Independent School District		871,740.04	17,469,927.90
Donna Independent School District			28,641,208.95
Galena Park Independent School District		9,006.00	23,893,555.50
Oklahoma City School District I–89	561,480.39	3,216,360.00	40,770,145.80
El Paso Independent School District	46,800.00	3,088,074.03	41,639,602.13
Navajo Education Technology Consortium			41,305,747.50
Memphis City School District	5,891,241.25	25,377.96	19,902,043.07
Albuquerque School District			37,355,476.23
Totals	6,499,521.64	7,210,558.03	250,977,707.08

Appendix B

1. Although the specific circumstances of each of the following applicants vary, the record reflects that the following applicants engaged in competitive bidding practices substantially similar to those practiced by Ysleta in Funding Year 2002. We describe below the factual circumstances of each applicant, and incorporate by reference our discussion in this Order regarding Ysleta's practices. As with Ysleta, the procurement process of each of the following applicants violates our competitive bidding rules and undermines the goals of the program. For the reasons discussed in the Order, however, we find that good cause exists to waive our rules governing the filing window for Funding Year 2002, and permit these applicants to re-bid for services for Funding Year 2002 in accordance with our rules.

Donna Independent School District (DISD)

2. On October 1, 2001, DISD's Funding Year 2002 FCC Form 470 was posted on SLD's website. DISD indicated on its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism. Moreover, in Blocks 8, 9, and 10 of FCC Form 470, DISD checked the box for, respectively, telecommunications services, Internet access, and internal connections. In each instance, DISD checked the box stating, "No, I do not have an RFP [Request for Proposal] for these services."

3. Twenty-five days after the posting of the FCC Form 470, DISD released a Request for Information (RFI) on October 21, 2001, which generally sought a strategic technology partner to assist it with the E-rate program. DISD's RFI did not specify projects for which it sought funding, and did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.

4. DISD subsequently received bids. In its bid submitted to DISD, IBM did not list any prices except for a listing of hourly rates for its employees. After negotiations were conducted, on January 15, 2002, DISD signed an agreement with IBM to provide its requested services. On January 16, 2002, DISD filed its FCC Form 471 application. On March 10, 2003, SLD issued a decision denying DISD's discounts. Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) The price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.

5. As with Ysleta's appeal, we conclude that DISD's two-step procurement process violated program rules. First, DISD's competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission's rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support." Further, as with the bidding process employed by Ysleta, DISD failed to seek actual pricing information from bidders, and selected IBM without consideration of specific pricing information relating to the actual E-rate eligible services to be provided. We therefore find that DISD did not consider price as the primary factor in selecting IBM. DISD neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support. As a final matter, we also find that because DISD violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, DISD violated section 254's mandate that applicants submit a bona fide request for services.

Galena Park Independent School District (Galena Park)

6. Galena Park's initial Funding Year 2002 FCC Form 470 was posted on September 10, 2001. In its FCC Form 470, Galena Park indicated it did not have an RFP for the services for which it was seeking discounts. On October 4, 2001, Galena Park released an RFP. Galena Park's RFP did not seek bids for specific services eligible for support. Its RFP stated that Galena Park was seeking an "E-rate Program Architect" to serve as a Systems Integrator. Galena Park's RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.

7. IBM submitted a bid response on October 19, 2001. IBM did not list any prices except for a listing of hourly rates for its employees. On November 9, 2001, Galena

Park filed another FCC Form 470 which added E-mail to services for which it sought discounts. In its second FCC Form 470, Galena Park indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism. Despite the fact that Galena Park had released its RFP a month earlier, in Blocks 8, 9, and 10 of FCC Form 470, Galena Park checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."

8. Galena Park did not receive any bid other than IBM's. After conducting negotiations with IBM, on January 16, 2002, Galena Park signed a contract with IBM and filed an FCC Form 471. On March 10, 2003, SLD issued a decision denying DISD's discounts. SLD denied discounts finding: (1) The price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.

9. We conclude, similar to our findings concerning Ysleta's appeal, that Galena Park's two-step procurement process violated program rules. By checking the box on its second FCC Form 470 to indicate that it did not have an RFP, even though it had previously released an RFP, Galena Park provided incorrect and misleading information on its FCC Form 470. Further, Galena Park's competitive bidding for a systems integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support," and violated section 254's mandate that applicants submit a bona fide request for services.

Oklahoma City Public Schools (OCPS)

10. OCPS's Funding Year 2002 FCC Form 470 was posted on SLD's website on October 16, 2001. In its FCC Form 470, OCPS indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism. Moreover, in Blocks 8, 9, and 10 of the form, OCPS checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."

11. Some time in mid to late October, 2001, OCPS released an RFP. The RFP stated that OCPS was seeking a "Strategic Technology Solution Provider" for a four-year term to, among other things, "assist the District with all aspects of the E-rate process." The Solution Provider would "assist [OCPS] in effectively infusing technology throughout the District." The specified technology requirements were not identified in the RFP.

12. OCPS's RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought. The RFP stated, "Prospective bidders should note that this RFP does not require a firm fixed price, a cost plus proposal, or any other specific cost information with the exceptions of: a cost schedule for services and costs for Specialized Services for funding assistance."

13. Eight vendors submitted bids in response to the OCPS proposal. On December 17, 2001, the Oklahoma City Board of Education unanimously approved IBM as the District's Solution Provider. Only after OCPS chose IBM as the awardee, and prior to submitting its FCC Form 471, did OCPS begin specifically identifying the scope of work and cost of the actual products and services for Funding Year 2002 that would be eligible for discounts under the support mechanism. On January 17, 2002, the final day of the filing window for Funding Year 2002 applications for discounts, OCPS filed its FCC Form 471 application.

14. On March 10, 2003, SLD issued a decision denying OCPS's discounts. SLD denied discounts finding: (1) The price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.

15. We conclude, consistent with our findings concerning Ysleta's appeal, that OCPS's two-step procurement process violated program rules. First, OCPS's competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support." As with the bidding process employed by Ysleta, OCPS failed to seek actual pricing information from bidders, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided. We therefore find that OCPS did not consider price as the primary factor in selecting IBM. OCPS neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support. As a final matter, we also find that because OCPS violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a bona fide request for services.

El Paso Independent School District (EPISD)

16. EPISD's Funding Year 2002 FCC Form 470 was posted on SLD's website on November 26, 2001. In its FCC Form 470, EPISD indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism. Like Ysleta, in Blocks 8, 9, and 10 of the form, EPISD checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."

17. In the previous Funding Year (Funding Year 2001), IBM had been selected by EPISD as its service provider pursuant to a contract entered into by IBM and EPISD on January 18, 2001. This contract was based upon an RFP dated December 1, 2000. El Paso selected IBM over seven other bidders, in a two-step process similar to Ysleta's that did not compare proposed prices for specified E-rate eligible services during the bidding process. Prices and service terms were negotiated with IBM post-selection in the second step of this two-step process. The 2000 RFP and the subsequent contract, similar to Ysleta's Funding Year 2002 arrangements, formed a "Strategic Technology Solution Provider" relationship between IBM and EPISD for a four-year term to, among other things, "assist the District with all aspects of the E-rate process." Similar to Ysleta, the exact technology requirements were not identified in the December 2000 RFP. The RFP also did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.

18. EPISD states that it "did not issue a[n RFP] for Funding Year 2002 * * * but instead "renewed its pre-existing contract with IBM as a service provider." EPISD states that even though it was not required to post a Form 470 in Funding Year 2002, it did so because it wanted to "inquire as to interest from other possible vendors, in an effort to determine whether or not renewal was cost-effective and should take place." EPISD states that no inquiries were received from vendors other than IBM in response to the Funding Year 2002 Form 470 "sufficient to convince EPISD not to renew its existing contract with IBM."

19. On March 10, 2003, SLD issued a decision denying EPISD's discounts for internal connections and Internet access from IBM. Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) The price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.

20. We find that EPISD's Funding Year 2001 procurement process for internal connections and Internet access, which was the foundation for its renewal of its contract with IBM, contains significant similarities to Ysleta's procurement process and violates program rules. EPISD argues that its decision to select IBM for Funding Year 2002 was based not on its Funding Year 2002 FCC Form 470, but rather on its Funding Year 2001 RFP. EPISD maintains that the Commission may not address the propriety of EPISD's Funding Year 2001 RFP, because doing so "is an improper collateral attack." That position is without merit, as nothing precludes the Commission from examining the circumstances of a previous funding decision. EPISD's competitive bidding in

Funding Year 2001 for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support."

21. As with the bidding process employed by Ysleta, EPISD did not seek actual pricing information from bidders for its Internet access and internal connections services, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided. We therefore find that EPISD did not consider price as the primary factor in selecting IBM. EPISD neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support. As a final matter, we also find that because EPISD violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a bona fide request for services.

22. We note that SLD also denied a Funding Year 2002 funding request from EPISD for telecommunications services, to be provided by AT&T. This funding request was denied for the same reasons that the funding requests for Internet access and internal connections from IBM were denied. Although EPISD also challenges SLD's denial of funding for this funding request in its Request for Review, we do not make a decision on that funding request in this Order. Rather, since this funding request was part of a separate Form 471 and Funding Commitment Decision Letter and thus requires a separate factual assessment, we will defer a ruling on this portion of EPISD's Request for Review to a later decision.

Navajo Education Technology Consortium (NETC)

23. NETC's Funding Year 2002 FCC Form 470 was posted on SLD's website on October 31, 2001. NETC indicated in its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism. Moreover, like Ysleta, in Blocks 8, 9, and 10 of FCC Form 470, NETC checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for theses services." Unlike in Ysleta, however, in its FCC Form 470, NETC did not indicate that it was seeking a technology implementation and Systems Integration partner.

24. Unlike Ysleta, NETC did not release a subsequent RFP. Rather, NETC states that it determined the size of its project through an "E-Rate 5 Planning" process in which the scope of funding and services needed by NETC was developed and the schools and buildings for which funding was required were identified. NETC also states that it relied on a state-approved Educational Technology Plan as a model to determine the parameters of its project. NETC subsequently received 12 bids, and states that it contacted each vendor by phone and explained the scope and size of the proposed project. NETC points to certain "quotes" by vendors as evidence that price was considered prior to the selection of IBM. These "quotes," however, do not by any means match the scope of the services outlined in NETC's FCC Form 470, nor do they compare in any way to the IBM "Statement of Work" dated January 11, 2002, which apparently formed the basis for the approximately $41 million in services from IBM that NETC sought in its FCC Form 471.

25. On January 17, 2002, NETC filed its FCC Form 471 application. On March 10, 2003, SLD issued a decision denying NETC's discounts. Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) The price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; and (3) the services for which funding was sought were not defined when the vendor was selected.

26. We find that NETC's Funding Year 2002 procurement process contains significant similarities to Ysleta's procurement process and violates program rules. Its competitive bidding without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support." As with the bidding process employed by Ysleta, NETC failed to seek actual pricing information from bidders for comparable service packages, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided. Furthermore, according to the record, the price of IBM's services was far in excess of any other quote received by NETC. We therefore find that NETC did not consider price as the primary factor in selecting IBM. NETC neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support. As a final matter, we also find that because NETC violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a bona fide request for services.

Memphis City School District

27. The FCC Form 470 for Memphis City Schools (Memphis) was posted on August 10, 2001. Unlike the other entities discussed in this Order, Memphis indicated in Blocks 8, 9, and 10 on its FCC Form 470 that it had a Request for Qualifications (RFQ) for, respectively, telecommunications services, Internet access, and internal connections, and that the RFQ was available on its website. Because it indicated that it had an RFQ, Memphis was not required under SLD's procedures to list the eligible services it sought on the FCC Form 470. On the same day as the posting of Memphis's FCC Form 470, Memphis released the related RFQ. In its RFQ, Memphis indicated it was seeking a "Technology Business Partnership" with a "Qualified Provider" with whom to enter into a multi-year master contract for "a comprehensive program." This program included management services, telecommunications services, Internet access, hardware/software, infrastructure services, other technology-related services, application and systems support services, and customer support services. Bids were due one month later on September 10, 2001.

28. Memphis's RFQ outlined a two-step procurement process. In the first step, bidders would submit bids that would be evaluated on the basis of (1) Experience and background; (2) total capabilities; (3) project implementation; (4) minority/women business enterprise participation; (5) legal agreement; and (6) on-going support program. After selecting the most qualified bidder based on these criteria, Memphis would then engage in contract negotiations. The chosen firm would have fifteen days to submit a proposed contract, and if, within thirty days of the date of selection, Memphis and the provider had not concluded successful negotiations (including the price of services), the next highest-ranked bidder would be contacted.

29. Memphis received only one bid, however, from IBM. Consequently, it immediately entered into contract negotiations with IBM. Memphis and IBM signed a contract on December 19, 2002. As with Ysleta, the contract included language that offered Memphis certain price protections. On March 24, 2003, SLD denied Memphis's request for discounts, stating, "Services for which funding [were] sought [were] not defined when vendors selected; price of services [was] not a factor in vendor selection; [and] price of services [was] set after vendor selection."

30. We conclude, consistent with our findings concerning Ysleta's appeal, that Memphis's use of a two-step procurement process violated program rules. In particular, Memphis's competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission's rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support." As with the bidding process employed by Ysleta, Memphis failed to seek actual pricing information from bidders for E-rate eligible services. Moreover, we find that because Memphis violated our competitive bidding rules through the use of a two-step procurement process, it also violated section 254's mandate that applicants submit a bona fide request for services.

31. That only one bidder responded to the RFQ does not alter our conclusion that Memphis's two-step procurement process failed to comply with program rules. Indeed, this case illustrates how an imperfect competitive bidding process may well stifle competition among service providers. We find it unusual that only one entity would bid on the opportunity to provide services and products eligible for discounts under the schools and libraries support mechanism, given the size of the Memphis School District and the scope of its proposed project. In a major city like Memphis, we would expect to see more robust competition.

Albuquerque School District (Albuquerque)

32. Unlike Ysleta, Albuquerque states that it relied on a purchasing alliance as equivalent to an RFP when it selected IBM. In 1999, the Western States Contracting Alliance (WCSA) set out an RFP to select computer vendors for several Western states. After a competitive bidding process, the WCSA selected five computer companies with whom to enter into price agreements, effective from September 3, 1999 through September 2, 2004: Compaq, CompUSA, Dell, Gateway, and IBM. Price was factored into the selection of the five companies in a limited manner, as each vendor submitted bids with prices for three computer configurations: a server, a desktop computer, and a laptop computer. The resulting price agreements included various pricing protections for Albuquerque and the other members of WCSA, such as predetermined discount percentages that would apply to purchases after certain volume "trigger points" were reached.

33. Albuquerque's FCC Form 470 was posted on December 10, 2001. Similar to Ysleta's FCC Form 470. Albuquerque indicated in its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism. Subsequently, Albuquerque began negotiating Statements of Work (SOWs) with IBM. IBM proposed five SOWs: maintenance, servers, network electronics, video systems, and web-based community interaction. Albuquerque contracted with IBM to provide services based on three SOWs—maintenance, servers, and network electronics (without cabling).

34. On March 24, 2003, SLD denied Albuquerque's request on the grounds that Albuquerque "did not identify the specific services sought—either clearly on the 470 or in the RFP—to encourage full competition on major initiatives." Albuquerque maintains that it competitively bid for eligible services, because the 1999 WSCA RFP served as the RFP for its Funding Year 2002 selection of IBM. Albuquerque also suggests that its agreement with IBM that stemmed from the WSCA RFP constituted a master contract, which is permissible under our rules.

35. Although Albuquerque maintains that it relied on a master contract, and therefore did not need to submit an FCC Form 470, the WSCA contract with IBM does not meet our requirements for a master contract, negotiated by third parties, that has been competitively bid. Master contracts subject to competitive bidding must bear a reasonable connection to the products or services for which discounts are sought. We conclude that in this instance, the WSCA contract did not have such a connection. The record does not reflect that IBM's bid on the cost of a server, a laptop, and a desktop in its 1999 bid was reasonably related to the extensive costs for maintenance and network electronics for which Albuquerque sought discounts in Funding Year 2002. Although Albuquerque argues that the 1999 master contract includes "maintenance and support services," we are not persuaded that the type of maintenance and support services sought in 2002 in the 1999 RFP are sufficiently similar to the extensive maintenance and support services to relieve Albuquerque of its obligation to competitively bid those services in Funding Year 2002. We therefore conclude that Albuquerque's reliance on the WSCA contract in lieu of an FCC Form 470 was misplaced.

36. Albuquerque's competitive bidding without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids * * * for all services eligible for support." We also find that because Albuquerque violated our competitive bidding rules, it violated section 254's mandate that applicants submit a bona fide request for services.

[FR Doc. 04–1366 Filed 1–22–04; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2641]

Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings

January 7, 2004.

Petitions for Reconsideration and Clarification have been filed in the Commission's Rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of this document is available for viewing and copying in Room CY–A257, 445 12th Street, SW., Washington, DC, or may be purchased from the Commission's copy contractor, Qualex International (202) 863–2893. Oppositions to these petitions must be filed by February 9, 2004. *See* section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets (WT Docket No. 00–230).

Number of Petitions Filed: 5.

Subject: In the Matter of Digital Broadcast Content Protection (MB Docket No. 02–230).

Number of Petitions Filed: 4.

Subject: In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996 (CS Docket No. 97–80).

Commercial Availability of Navigation Devices.

Compatibility Between Cable Systems and Consumer Electronics Equipment (PP No. 00–67).

Number of Petitions Filed: 6.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–1409 Filed 1–22–04; 8:45 am]
BILLING CODE 6712–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 6, 2004.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. Brian F. Thomas, Morgantown, West Virginia, and Roger A. Hardesty, Kingwood, West Virginia; to acquire voting shares of State Bancorp, Inc., Bruceton Mills, West Virginia, and thereby indirectly acquire voting shares of Bruceton Bank, Bruceton Mills, West Virginia, and The Terra Alta Bank, Terra Alta, West Virginia.

Board of Governors of the Federal Reserve System, January 16, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–1391 Filed 1–22–04; 8:45 am]
BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or

assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. 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 the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 6, 2004.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. South Dakota Bancshares, Inc., Pierre, South Dakota; to engage *de novo* through its subsidiary, SDBS Reinsurance Limited, Grand Turks & Caicos Islands, in the underwriting of credit life, credit accident and health insurance reinsurance, pursuant to section 225.28(b)(11)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, January 16, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–1390 Filed 1–22–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–TANF]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

#1 Type of Information Collection Request: New Collection;

Title of Information Collection: Survey of State and Local Contracting Officials on Contracting for Social Services Under Charitable Choice;

Form/OMB No.: OS–0990–TANF;

Use: This data collection will enable HHS to document the extent to which state and local contracting officials in the Temporary Assistance for Needy Families and Substance Abuse Prevention and Treatment programs understand and implement Federal Charitable Choice regulations governing the provisions of social services by faith-based organizations. The information will be collected via a mail survey of a total of 173 respondents at the state and local levels.

Frequency: One time;

Affected Public: State, local, or Tribal governments;

Annual Number of Respondents: 173;

Total Annual Responses: 173;

Average Burden Per Response: 30 to 90 minutes;

Total Annual Hours: 175;

#2 Type of Information Collection Request: New collection;

Title of Information Collection: Implementation of an Internet & Paper-based Uniform Data Set for OMH-funded Activities;

Form/OMB No.: OS–0990–OMH;

Use: Involves transitioning the developed paper-based UDS modules to the Web-based prototype; implementing among OMH-partners. Will be regular system for reporting program management and performance data for all OMH-funded activities.

Frequency: Quarterly;

Affected Public: Not-for-profit institutions and State, Local, or Tribal Government;

Annual Number of Respondents: 2,772;

Total Annual Responses: 2,772;

Average Burden Per Response: 15 minutes to 15 hours;

Total Annual Hours: 2,772;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Naomi.Cook@hhs.gov*. or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB Desk Officer at the address below:

OMB Desk Officer: Brenda Aguilar. OMB Human Resources and Housing Branch, Attention: (OMB #0990–TANF/OMH), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: January 16, 2004.

Robert Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–1398 Filed 1–22–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–19–04]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project: Project DIRECT: Phase 2 Evaluation of Impact of Multilevel Community Interventions—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Prevention and Control (CDC). Project DIRECT (Diabetes Intervention Reaching and Educating Communities Together) is the first comprehensive community based project in the United States to address the growing burden of diabetes in African Americans. The goal

of the project is to use existing knowledge of diabetes risk factors and complications to implement community level interventions to reduce the prevalence and severity of diabetes in communities with large African American populations. A community in Raleigh, North Carolina was selected as the demonstration site for the project. An area in Greensboro, North Carolina was identified as a suitable comparison community. CDC, Division of Diabetes Translation (DDT) is collaborating with the state of North Carolina to implement and evaluate public health strategies for reducing the burden of diabetes in this predominantly African American community.

Project DIRECT has three distinct intervention components—Health Promotion, Outreach, and Diabetes Care. The goals of all three interventions are to reduce or prevent diabetes and its complications, but each has a different but complimentary approach. In 1996–1997, Project DIRECT implemented a baseline population-based survey. Interventions have been employed since then and continue to the present. A follow-up study is now required to evaluate the impact of the multilevel approach to diabetes prevention and control. Data from this project will be critical to CDC on-going efforts to reduce the burden of diabetes, and to determine whether a similar program could be implemented successfully in other communities. A pre-post design was selected for the evaluation to determine if any changes observed from these outcomes might be attributed to the interventions used in Project DIRECT by comparing changes in the intervention and comparison communities. The baseline study for the pre-post evaluation was conducted during 1996–1997.

In Phase 2, households in the Raleigh and Greensboro communities will be selected at random using mailing lists. An interviewer will verify the address and do an initial screening for eligible participants in the household. Eligible participants will be asked to participate in the study and will have to complete a consent form. All participants will be asked to complete an interview on their health status and lifestyle and will be measured for height and weight. Participants who self-report a history of diabetes will be asked additional questions (diabetes module) about their management of diabetes and its complications and other related health conditions.

All participants who self-report a history of diabetes and a sub-sample of those without diabetes will be invited to participate in a household examination that will include blood pressure and waist circumference measurement and a blood draw for laboratory analysis including glucose and lipids concentrations. For quality control purposes, a small sample of participants will be asked to do a short telephone interview to verify information collected during the general interview. The estimated annualized burden for this data collection is 3,946 hours.

Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Screening Form	4,587	1	5/60
Consent Form	3,136	1	5/60
General Population Questionnaire	3,136	1	40/60
Diabetes Module	773	1	20/60
Household Exam, Consent Forms and HIPPA Authorization	1,854	1	30/60
Verification Questionnaire	314	1	5/60

Dated: January 14, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1477 Filed 1–22–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–04]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project: Work Organization Predictors of Depression in Women—New—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background

Depression is a costly and debilitating occupational health problem. Research has indicated that the costs to an organization of treatment for depression can rival those for heart disease, and both major depressive disorder and forms of minor depression have been found to be associated with more disability days than other types of health diagnoses. This may be of particular relevance for working women. Various national and international studies indicate that women in developed countries experience depression at up to twice the rate of men. Studies that have examined this gender difference have focused on social, personality, and genetic explanations while few have explored factors in the workplace that may contribute to the gender differential.

Examples of workplace factors that may contribute to depression among women include: Additive workplace and home responsibilities, lack of control and authority, and low paying and low status jobs. Additionally, women are much more likely to face various types of discrimination in the workplace than men, ranging from harassment to inequalities in hiring and promotional opportunities, and these types of stressors have been strongly linked with psychological distress and other negative health outcomes. On the positive side, organizations that are judged by their employees to value diversity and employee development engender lower levels of employee stress, and those that enforce policies against discrimination have more committed employees. Such organizational practices and policies may be beneficial for employee mental

health, particularly the mental health of women. This research will focus on the following questions: (1) Which work organization factors are most predictive of depression in women, and (2) are there measurable work organization factors that confer protection against depression in women employees.

The research will use repeated measures, and a prospective design with data collection at three points (baseline and 1-year and 2-year follow-ups). A 45 minute survey will be administered by telephone to 2500 newly employed women and men at different organizations. The survey will contain questions about (1) traditional job stressors (*e.g.*, changes in workload, social support, work roles); (2) stressors not traditionally examined, but may be linked with depressive symptoms among women (*e.g.*, roles and responsibilities outside of the workplace, discrimination, career issues); (3) depression symptoms; and (4) company policies, programs, and practices. One Human Resource (HR) representative at each company will also be surveyed about company policies, programs and practices. This survey will take approximately 20 minutes. Analyses will determine which work organization factors are linked with depressive symptoms and what effect the organizational practices/policies of interest have on depression. Findings from this prospective study will also help target future intervention efforts to reduce occupationally-related depression in women workers. This request is for three years. The estimated annualized burden for this data collection is 1,892 hours.

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Worker Survey	2,500	3	45/60
HR Survey	50	3	20/60

Dated: January 13, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1478 Filed 1–22–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Foreign Quarantine

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of embargo of civets (Family: Viverridae).

SUMMARY: According to published scientific articles, Severe Acute Respiratory Syndrome (SARS)-like virus has been isolated from civets (Family: Viverridae) captured in areas of China where the 2002–2003 SARS outbreak originated. Shipments of civets are being imported into the United States and further distributed. CDC is banning the importation of all civets immediately and until further notice. CDC is taking this action to prevent the importation and spread of SARS, a communicable disease.

DATES: This embargo is effective on January 13, 2004, and will remain in effect until further notice.

FOR FURTHER INFORMATION CONTACT: Paul Arguin, National Center for Infectious Diseases, Centers for Disease Control and Prevention, Mailstop C–14, 1600 Clifton Rd., Atlanta, GA 30030, telephone 404–498–1600.

SUPPLEMENTARY INFORMATION:

Background

Severe Acute Respiratory Syndrome (SARS) is a viral respiratory illness caused by a coronavirus, called SARS-associated coronavirus (SARS-CoV). In general, SARS begins with a high fever (temperature greater than 100.4F (>38.0°C)). Other symptoms may include headache, an overall feeling of discomfort, and body aches. Some people also have mild respiratory symptoms at the outset. About 10 percent to 20 percent of patients have diarrhea. After 2 to 7 days, SARS patients may develop a dry cough. Most patients develop pneumonia. The case-fatality rate among persons with illness is approximately 10%.

The main way that SARS seems to spread is by close person-to-person contact. The virus that causes SARS is thought to be transmitted most readily by respiratory droplets (droplet spread) produced when an infected person coughs or sneezes. Droplet spread can happen when droplets from the cough or sneeze of an infected person are propelled a short distance (generally up to 3 feet) through the air and deposited on the mucous membranes of the mouth, nose, or eyes of persons who are nearby. The virus also can spread when a person touches a surface or object contaminated with infectious droplets and then touches his or her mouth, nose, or eye(s). In addition, it is possible that the SARS virus might spread more broadly through the air (airborne spread) or by other ways that are not now known.

At this time, there is no known effective treatment for SARS.

Public Health Risks

SARS was first reported in Asia in February 2003. Over the next few months, the illness spread to more than two dozen countries in North America, South America, Europe, and Asia. According to the World Health Organization (WHO), during the SARS outbreak of 2003, a total of 8,098 people worldwide became sick with SARS; of these, 774 died. In the United States, there were a total of 192 cases of SARS among people, using the 2003 WHO case definitions of "probable" and "suspect," all of whom recovered. Eight of these cases were subsequently laboratory confirmed as SARS-CoV.

Public health officials worldwide commonly used isolation and quarantine measures to control the outbreak. In the United States, some states exercised their legal authorities to compel isolation of suspect cases. On April 4, 2003, the President added SARS to the list of diseases for which the federal government could isolate or quarantine individuals, though use of this federal authority never became necessary.

The SARS global outbreak of 2003 was contained after extraordinary global effort that focused on reducing contact with infected individuals. Subsequently, there have been 2 laboratory acquired cases of SARS, one in Taiwan and one in Singapore; however, on January 5, 2004 the government of China and the World Health Organization confirmed the first non-laboratory-acquired case of SARS infection in a human since the initial

outbreak subsided in the spring of 2003. Measures being taken by Chinese health authorities since the 2004 non-laboratory-acquired case was reported include interventions on civets in the animal market based upon an accumulating but as yet unpublished body of evidence linking them with SARS-CoV infection.

To date, scientists have not been able to confirm the origin of SARS in humans. Some public health officials hypothesize that SARS-CoV was transmitted from an animal to human thereby sparking the 2003 outbreak. There is growing indirect evidence suggesting that exposure to certain wild animals, may be associated with infection, although there is no evidence that humans have become infected with the SARS coronavirus from direct contact with certain wild animals. During the initial investigations of cases of SARS coronavirus infection, it was reported that cases occurred among restaurant workers that handled wild animals and among workers in animal associated professions (1,2). Two subsequent investigations demonstrated higher rates of seropositivity against the SARS coronavirus among wild animal traders compared to controls (1,3). An analysis of the epidemiology of the SARS outbreak in Guangdong indicated that the outbreak appeared to have originated in many different municipalities without identified person to person linkages (4). Assuming humans acquire infection directly from animals, this suggests that there may have been multiple introductions from animals to humans and that the transmission was not a one-time unusual occurrence.

To date a SARS-like coronavirus has been isolated from many palm civets (Paguma larvata) (1). A comparison of isolates from civets and humans demonstrated 99.8% homology (1). In addition, there have been reports of small numbers of other animals that have demonstrated evidence of infection with SARS-like coronaviruses (1,5,6). Although it is possible that other animals may have a role in the lifecycle of the SARS coronavirus, to date the best available evidence points towards involvement of civets.

Civets, being wild terrestrial carnivores, also can be infected with and transmit rabies (7).

In 2001–2002, 98 civets were imported into the United States (44% from Asia); most, if not all, were imported for private ownership. Introduction of non-native species, such as civets, into the United States can lead to outbreaks of disease in the human population. CDC is therefore taking this action to reduce the chance of the introduction or spread of SARS into the United States. Importation of civets infected with SARS would present a public health threat, and, based upon currently available evidence, banning the importation of civets is an effective way of limiting this threat.

Because there is no current evidence suggesting that SARS-infected civets have been imported and are causing disease in the United States, this order does not include restrictions upon the domestic movement of civets already in the United States.

Immediate Action

Therefore, pursuant to 42 CFR 71.32(b) and in accordance with this order, no person may import or attempt to import any civets (Family: Viverridae), whether dead or alive, or any products derived from civets. This prohibition does not apply to any person who imports or attempts to import products derived from civets if such products have been properly processed to render them noninfectious so that they pose no risk of transmitting or carrying the SARS virus. Such products include, but are not limited to, fully taxidermied animals and completely finished trophies. This prohibition also does not apply to any person who receives permission from the CDC to import civets or unprocessed products from civets for educational, exhibition, or scientific purposes as those terms are defined in 42 CFR 71.1.

Dated: January 15, 2004.

Julie Louise Gerberding,

Director, Centers for Disease Control and Prevention.

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[FR Doc. 04–1401 Filed 1–22–04; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04069]

HIV Prevention Projects for the Pacific Islands; Notice of Availability of Funds—Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for HIV Prevention Projects for the Pacific Islands was published in the **Federal Register**, Tuesday, December 30, 2003, Volume 68, Number 249, pages 75246–75256. The notice is amended as follows:

Page 75246, first column, Application Deadline, and Page 75253, second column, Application Deadline Date, delete "February 2, 2004", and replace with "February 9, 2004".

Dated: January 16, 2004.

Sandra R. Manning,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1419 Filed 1–22–04; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Implementation of the National Violent Death Reporting System

Announcement Type: New.
Funding Opportunity Number: 04061.
Catalog of Federal Domestic Assistance Number: 93.136.
Key Dates:
Application Deadline: April 22, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under section 301(a) (42 U.S.C. 241(a)) of the Public Health Service Act and section 391(a) (42 U.S.C. 280b(a)) of the Public Service Health Act, as amended.

Purpose: The purpose of the program is to expand the implementation of the National Violent Death Reporting System (NVDRS) as mandated in FY 2004 Senate appropriations language. NVDRS will assist state governments to assess the extent of the violence related deaths in their states, identify risk factors and develop and evaluate violence prevention program efforts. This program addresses the "Healthy People 2010" focus area of Injury and Violence Prevention.

Measurable outcomes of the program will be in alignment with the following performance goal for the National Center for Injury Prevention and Control (NCIPC): Develop new or improved approaches for preventing and controlling death and disability due to injuries.

For this cooperative agreement, the case definition of violent deaths include deaths coded on the death certificate as a suicide (ICD10 X60–X84, Y87.0), a homicide (ICD10 X85–Y09, Y87.1), a death of undetermined intent (ICD10 Y10–Y34, Y87.2), a death from legal intervention (ICD10 Y35.0–Y35.4, Y35.6–Y35.7, Y89.0), a death related to terrorism (ICD10 U01–U03), an "accidental" death from a firearm (ICD10 W32–W34, and those cases coded to Y86 where a firearm is the source of injury) and those cases coded to Y89.9 where the death is later determined to be due to violence or unintentional firearm injury. Note that the defining code ranges explicitly include the sequelae or "late effects" of violent injuries.

Activities

Awardee activities for this program are as follows:

a. Establish or maintain an advisory committee that will help in the development of the state violent death reporting system. Membership should include representatives from agencies that control medical examiner/coroner records, death certificates, police records, and crime laboratory data.

b. Establish, maintain or expand routine access to uniquely identifiable case information from each of the four critical data sources for deaths occurring on or after 1/01/2005.

c. Use case definition and uniform data elements developed by CDC (See Attachment I. All attachments are posted with this announcement on the CDC website).

d. Obtain and code data from all core data sources for all cases identified. The means for obtaining data may be abstraction from the required data sources, electronic transfer or other method(s).

e. Collect and input specified child fatality review (CFR) data into the NVDRS software.

f. Develop procedures to combine information from the data sources. Maintain a unique case ID number.

g. Establish or maintain: (1) A centralized location for maintaining a secure data storage system that allows for ready access to and retrieval of your collected data; and (2) an off-site, backup storage system for all your data.

h. Transmit data free of personal identifiers electronically to CDC using software provided by CDC. Office of Management and Budget (OMB) clearance for this data collection is pending.

i. Develop a quality assurance program that includes a systematic review of the accuracy, completeness and timeliness of the data collection process. This should include reabstraction of a sample of cases where applicable, and monitoring of time intervals from death to case completion, as well as routine checks to identify duplicate cases.

j. Evaluate the surveillance system annually using standard guidelines. These include: simplicity, flexibility, data quality, acceptability, sensitivity, predictive value positive, representativeness, timeliness, and stability. [See Morbidity and Mortality Weekly Report (MMWR) Recommendations and Reports, "Updated guidelines for evaluating public health surveillance systems," RR–13, vol. 50, 07/27/2001, found at: *http://www.cdc.gov/mmwr/PDF/RR/RR5013.pdf.*]

k. Prepare standard reports with aggregated data and distribute them widely.

l. Share information learned from the project through presentations, peer-reviewed publications and media events.

m. Participate in a collaborative effort coordinated by the CDC to establish a national violent death reporting system that collects uniform data across states as prescribed in the FY 2002 and FY 2003 appropriations report language. Meetings will be held on a semiannual basis.

Note: Applicants may choose to begin gathering data in smaller geographic areas, such as cities, counties or regions, rather than beginning statewide. If an applicant chooses to begin collecting data in a portion of the state, the applicant must outline a plan for expansion statewide within the five-year project period. If an applicant cannot go statewide within the five-year time frame, a justification must be provided.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

a. Provide a case definition and required uniform data elements to be collected.

b. Provide standardized model software that can be used to store and transmit data to CDC electronically, and provide software updates, as needed.

c. Train recipients on NVDRS systems. This includes: data standards, coding, data entry, data editing, quality assurance functions, record tracking, and reporting format.

d. Provide technical assistance in solving problems in all aspects of the system.

e. Review submitted records for quality and completeness and provides feedback to recipients. Work with the recipients to systematically resolve problems of missing or inaccurate data.

f. Prepare an analysis file of final edited data to be shared with the recipient for data analysis and reporting of findings.

g. Prepare standard reports with aggregated data and distribute them widely.

h. Prepare Office of Management and Budget (OMB) package to obtain clearance for data collection.

i. Provide list of child fatality review data elements that should be collected.

II. Award Information

Type of Award: Cooperative Agreement. CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $700,000.

Approximate Number of Awards: Three.

Approximate Average Award: $233,000.

Floor of Award Range: None.

Ceiling of Award Range: $320,000.

For applicants with violent deaths equal to 2,200 or less per year, your application will not be eligible for review if you request a funding amount greater than the upper threshold. You will be notified that you did not meet the submission requirements.

For applicants with violent deaths greater than 2,200 per year, an amount greater than the ceiling is allowable.

Anticipated Award Date: September 1, 2004.

Budget Period Length: 12 months.

Project Period Length: Five years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory

progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

III. Eligibility Information

Eligible applicants: Applications may be submitted by:

- State and local governments or their Bona Fide Agents (this includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Marianna Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau)

A Bona Fide Agent is an agency/organization identified by the state as eligible to submit an application under the state eligibility in lieu of a state application. If you are applying as a bona fide agent of a state or local government, you must provide a letter signed by the authorizing official of the state health department designating the status bona fide agent. The letter must state that the state health department is aware of the opportunity to be involved in the cooperative agreement (include the Program Announcement number) and is allowing the bona fide agency to be the state applicant. Place this documentation behind the first page of your application form.

Other Eligibility Requirements: If your application is incomplete or non-responsive to the requirements listed below, it will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

States already receiving funding under Program Announcements 02059 and 03038—Cooperative Agreement for Development of National Violent Death Reporting System (Alaska, Colorado, Georgia, North Carolina, Maryland, Massachusetts, New Jersey, Oklahoma, Oregon, Rhode Island, South Carolina, Virginia and Wisconsin) are not eligible to apply.

The ability to obtain population-based information from core data sets is crucial for the successful development of the NVDRS. Eligible applicants must document, through letters of support and memorandums of agreement/understanding (MOA/MOU), access to information on individual, identifiable decedents from all of the following data sources:

1. Death certificates.
2. Medical examiner and/or coroner records.
3. Police records.
4. Crime laboratory records.

The letters of support must come from each agency authorized to grant access to the specific required data. Each letter must note the most recent year for which data is available to the health department, and note that a MOA/MOU is in place between the applicant and the data agency. The MOA/MOU must note the applicant's access to data and specify any limitations regarding data use. A copy of the MOA/MOU must accompany each letter of support to confirm access.

Applicants from states that do not have centralized, statewide medical examiner/coroner or police records, must obtain letters of support from the agencies with authority over the four required data sources in three cities or counties within the state, and MOA/MOUs from at least three of the four agencies in each city or county.

MOA/MOUs are required to verify that an applicant has access to data and will not send the majority of project time trying to gain access to required data.

Applications that fail to submit all evidence listed above will be considered non-responsive and will be returned without review.

Cost Sharing or Matching

Matching funds are not required for this program.

Note: Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

How to Obtain Application Forms: To apply for this funding opportunity use application form PHS 5161. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO-TIM) staff at: 770–488–2700. Application forms can be mailed to you.

Content and Form of Application Submission

This program announcement is the definitive guide on application format, content, and deadlines. It supersedes information provided in the application instructions. If there are discrepancies between the application form instructions and the program announcement, adhere to the guidance in the program announcement.

You are required to have a Dun and Bradstreet (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.*

If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Application

You must submit a signed original, two copies, and a labeled disk or CD-Rom of your application forms.

You must include a project narrative with your application forms. Your narrative must be submitted in the following format:

- *Maximum number of pages:* 30.

If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.

- *Font size:* 12 point unreduced.
- *Paper size:* 8.5 by 11 inches.
- *Page margin size:* One inch.
- Printed only on one side of page.
- Held together only by rubber bands or metal clips; not bound in any other way.
- *Maximum number of pages for entire application:* 70 (which includes the 30 page narrative).

Note: Applicants who do not follow the content guidelines will have the following point reductions to their overall evaluation score: 5 points for more than 30 pages of the narrative; 3 points for use of a font smaller than 12-point; 2 points for less than double spacing; and 2 points for margins less than specified.

Your narrative should address activities to be conducted over the entire project period, and must include the following items in the order listed: Methods, Goals and Objectives, Experience, Capacity and Staffing, Collaboration, Evaluation and Background. The Budget Justification is not included in the narrative page count.

Funding restrictions, which must be taken into account while writing your budget, are as follows: none

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If

your indirect cost rate is a provisional rate, the agreement must be less than 12 months of age.

Guidance for completing your budget can be found on the CDC web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information may include: Curriculum Vitaes, Resumes, Organizational Charts, Letters of Support, etc.

Submission Date, Time, and Address:

Application Deadline Date: April 22, 2004.

Application Submission Address: Submit your application by mail or express delivery service to: Technical Information Management-PA# 04061, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. Eastern Time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This program announcement is the definitive guide on application format, content and deadlines. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

Review Criteria: You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the "Purpose" section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

1. Methods (25 points)

a. Are methods used for ascertaining cases and obtaining data from core data sources provided? It should include a discussion of methods used in motivating reporting sources, ensuring high quality data, and resolving data issues.

b. Does the applicant provide a detailed and clear description of how linkage of records from different sources is, or will be, accomplished?

c. Does the applicant describe how data will be stored in a central location in the state?

d. Is a detailed plan for protecting data from loss and assuring confidentiality where required by state law or regulation provided?

e. Does the applicant provide evidence that proposed activities are not duplications of existing activities?

f. Does the applicant provide evidence of access to child fatality review team (CFR) data?

2. Goal(s) and Objectives (15 points)

a. Are goals that are relevant and consistent with the purpose of the program announcement included?

b. Are the objectives specific, measurable, assigned to specific staff, realistic, and time-phased?

c. Does the applicant include a five-year plan with timeline? Is it realistic? Does it accomplish the goals and objectives?

3. Experience (15 points)

a. Is experience in accessing, collecting, linking, editing, managing, and analyzing surveillance information from multiple data sets documented, especially experience with mortality surveillance?

b. Does the applicant provide evidence of experience in injury surveillance, conducting data quality assurance activities, and generating data reports?

4. Capacity and Staffing (15 points)

a. Does the applicant provide evidence of existing staff with expertise in Statistical Analysis Software (SAS) software and database manager, (*e.g.*, Microsoft Access), computer programming skills, and skills in data management and quality assurance, especially involving large complex databases?

b. Is a plan provided with position description(s) for hiring someone with such skills and expertise? Resumes or curriculum vitae should be included.

c. Is there a timetable provided showing when information regarding the occurrence of a violent death during a given calendar quarter is available to the applicant from each of the four required data sources?

5. Collaboration (15 points)

a. Does the applicant provide evidence of involvement by key stakeholders in the current system, or a plan for including key stakeholders, in the development of a violent death reporting system?

b. Does the applicant document the quality and specificity of access to required and optional data sources, *e.g.*, the limitations of that access, the most recent year data are available, the timeliness and availability of data from all core and optional data sources, the duration of access, etc? Information from the letters of support will be considered in this context.

c. Are additional letters of support from potential partners in the project included?

d. Do the letters of support document specific contributions of the partner, including but not limited to a description of the precise nature of past and proposed collaborations, products, services, and other activities that will be provided by and to the applicant through the proposed collaboration?

6. Evaluation (10 points)

a. Is a detailed plan for evaluating the surveillance system included? The plan should include standard CDC surveillance evaluation measures described above.

b. Does the applicant describe both system and data quality assurance procedures?

7. Background (5 points)

Does the applicant describe the magnitude of the violent death problem in the state and/or target area?

8. Human Subjects (Not Scored)

Does the applicant adequately address the requirements of Title 45 CFR part 46 for the protection of human subjects?

This criteria is not scored; however, an application can be disapproved if the research risks are sufficiently serious and protection against risks is so inadequate as to make the entire application unacceptable.

9. Budget (Not Scored)

Is the budget request clearly explained, adequately justified, reasonable, sufficient and consistent with the stated objectives and planned activities? It should include funds for at least two trips to CDC for program related meetings and training. Attachment II provides guidance for developing budgets.

Review and Selection Process: A Special Emphasis Panel (SEP) will evaluate your application according to the criteria listed above.

In addition, the following factors may affect the funding decision: At least two applicants will be funded whose violent deaths total 2500 or more per year statewide.

VI. Award Administration Information

Award Notices: Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Administrative and National Policy Requirements: 45 CFR part 74 or 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–1 Human Subjects Requirements
- AR–2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research
- AR–9 Paperwork Reduction Act Requirements
- AR–10 Smoke-Free Workplace Requirements
- AR–11 Healthy People 2010
- AR–12 Lobbying Restrictions
- AR–13 Prohibition on Use of CDC Funds for Certain Gun Control Activities
- AR–21 Small, Minority, and Women-Owned Business
- AR–22 Research Integrity

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

Reporting Requirements

You must provide CDC with an original, plus two copies of the following reports:

1. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Detailed Line-Item Budget and Justification.

e. Additional Requested Information.

2. Financial status report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, PA# 04061, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Telephone: 770–488–2700.

For program technical assistance, contact: Leroy Frazier, Jr., Project Officer, Division of Violence Prevention, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Hwy, NE, MS K60, Atlanta, GA 30341.

Telephone: 770–488–1507.

E-mail: *Lfrazier1@cdc.gov.*

For budget assistance, contact: Nancy Ware, Contract Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Telephone: 770–488–2878.

E-mail: *ngw5@cdc.gov.*

Dated: January 16, 2004.

Sandra R. Manning,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1420 Filed 1–22–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Institute for Occupational Safety and Health, Advisory Board on Radiation and Worker Health

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following board meeting:

Name: National Institute for Occupational Safety and Health (NIOSH), Advisory Board on Radiation and Worker Health (ABRWH).

Times and Dates: 8 a.m.–4 p.m., February 5, 2004; 8:30 a.m.–4:30 p.m., February 6, 2004.

Place: Radisson Riverfront Hotel Augusta, Two Tenth Street, Augusta, Georgia 30901, telephone (706) 823–6505, fax (706) 724–0044.

Status: Open 8 a.m.–4 p.m., February 5, 2004. Open 8 a.m.–12 p.m., February 6, 2004. Closed 1:30 p.m.–4:30 p.m., February 6, 2004.

Background: The Advisory Board on Radiation and Worker Health ("the Board") was established under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) of 2000 to advise the President, through the Secretary of Health and Human Services (HHS), on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Board include providing advice on the development of probability of causation guidelines which have been promulgated by HHS as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, evaluation of the scientific validity and quality of dose reconstructions conducted by the NIOSH for qualified cancer claimants, and advice on petitions to add classes of workers to the Special Exposure Cohort.

In December 2000 the President delegated responsibility for funding, staffing, and operating the Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, and renewed on August 3, 2003.

Purpose: This board is charged with a) providing advice to the Secretary, HHS on the development of guidelines under Executive Order 13179; b) providing advice to the Secretary, HHS on the scientific validity and quality of dose reconstruction efforts performed for this

Program; and c) upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters to be Discussed: Agenda for this meeting will focus on Program Status Reports from NIOSH and Department of Labor; Site Profile Status; Research Issues; a Board Working Session with Sanford Cohen and Associates, and a closed session to discuss Task Order Proposals and Independent Government Cost Estimate.

The closed portion of the meeting on the afternoon of February 6th will involve discussion of the Task Order proposals and Independent Government Cost Estimate (IGCE), which could lead to a revision of the IGCE. These contracts will serve to provide technical support consultation to assist the ABRWH in fulfilling its statutory duty to advise the Secretary of Health and Human Services on the scientific validity and quality of dose estimation and reconstruction efforts under the Energy Employees Occupational Illness Compensation Program Act.

This portion of the meeting will be closed to the public in accordance with provisions set forth regarding subject matter considered confidential under the terms of 5 U.S.C. 552b(c)(9)(B), 48 CFR 5.401(b)(1) and (4), and 48 CFR 7.304(d), and the Determination of the Director of the Director of the Management Analysis and Services Office, Centers for Disease Control and Prevention, pursuant to Pub. L. 92–1.A summary of this meeting will be prepared and submitted within 14 days of the close of the meeting.

The agenda is subject to change as priorities dictate.

Due to programmatic issues that had to be resolved, the **Federal Register** notice is being published less than fifteen days before the date of the meeting.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Executive Secretary, ABRWH, NIOSH, CDC, 4676 Columbia Parkway, Cincinnati, Ohio 45226, telephone (513) 533–6825, fax (513) 533–6826.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: January 16, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–1421 Filed 1–22–04; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1375–N]

Medicare Program; Request for Nominations to the Advisory Panel on Ambulatory Payment Classifications Groups

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice invites nominations of members to the Advisory Panel on Ambulatory Payment Classification (APC) Groups (the Panel). There will be four vacancies on the Panel as of March 31, 2004. The purpose of the Panel is to review the APC groups and their associated weights and to advise the Secretary of Health and Human Services (the Secretary) and the Administrator of the Centers for Medicare & Medicaid Services (CMS) concerning the clinical integrity of these groups and weights, which are major elements of the hospital outpatient prospective payment system. The Panel is chartered through November 21, 2004.

Nominations

Nominations will be considered if received at the appropriate address, which is provided below, no later than 5 p.m. e.s.t. February 13, 2004. Mail or deliver nominations to the following address: CMS, Center for Medicare Management, Hospital & Ambulatory Policy Group, Division of Outpatient Care, Attention: Shirl Ackerman Ross, Designated Federal Official (FACA), Advisory Panel on APC Groups, 7500 Security Boulevard, Mail Stop C4–05–17, Baltimore, MD 21244–1850.

FOR FURTHER INFORMATION CONTACT: Persons wishing to nominate individuals to serve on the Panel or to obtain further information can also contact the Panel coordinator, Shirl Ackerman-Ross by e-mail at *SAckermanross@cms.hhs.gov* or by telephone at (410) 786–4474.

For additional information and updates on the Panel's activities, please refer to the Internet at *http://www.cms.gov/faca.*

You may also refer to the CMS Advisory Committee Information Hotlines at 1–877–449–5659 (toll-free) or 410–786–9379(local) for additional information.

News media representatives should contact the CMS Press Office, (202) 690–6145.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Department of Health and Human Services (the Secretary) is required by section 1833(t)(9)(A) of the Social Security Act (the Act) to consult with an advisory panel on Ambulatory Payment Classification (APC) Groups (the Panel). The Panel will meet up to three times annually to review the APC groups and to provide technical advice to the Secretary and to the Administrator of the Centers for Medicare & Medicaid Services (CMS) concerning the clinical integrity of the groups and their associated weights. The groups and their weights are major elements of the hospital Outpatient Prospective Payment System (OPPS). We will consider the technical advice provided by the Panel as we prepare the annual Notice of Proposed Rulemaking that will propose changes to the OPPS for the next calendar year.

The current members of the Panel are: Marilyn Bedell, M.S., R.N., O.C.N.; Geneva Craig, R.N., M.A.; Lora DeWald, M.Ed.; Albert Brooks Einstein, Jr., M.D.; Robert E. Henkin, M.D.; Lee H. Hilborne, M.D., M.P.H.; Stephen T. House, M.D.; Kathleen Kinslow, C.R.N.A., Ed.D.; Mike Metro, R.N., B.S.; Gerald V. Naccarelli, M.D.; Frank G. Opelka, M.D., F.A.C.S.; Beverly K. Philip, M.D.; Lynn R. Tomascik, R.N., M.S.N.; Timothy Gene Tyler, Pharm.D.; and William Van Decker, M.D. The Panel Chair position, which must be a CMS Federal official, is vacant.

The Charter allows for up to 15 members plus a Chair, and we will have four openings as of March 31, 2004. Therefore, we are requesting nominations for members to serve on the Panel. Panel members serve without compensation, pursuant to advance written agreement; however, travel, meals, lodging, and related expenses will be reimbursed in accordance with standard Government travel regulations. We have a special interest for ensuring that women, minorities, and the physically challenged are adequately represented on the Panel, and we

encourage nominations of qualified candidates from those groups.

The Secretary, or his designee, will appoint new members to the Panel from among those candidates determined to have the required expertise; new appointments will be done in a manner that will ensure an appropriate balance of membership.

II. Criteria for Nominees

Qualified nominees will meet those requirements necessary to be a Panel member. Panel members must be full-time employees and representatives of Medicare providers subject to the OPPS, with technical and/or clinical expertise in any of the following areas:

- Hospital payment systems.
- Hospital medical care delivery systems.
- Outpatient payment requirements.
- Ambulatory payment classification groups.
- Use of, and payment for, drugs and medical devices in an outpatient setting.
- Provision of, and payment for, partial hospitalization services.
- Any other relevant expertise.

It is not necessary that any nominee possess expertise in all of the areas listed, but each must have a minimum of 5 years experience and currently be employed full-time in his or her area of expertise. (**Please Note:** Consultants do not qualify for Panel membership under the nominee criteria.)

Members of the Panel serve overlapping 4-year terms, contingent upon the rechartering of the Panel on or before November 21, 2004.

Any interested person may nominate one or more qualified individuals. Self-nominations will also be accepted. Each nomination must include a letter of nomination, a curriculum vita of the nominee, and a statement from the nominee that the nominee is willing to serve on the Panel under the conditions described in this notice and further specified in the Charter.

III. Copies of the Charter

You may obtain a copy of the charter for the Panel by submitting a request to: Shirl Ackerman-Ross, CMS, Center for Medicare Management, Hospital & Ambulatory Policy Group, Division of Outpatient Care, 7500 Security Boulevard, Mail Stop C4–05–17, Baltimore, MD 21244, by telephone at (410) 786–4474 or by e-mail to *SAckermanross@cms.hhs.gov*. A copy of the charter is also available on the Internet at *http://www.cms.hhs.gov/faca*.

Authority: Section 1833(t)(9)(A) of the Social Security Act (42 U.S.C. 13951(t)(9)(A)) and Pub. L. 92–463 (5 U.S.C. App. 2).

Dated: January 16, 2004.

Dennis G. Smith,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 04–1516 Filed 1–22–04; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1362–N]

Medicare Program; February 23–24, 2004, Meeting of the Practicing Physicians Advisory Council

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the Practicing Physicians Advisory Council (the Council). The Council will be meeting to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary of the Department of Health and Human Services (the Secretary). These meetings are open to the public.

Meeting Registration: Persons wishing to attend this meeting must register for the meeting at least 72 hours in advance by contacting the Council Administrative Officer, Cheryl Slay, at *cslay@cms.hhs.gov* or (410)–786–7054. Persons who are not registered in advance will not be permitted into the Humphrey Building and thus will not be able to attend the meeting. Persons attending the meeting will be required to show a photographic identification, preferably a valid driver's license, before entering the building.

DATES: The meeting is scheduled for February 23, and February 24, 2004 from 8:30 a.m. until 5 p.m. e.s.t.

ADDRESSES: The meeting will be held in Room 800, at the Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Kenneth Simon, M.D., Executive Director, Practicing Physicians Advisory Council, 7500 Security Boulevard, Mail Stop C4–11–27, Baltimore, MD 21244–1850, (410) 786–3377. Please refer to the CMS Advisory Committees Information Line: (1–877–449–5659 toll free)/(410–786–9379 local) or the Internet at *http://cms.hhs.gov/faca/ppac/default.asp* for additional information and updates on committee activities. News media representatives should contact the CMS Press Office, (202) 690–6145.

SUPPLEMENTARY INFORMATION: The Secretary of the Department of Health and Human Services (the Secretary) is mandated by section 1868 of the Social Security Act (the Act) to appoint a Practicing Physicians Advisory Council (the Council) based on nominations submitted by medical organizations representing physicians. The Council meets quarterly to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary. To the extent feasible and consistent with statutory deadlines, the consultation must occur before publication of the proposed changes. The Council submits an annual report on its recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services not later than December 31 of each year.

The Council consists of 15 physicians, each of whom has submitted at least 250 claims for physicians' services under Medicare in the previous year. Members of the Council include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas. At least 11 of the members of the Council must be physicians described in section 1861(r)(1) of the Act; that is, State-licensed doctors of medicine or osteopathy. The remaining members may include dentists, podiatrists, optometrists, and chiropractors. Members serve for overlapping 4-year terms; terms of more than 2 years are contingent upon the renewal of the Council by appropriate action before its termination. Section 1868(a) of the Act provides that nominations to the Secretary for Council membership must be made by medical organizations representing physicians.

The Council held its first meeting on May 11, 1992. The current members are: James Bergeron, M.D.; Ronald Castellanos, M.D.; Rebecca Gaughan, M.D.; Carlos R. Hamilton, M.D.; Joseph Heyman, M.D.; Dennis K. Iglar, M.D.; Joe Johnson, D.O.; Christopher Leggett, M.D.; Barbara McAneny, M.D.; Angelyn L. Moultrie-Lizana, D.O.; Laura B. Powers, M.D.; Michael T. Rapp, M.D. (Council Chair); Amilu Rothhammer, M.D.; Robert L. Urata, M.D.; and Douglas L. Wood, M.D.

Council members will be updated on the status of recommendations made. The agenda will provide for discussion and comment on the following topics:

- 2004 Physician Fee Schedule.
- Physicians Regulatory Issues Team Update.

- Sustainable Growth Rate.
- Medicare Prescription Drug Improvement and Modernization Act of 2003.
- Emergency Medical Treatment and Active Labor Act.
- End Stage Renal Disease Quality Initiative.
- Current Procedural Terminology (CPT) Codes and Evaluation & Management.
- Adjusted Wholesale Pricing.
- Outcome and Assessment Information Set and Home Care Benefits.
- Medical Malpractice Premiums.
- Wheelchair Billing Brochure.

For additional information and clarification on the topics listed, call the contact person in the "For Further Information Contact" section of this notice.

Individual physicians or medical organizations that represent physicians wishing to make 5-minute oral presentations on agenda issues must contact the Executive Director by 12 noon, Friday, February 13, 2004, to be scheduled. Testimony is limited to agenda topics. The number of oral presentations may be limited by the time available. A written copy of the presenter's oral remarks must be submitted to Cheryl Slay at *cslay@cms.hhs.gov* no later than 12 noon, Friday, February 13, 2004, for distribution to Council members for review before the meeting. Physicians and organizations not scheduled to speak may also submit written comments to the Executive Director and Council members. The meeting is open to the public, but attendance is limited to the space available. Individuals requiring sign language interpretation or other special accommodation must contact Cheryl Slay at *cslay@cms.hhs.gov* or (410) 786–7054 at least 10 days before the meeting.

Authority: (Section 1868 of the Social Security Act (42 U.S.C. 1395ee) and section 10(a) of Public Law 92–463 (5 U.S.C. App. 2, section 10(a)); 45 C.F.R. Part 11) (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: January 13, 2004.

Dennis G. Smith,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 04–1150 Filed 1–22–04; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0397]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Threshold of Regulation for Substances Used In Food-Contact Articles

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by February 23, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Threshold of Regulation for Substances Used In Food-Contact Articles—(OMB Control Number 0910–0298)—Extension

Under section 409(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(a)), the use of a food additive is deemed unsafe unless one of the following is applicable: (1) It conforms to an exemption for investigational use under section 409(j) of the act, (2) it conforms to the terms of a regulation prescribing its use, or (3) in the case of a food additive which meets the definition of a food-contact substance in section 409(h)(6) of the act, there is either a regulation authorizing its use in accordance with section 409(a)(3)(A) or an effective notification in accordance with section 409(a)(3)(B).

The regulations in § 170.39 (21 CFR 170.39) established a process that provides the manufacturer with an opportunity to demonstrate that the likelihood or extent of migration to food of a substance used in a food-contact article is so trivial that the use need not be the subject of a food additive listing regulation or an effective notification. The agency has established two thresholds for the regulation of substances used in food-contact articles. The first exempts those substances used in food-contact articles where the resulting dietary concentration would be at or below 0.5 part per billion (ppb). The second exempts regulated direct food additives for use in food-contact articles where the resulting dietary exposure is 1 percent or less of the acceptable daily intake for these substances.

In order to determine whether the intended use of a substance in a food-contact article meets the threshold criteria, certain information specified in § 170.39(c) must be submitted to FDA. This information includes the following components: (1) The chemical composition of the substance for which the request is made, (2) detailed information on the conditions of use of the substance, (3) a clear statement of the basis for the request for exemption from regulation as a food additive, (4) data that will enable FDA to estimate the daily dietary concentration resulting from the proposed use of the substance, (5) results of a literature search for toxicological data on the substance and its impurities, and (6) information on the environmental impact that would result from the proposed use.

FDA uses this information to determine whether the food-contact article meets the threshold criteria. Respondents to this information collection are individual manufacturers and suppliers of substances used in food-contact articles (i.e., food packaging and food processing equipment) or of the articles themselves.

In the **Federal Register** of September 16, 2003 (68 FR 54232), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden for this collection of information as follows:

TABLE 1. —ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
170.39	6	1	6	48	288

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Under section 409(a) of the act, the use of a food additive is deemed unsafe unless one of the following is applicable: (1) It conforms to an exemption for investigational use under section 409(j) of the act, (2) it conforms to the terms of a regulation prescribing its use, or (3) in the case of a food additive which meets the definition of a food-contact substance in section 409(h)(6) of the act, there is either a regulation authorizing its use in accordance with section 409(a)(3)(A) or an effective notification in accordance with section 409(a)(3)(B).

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Dated: January 16, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–1472 Filed 1–22–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Radiological Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one portion of the meeting will be closed to the public.

Name of Committee: Radiological Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 3, 2004, from 8:30 a.m. to 5 p.m.

Location: Gaithersburg Marriott, - Salons A, B, C, and D, 9751 Washingtonian Blvd., Gaithersburg, MD.

Contact Person: Robert J. Doyle, Center for Devices and Radiological Health (HFZ–470), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1212, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512526. Please call the Information Line for up-to-date information on this meeting.

Agenda: The committee will discuss, make recommendations, and vote on a premarket approval application for a computer aided detection device that identifies nodules in CT (computerized tomography) images of the lung. Background information, including the agenda and questions for the committee, will be available to the public 1 business day before the meeting, on the Internet at *http://www.fda.gov/cdrh/panelmtg.html*. Material will be posted on February 2, 2004.

Procedure: On February 3, 2004, from 9 a.m. to 5 p.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by January 27, 2004. On February 3, 2004, oral presentations from the public will be scheduled between approximately 9:20 a.m. and 9:50 a.m., and for an additional 30 minutes near the end of the committee deliberations. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before January 27, 2004, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Closed Committee Deliberations: On February 3, 2004, from 8:30 a.m. to 9 a.m., the meeting will be closed to permit discussion and review of trade secret and/or confidential commercial information (5 U.S.C. 552b(c)(4)).

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact AnnMarie Williams, Conference Management

Staff, at 301–594–1283, ext. 113, at least 7 days in advance of the meeting.

FDA regrets that it was unable to publish this notice 15 days prior to the Radiological Devices Panel of the Medical Devices Advisory Committee meeting. Because the agency believes there is some urgency to bring this issue to public discussion and qualified members of the Radiological Devices Panel of the Medical Devices Advisory Committee were available at this time, the Commissioner of Food and Drugs concluded that it was in the public interest to hold this meeting even if there was not sufficient time for the customary 15-day public notice.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 5, 2004.

William K. Hubbard,

Associate Commissioner for Policy and Planning.

[FR Doc. 04–1379 Filed 1–22–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: The Health Education Assistance Loan (HEAL) Program: Physician's Certification of Borrower's Total and Permanent Disability Form (OMB No. 0915–0204)—Extension

The Health Education Assistance (HEAL) program provided federally-insured loans to students in schools of allopathic medicine, osteopathic medicine, dentistry, veterinary medicine, optometry, podiatric medicine, pharmacy, public health, allied health, or chiropractic, and graduate students in health administration or clinical psychology through September 30, 1998. Eligible lenders, such as banks, savings and loan associations, credit unions, pension funds, State agencies, HEAL schools, and insurance companies, make new refinanced HEAL loans which are insured by the Federal Government against loss due to borrower's death, disability, bankruptcy, and default. The basic purpose of the program was to assure the availability of funds for loans to eligible students who needed to borrow money to pay for their educational loans. Currently, the program refinances previous HEAL loans, monitors the Federal liability, and assists in default prevention activities. The HEAL borrower, the borrower's physician, and the holder of the loan completes the Physician's Certification form to certify that the HEAL borrower meets the total and permanent disability provisions. The Department uses this form to obtain detailed information about disability claims which includes the following: (1) The borrower's consent to release medical records to the Department of Health and Human Services and to the holder of the borrower's HEAL loans, (2) pertinent information supplied by the certifying physician, (3) the physician's certification that the borrower is unable to engage in any substantial gainful activity because of a medically determinable impairment that is expected to continue for a long and indefinite period of time or to result in death, and (4) information from the lender on the unpaid balance. Failure to submit the required documentation will result in disapproval of a disability claim.

The estimate of burden for the Physician's Certification form is as follows:

Type of respondent	Number of respondents	Responses per respondent	Total responses	Minutes per response	Total burden hours
Borrower [1]	117	1	117	5	10
Physician	117	1	117	30	59
Loan Holder	20	5.85	117	10	20
Total	254		351		89

[1] Includes 2 categories of borrowers requesting disability waivers: (1) whose loans have previously defaulted, and (2) whose loans have not defaulted.

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 15, 2004.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 04–1380 Filed 1–22–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on

proposed data collection projects (section 3506(c)(2) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13), the Health Resources and Services Administration (HRSA) will publish periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information ; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques of other forms of information technology.

Proposed Project: The Nursing Education Loan Repayment Program Application (OMB No. 0915–0140)—Revision

This is a request for Revision of the Nursing Education Loan Repayment Program (NELRP). The NELRP was originally authorized by 42 U.S.C. 297b(h) (section 836(h) of the Public Health Service Act) as amended by Public Law 100–607, November 4, 1988. The NELRP is currently authorized by 42 U.S.C. 297(n) (section 846 of the Public Health Service Act) as amended by Public Law 102–408, October 13, 1992.

Under the NELRP, registered nurses are offered the opportunity to enter into a contractual agreement with the Secretary under which the Public Health Service agrees to repay the nurses' indebtedness for nursing education. In exchange, the nurses agree to serve for a specified period of time in certain types of critical shortage facilities identified in the statute.

Nurse educational loan repayment contracts will be approved by the Secretary for eligible nurses who have incurred previous monetary indebtedness by accepting a loan for nursing education costs from a bank, credit union, savings and loan association, Government agency or program, school, or other lender that meets NELRP criteria.

NELRP requires the following information:

1. Applicants must provide information on the proposed service site;

2. Applicants must provide information on loan status for all loans from all lenders; and

3. Applicants must provide banking information from financial institution.

Estimates of Annualized Hour Burden: The application has been changed due to legislative and program changes and an increased budget. Burden estimates are as follows:

Form/regulatory requirement	Number of respondents	Responses per respondents	Hours per response	Total burden hours
NELRP Application	16,000	1	1.5	24,000
Loan Verification Form	16,000	1	2.5	40,000
Employ. Verification Form	16,000	1	.5	8,000
Payment Info. Form	16,000	1	1	16,000
Total	16,000			88,000

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14–45 Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Written comments should be received with 60 days of this notice.

Dated: January 16, 2004.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 04–1381 Filed 1–22–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Scholarship Program for Students of Exceptional Financial Need (EFN) and Program of Financial Assistance for Disadvantaged Health Professions Students (FADHPS): Regulatory Requirements (OMB No. 0915–0028)—Extension

The EFN Scholarship Program, authorized by section 736 of the Public Health Service (PHS) Act, and the FADHPS Program, authorized by section 740(a)(2)(F) of the PHS Act, provides financial assistance to schools of allopathic and osteopathic medicine and dentistry for awarding tuition scholarships to health professions students who are of exceptional financial need. To be eligible for support under the FADHPS Program, a student must also be from a disadvantaged background. In return for this support, students of allopathic and osteopathic medicine must agree to complete residency training in primary care in 4 years, and practice in primary care for 5 years after completing residency training.

The program regulations contain recordkeeping requirements designed to ensure that schools maintain adequate records for the government to monitor program activity and that funds are spent as intended. The estimate of burden for the regulatory requirements of this clearance are as follows:

Form	Number of respondents	Responses per respondents	Total responses	Minutes per response	Total burden hours
EFN/FADHPS	80	1	80	10	13 hours.

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 16, 2004

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 04–1382 Filed 1–22–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (Paperwork Reduction Act of 1995, as amended, 44 U.S.C. Chapter 35), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Telephone Survey of Public Opinion Regarding Various Issues Related to Organ and Tissue Donation (NEW)

The Division of Transplantation (DoT), Special Programs Bureau (SPB), Health Resources and Services Administration (HRSA), is planning to conduct a telephone survey of public knowledge, perceptions, opinion, and behaviors related to organ donation. Two key missions of the DoT are (1) to provide oversight for the Organ Procurement and Transplantation Network and policy development related to organ donation and transplantation and (2) to implement efforts to increase public knowledge, attitudes, and behaviors related to organ and tissue donation. With a constantly growing deficit between the number of Americans needing donor organs, (currently exceeding 83,000) and the annual number of donors (12,795 in 2002), increasing the American public's willingness to donate becomes increasingly critical. Effective education campaigns need to be based on knowledge of the public's attitudes and perceptions about, and perceived impediments to, organ donation. The last national survey of public attitudes and perceptions of organ donation was conducted in 1993.

The purpose of this study is to obtain current information on public attitudes and perceptions of organ donation and transplantation of the general public and various population subgroups. The survey will measure issues such as level of public knowledge about donation, public intent to donate, impediments to public intent to donate, living donation, presumed consent, and financial incentives for donation. Demographic information also will be collected. The sample will consist of 2,500 adults, will oversample Asian, Hispanic, and African Americans, and will be geographically representative of the United States. Computer-assisted telephone interviews will be conducted in the English, Spanish, and Mandarin languages. The survey will replicate a number of questions asked in the 1993 survey and also will include new items, some of which will ask about untried methods to increase donation. In addition to being useful to the DoT, results of this survey also will be of considerable assistance to the transplant community and to the Secretary's Advisory Committee on Organ Transplantation (ACOT) as it fulfills its charge to advise the Secretary of Health and Human Services on the numerous and often controversial issues related to donation and transplantation. In its first meeting, the ACOT suggested such a survey to gather information to inform both public education efforts and policy decisions on the issue of organ donation.

The estimated burden is as follows:

	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total burden hours
Telephone Survey	2,500	1	2,500	.2	500
Total	2,500		2,500		500

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14–45, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 16, 2004.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 04–1383 Filed 1–22–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Proposed Project: Healthcare Integrity and Protection Data Bank for Final Adverse Information on Health Care Providers, Suppliers, and Practitioners (OMB No. 0915–0239)—Revision

Section 221(a) of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 specifically directs the Secretary to establish a national health care fraud and abuse data collection program for the reporting and disclosure of certain final adverse actions taken against health care providers, suppliers, and practitioners. A final rule was published October 26, 1999 in the **Federal Register** to implement the statutory requirements of section 1128E of the Social Security Act (The Act) as added by Section 221 (a) of HIPAA. The Act requires the Secretary to implement the national healthcare fraud and abuse data collection program. This data bank is known as the Healthcare Integrity and Protection Data Bank (HIPDB). It contains the following types of information: (1) Civil judgments against a health care provider, supplier, or practitioner in Federal or State court related to the delivery of a health care item or service; (2) Federal or State criminal convictions against a health care provider, supplier, or practitioner related to the delivery of a health care item or service; (3) Actions by Federal or State agencies responsible for the licensing and certification of health care providers, suppliers, or practitioners (4) Exclusion of a health care provider, practitioner or supplier from participation in Federal or State health care programs; and (5) Any other adjudicated actions or decisions that the Secretary shall establish by regulations. Access to this data bank is limited to Federal and State Government agencies and health plans.

This request is for a revision of reporting and querying forms previously approved on March 15, 2001. The reporting forms and the request for information forms (query forms) must be accessed, completed, and submitted to the HIPDB electronically through the HIPDB Web site at *www.npdb-hipdb.com*. All reporting and querying is performed through this secure Web site. Due to overlap in requirements for the HIPDB, some of the National Practitioner Data Bank's burden has been subsumed under the HIPDB.

Estimates of burden are as follows:

Regulation citation	No. of respondents	Frequency of responses	Minutes per response	Total burden hours
61.6 Errors & Omissions	172	4.3	15	185 [1]
61.6(b) Revisions to Actions	107	23.25	30	1,244
61.7 Licensure Actions: Reporting by State licensing authorities	275	60.6	45	12,512
61.8 Reporting of State Criminal Convictions	54	13	45	525
61.9 Reporting of Civil Judgments	62	8	45	375
61.11 Reporting of adjudicated actions/decisions	410	12.5	45	3,845
61.12 Access to data: State Licensure Boards	1000	67.5	5	5,623
State Certification Agencies	16	6	5	8
States/district attorneys & law enforcement	2000	25	5	3,749
State Medicaid Fraud Units	47	50	5	196
Health plans	2,841	263.76	5	62,422
Health care providers, suppliers, practitioners (self-query)	37,925	1	25	15,800
Entity Registration—Initial	2500	1	60	2,500
Entity Registration—Update	451	1	5	38
Authorized Agent Designation—Initial	100	1	15	16
Authorized Agent Designation-Update	250	1	5	62
Disputed Reports-Secretarial Review	459	1	5	38
Request for Secretarial Review	43	1	480	344
Account Discrepancy Report	1,000	1	15	250
Electronic Funds Transfer Authorization	400	1	15	100
Entity reactivation	450	1	60	450
Total				110,282

[1] Estimates in this column that fall below or above a full hour are rounded to the nearest hour.

Send comments to Susan Queen, Ph.D., HRSA Reports Clearance Officer, Room 16C–17, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20853, (301) 443–1129. Written comments should be received within 60 days of this notice.

Dated: January 15, 2004.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 04–1384 Filed 1–22–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget, in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners: Regulations and Forms (OMB No. 0915–0126)—Revision

The National Practitioner Data Bank (NPDB) was established through Title IV of Public Law 99–660, the Health Care Quality Improvement Act of 1986, as amended. Final regulations governing the NPDB are codified at 45 CFR part 60. Responsibility for NPDB implementation and operation resides in the Bureau of Health Professions, Health Resources and Services Administration, U.S. Department of Health and Human Services (DHHS). The NPDB began operation on September 1, 1990.

The intent of Title IV of Public Law 99–660 is to improve the quality of health care by encouraging hospitals, State licensing boards, professional societies, and other entities providing health care services to identify and discipline those who engage in unprofessional behavior; and to restrict the ability of incompetent physicians, dentists, and other health care practitioners to move from State to State without disclosure of the practitioner's previous damaging or incompetent performance.

The NPDB acts primarily as a flagging system; its principal purpose is to facilitate comprehensive review of practitioners' professional credentials and background. Information on medical malpractice payments, adverse licensure actions, adverse clinical privileging actions, adverse professional society actions and Medicare/Medicaid exclusions is collected from, and disseminated to, eligible entities. It is intended that NPDB information should be considered with other relevant information in evaluating a practitioner's credentials.

This request is for a revision of reporting and querying forms previously approved on April 30, 2002. The reporting forms and the request for information forms (query forms) must be accessed, completed, and submitted to the NPDB electronically through the NPDB Web site at *www.npdb-hipdb.com*. All reporting and querying is performed through this secure website. Due to overlap in requirements for the Healthcare Integrity and Protection Data Bank (HIPDB), some of the NPDB's burden has been subsumed under the HIPDB.

Estimates of burden are as follows:

Regulation	Number of respondents	Frequency of responses	Minutes per response	Total burden hours
60.6(a) Errors & Omissions	303	5.08	15	384.75
60.6(b)	115	1.11	30	64
60.7(b) Malpractice Payment Report	485	39.1	45	14,235.75
60.8(b) Adverse Action Reports—State Boards	[1] 0	0	0	0
60.9(a)3 Adverse Action Clinical Privileges & Professional Society	686	1.52	45	784.5
Requests for Hearings by Entities	1	1	480	8
60.10(a)(1) Queries by Hospital—Practitioner Applications	6,000	37.24	5	18,615.39
60.10(a)(2) (Queries by Hospitals—Two-Yr. Cycle	6,000	148.9	5	74,461.67
60.11(a)(1) Disclosure to Hospitals	[2] 0	0	0	0
60.11(a)(2) Disclosure to Practitioners (Self Query)	[3] 0	0	0	0
60.11(a)(3) Disclosure to Licensure Boards	80	224.95	5	1,439.68
60.11(a)(4) Queries by Non-Hospital Health Care Entities	4,938	436.8	5	179,673.26
60.11(a)(5) Queries by Plaintiffs' Attorneys	5	5	30	2.5
60.11(a)(6) Queries by Non-Hospital Health Care Entities-Peer Review	[4] 0	0	0	0
60.11(a)(7) Requests by Researchers for Aggregated Data	84	1	30	42
60.14(b) Practitioner Places a Report in Disputed Status	666	1	15	166.5
60.14(b) Practitioner Statement	2,325	1	45	1,743.75
60.14(b) Practitioner Requests for Secretarial Review	117	1	480	936
60.3 Entity Registration—Initial	500	1	60	500
60.3 Entity Registration—Update	643	1	5	53.56
60.11(a) Authorized Agent Designation—Initial	500	1	15	125
60.11(a) Authorized Agent—Update	86	1	5	7.16
60.12(c) Account Discrepancy Report	300	1	15	75
60.12(c) Electronic Funds Transfer Authorization	363	1	15	90.75
60.3 Entity Reactivation	100	1	60	100
Total				293,509.22

[1] Included in estimate for reporting adverse licensure actions to the HIPDB in 45 CFR part 61.
[2] Included in estimates for 60.10(a)(1).
[3] Included in estimate for self queries to the HIPDB in 45 CFR part 61.
[4] Included in estimate for hospital queries under 60.11(a)(4).

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: John Morrall, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: January 15, 2004.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 04–1385 Filed 1–22–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Year 2004 Survey of Mental Health Organizations, General Hospital Mental Health Services, and Managed Care Organizations (SMHO)—(OMB No. 0930–0119, Revision)—The 2004 SMHO, to be conducted by SAMHSA's Center for Mental Health Services (CMHS), will be conducted in two phases. There will be only minor changes to the forms used in the 2002 SMHO. Phase I will be a brief two-three page inventory consisting of four forms: (1) A specialty mental health organization form; (2) a general hospital or Veterans Affairs Medical Center with either separate mental health services or integrated mental health services forms; (3) a community residential organization form; and (4) a managed behavioral healthcare organization form. This short inventory will be sent to all known organizations to define the universe of valid mental health organizations to be sampled in Phase II. The inventory will collect basic information regarding the name and address of the organizations, their type and ownership, size measures (*e.g.*, number of staff), and the kinds of services provided.

Phase II will sample approximately 2,200 mental health organizations and utilize a more detailed survey instrument. Although the Sample Survey form will be more comprehensive, it will be very similar to surveys and inventories fielded in 2002 and earlier. The organizational data to be collected by the Sample Survey form include university affiliation, client/patient census by basic demographics, revenues, expenditures, and staffing.

The resulting data base will be used to provide national estimates and will be the basis of the National Directory of Mental Health Services. In addition, data derived from the survey will be published by CMHS in *Data Highlights*, in *Mental Health, United States*, and in professional journals such as *Psychiatric Services* and the *American Journal of Psychiatry*. *Mental Health, United States* is used by the general public, State governments, the U.S. Congress, university researchers, and other health care professionals. The following table summarizes the burden for the survey.

Questionnaire	Number of respondents	Responses/ respondent	Average hours/response	Total burden (hrs.)
Phase I (Inventory)				
Specialty Mental Health Organizations	3,315	1	0.5	1,658
General Hospitals:				
with Separate Psych. Units	1,211	1	0.5	606
without Separate Psych. Units	3,614	1	0.5	1,807
VA Medical Centers	143	1	0.5	72
Community Residential Organizations	945	1	0.5	472
Managed Behavioral Healthcare Organizations	325	1	0.5	163
Phase II (Sample Survey)				
Specialty Mental Health Organizations	1,520	1	4.0	6,080
General Hospitals and VA Hospitals with Separate Mental Health Services	725	1	4.0	2,900
Total	9,553			13,758
3-year Average	3,184			4,586

Send comments to Nancy Pearce, SAMHSA Reports Clearance Officer, Room 16–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 15, 2004.

Anna Marsh,

Acting Executive Officer, SAMHSA.

[FR Doc. 04–1422 Filed 1–22–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

[CIS No. 2304–03]

Direct Mail of Requests for Special Immigrant Classification and/or Adjustment of Status by Officers or Employees of International Organizations and Their Family Members

AGENCY: Bureau of Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice advises eligible members of the international organization community that the Bureau of Citizenship and Immigration Services (CIS) is adjusting and expanding its Direct Mail Program by directing that all petitions for special immigrant classification pursuant to section 101(a)(27)(I) of the Immigration and Nationality Act (Act), whether submitted separately, or concurrently with an application for adjustment of status, be mailed to the Nebraska Service Center. Applicants who apply for adjustment of status based on a previously approved petition for special immigrant classification pursuant to section 101(a)(27)(I) of the Act must file their adjustment application at the Nebraska Service Center. We are making this change to provide better customer service.

DATES: This notice is effective February 2, 2004.

FOR FURTHER INFORMATION CONTACT: Corinna Luna-Benavides, Service Center Operations, Bureau of Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW, Washington, DC 20314, telephone (202) 305–8010.

SUPPLEMENTARY INFORMATION:

Background

What Is the Direct Mail Program?

Under the Direct Mail Program, individuals seeking certain immigration benefits, including classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act, have been directed to mail the prescribed application or petition directly to a service center for processing instead of submitting it to a local office. See 61 FR 56060 (October 30, 1996). This centralized procedure has resulted in more efficient processing of applications through standardization, the elimination of duplicative work, and the increase in staff productivity.

What Authority Does CIS Have To Administer the Direct Mail Program?

On March 1, 2003, the functions of the Immigration and Naturalization Service (Service) were transferred from the Department of Justice to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Public Law 107–296. The responsibility for the immigration-benefits-adjudications function of the Service, which includes the processes for the filing of petitions and applications, was transferred to CIS of the DHS.

Explanation of Changes

What Does This Notice Do?

This Notice advises eligible members of the international organization community that, as of February 23, 2004, if they wish to file a petition for classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act on Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant, the Form I–360 must be mailed to the Nebraska Service Center. If the petitioner wishes to file an application for adjustment of status on Form I–485, Application to Register Permanent Residence or Adjust Status, concurrently with the Form I–360, the Form I–485 must be mailed simultaneously (filed at the same time, bundled together in a single mailer or delivery packet, with proper filing fees, to the Nebraska Service Center). Applicants who file Form I–485 for adjustment of status based on a previously approved petition for classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act, must now file their application for adjustment of status only at the Nebraska Service Center.

Does This Notice Make Any Changes Relating to an Alien's Eligibility for Classification as a Special Immigrant and/or Adjustment of Status?

No. This notice only alters the filing location for petitions and applications for adjustment of status, filed either concurrently or separately under the Direct Mail Program, submitted by international organizations' officers or employees and their family members seeking special immigrant classification pursuant to section 101(a)(27)(I) of the Act.

How Are These Petitions and Applications Currently Being Processed?

Currently, if an eligible alien were filing only a Form I–360 petition for classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act, he or she would file the petition at the service center having jurisdiction over his or her place of residence. If an eligible alien were petitioning for special immigrant classification and applying for adjustment of status concurrently, then he or she would apply for both actions at his or her local district office. If an alien were applying for adjustment of status after his or her Form I–360 petition for classification as a special immigrant had been approved, then that alien would file a Form I–485 adjustment application at his or her local district office.

Why Is CIS Changing the Application Filing Location at This Time?

The CIS is consolidating the adjudication of these benefits at one location to enhance the uniformity of decisions and improve customer service.

Are There Any Advantages for an Alien Eligible for Classification as a Special Immigrant Pursuant to Section 101(a)(27)(I) of the Act To Concurrently File an Application for Adjustment of Status (Form I–485) With His or Her Petition for Special Immigrant Classification (Form I–360)?

For certain eligible aliens, it may be in their best interest to file concurrently because of statutory deadlines requiring them to file for adjustment of status by a certain date.

Why Would an Alien Eligible Under Section 101(a)(27)(I) of the Act Not Want To File an Application for Adjustment Concurrently With a Petition for Special Immigrant Classification?

There may be certain situations whereby aliens might wish to continue to maintain their current immigration status, while knowing that they have

already qualified for special immigrant status. In addition, an eligible alien may be currently outside the United States and wish to file the petition for special immigrant classification with CIS, before applying for an immigrant visa abroad, rather than applying to adjust status in the United States.

How Will Eligible Applicants Be Notified of This Change in Filing Location?

In addition to this notice, CIS will be alerting those eligible aliens of the new filing procedures on its forms Web site, at *http://www.uscis.gov/graphics/formsfee/index.htm.* To ensure that all international organizations are aware of this change, the Department of State will be contacting these organizations to inform them of the new filing procedure.

When Will the New Procedure Become Effective?

This procedure becomes effective on February 23, 2004.

What Address Should Be Used?

If an alien is only submitting a petition for classification as a special immigrant (Form I–360) pursuant to section 101(a)(27)(I) of the Act, then the following address should be used: Nebraska Service Center, P.O. Box 87360, Lincoln, NE 68501–7360.

If an alien is concurrently submitting an application for adjustment of status (Form I–485) with a petition for classification as a special immigrant (Form I–360) pursuant to section 101(a)(27)(I) of the Act, or if an alien who has already had the Form I–360 approved by CIS pursuant to section 101(a)(27)(I) of the Act and later separately submits an application for adjustment of status (Form I–485), then the following address should be used: Nebraska Service Center, P.O. Box 87485, Lincoln, NE 68501–7485.

What Will Happen to the Petitions/Applications Already Filed?

Petitions for classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act and any applications for adjustment of status based upon such special immigrant classification that have been filed with CIS prior to February 23, 2004, will be adjudicated to their completion at the service center or district office where they were originally filed.

What Will Happen to Those Applications/Petitions Filed at a Service Center or District Office After February 23, 2004?

Petitions for classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act and any applications for adjustment of status based upon such special immigrant classification that are filed with CIS at a location other than the Nebraska Service Center after February 23, 2004, will be forwarded to the Nebraska Service Center until the instructions to the Forms I–360 and I–485 have been amended to include the correct filing address.

Will Aliens Applying for Adjustment of Status Be Interviewed?

Applicants may be eligible for a waiver of the interview pursuant to existing CIS interview waiver criteria. If the interview requirement is not waived, the case at the Nebraska Service Center will be referred to the district office where the applicant lives for an interview.

Which Applicants Will This Notice Affect?

This notice will affect those eligible individuals who have not yet submitted their petitions for special immigrant classification pursuant to section 101(a)(27)(I) of the Act and/or filed for adjustment of status based upon classification as a special immigrant pursuant to section 101(a)(27)(I) of the Act.

Dated: December 2, 2003.

Eduardo Aguirre,

Director, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–1513 Filed 1–21–04; 2:14 pm]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4904–N–01]

Notice of Submission of Proposed Information Collection to OMB Emergency Comment Request; Self-Help Homeownership Opportunity Program (SHOP)

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comment Due Date:* February 6, 2004.

ADDRESSES: Interested persons are invited to submit comment regarding this proposal. Comments must be received within fourteen (14) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number (2577–0157) and should be sent to: Melaine Kadlic, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail: *Melanie_Kadlic@omb.eop.gov;* fax: (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail: *Wayne_Eddins@HUD.Gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of documents submitted to OMB may be obtained from Mr. Eddins or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: This notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, a proposed information collection for the Self-Help Homeownership Opportunity Program (SHOP).

This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

SHOP provides funds for eligible non-profit organizations to purchase home sites and develop or improve the infrastructure needed to set the stage for sweat equity and volunteer-based homeownership programs for low-income persons and families. SHOP is authorized by the Housing Opportunity

Program Extension Act of 1996, Section 11, and is subject to other Federal crosscutting requirements. SHOP funds are used for eligible expenses to develop decent, safe and sanitary non-luxury housing for low-income persons and families who otherwise would not become homeowners. Home buyers must be willing to contribute significant amounts of their own sweat equity toward the construction of the housing units. HUD awards grants to national or regional nonprofit public or private organizations or consortia for self-help housing project of at least 30 homes.

This notice also lists the following information:

Title of Proposal: Self-Help Homeownership Opportunity Program (SHOP).

Description of Information Collection: This is a proposed information collection for reporting requirements under the SHOP. SHOP grants are used to fund acquisition and infrastructure improvements to new self-help housing projects, to be occupied by persons meeting the definition of low-income. Grant recipients are required to report to HUD on a quarterly and annual basis regarding the success of their SHOP programs. Information collected form SHOP recipients includes proposed accomplishments, actual accomplishments, and financial, unit and beneficiary information. The information collected will be used by HUD to assess the performance of SHOP grant recipients and the success of the program.

OMB Control Number: 2577–0157

Agency Form Numbers: HUD–424, HUD–424B, HUD–424CB, SF–LLL, HUD–2880, HUD–2990, HUD–2993, HUD–40215, HUD–40216, HUD–40217 and HUD–40218.

Members of the affected public: National or regional nonprofit public or private organizations or consortia.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Paperwork requirement	Frequency of response	Hours per response	Number of respondents	Annual hour burden
HUD–424	1	.25	9	2.25
HUD–424B	1	.25	9	2.25
HUD–424CB	1	.25	9	18
SF–LLL	1	.25	9	2.25
HUD–2880	1	.25	9	2.25
HUD–2990	1	.5	9	4.5
HUD–2993	1	0	9	0
Rating Factor 1	1	4	9	36
Rating Factor 2	1	4	9	36
Rating Factor 3	1	6	9	54
Rating Factor 4	1	3	9	27
Rating Factor 5	1	4	9	36
HUD–40215	4	2.25	16	144
HUD–40216	1	9	16	144
HUD–40217	4	2.25	16	144
HUD–40218	4	2.25	912	8,055
Total Annual Hour Burden	(1)	(1)	3,900	8,861

[1] Varies.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended.

Dated: January 16, 2004.

William Eargle, Jr.,

Deputy Assistant Secretary for Operations.

[FR Doc. 04–1442 Filed 1–22–04; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4912–N–01]

Notice of Availability of a Draft Generic Environmental Impact Statement for the World Trade Center Memorial and Redevelopment Plan in the Borough of Manhattan, City of New York, NY

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The Department of Housing and Urban Development (HUD) gives notice to the public, agencies, and Indian tribes that a draft Generic Environmental Impact Statement (Draft GEIS) for the World Trade Center Memorial and Redevelopment Plan will be available for review and comment on January 21, 2004. This notice is given on behalf of the Lower Manhattan Development Corporation (LMDC). The LMDC is a subsidiary of the Empire State Development Corporation (a political subdivision and public benefit corporation of the State of New York). As the recipient of HUD Community Development Block Grant funds appropriated for World Trade Center disaster recovery and rebuilding efforts, LMDC acts, pursuant to 42 U.S.C. 5304(g), as the responsible entity for compliance with the National Environmental Policy Act (NEPA) in accordance with 24 CFR 58.4. LMDC also acts under its authority as lead agency in accordance with the New York State Environmental Quality Review Act. The Draft GEIS will also be prepared in cooperation with the Port Authority of New York and New Jersey. This notice is given in accordance with the Council on Environmental Quality Regulations at 40 CFR part 1500–1508.

DATES: *Comment Due Date:* Comments must be received by 5 p.m. Eastern Standard Time on March 15, 2004. Comments received after 5 p.m. e.s.t. on March 15, 2004, will not be considered. Written comments on the Draft GEIS will be accepted at the following address: Lower Manhattan Development Corporation, Attention: Comments WTC Memorial and Redevelopment Plan/DGEIS, One Liberty Plaza, 20th Floor, New York, NY 10006.

Comments on the Draft GEIS may also be submitted until 5 p.m. e.s.t. on March 15, 2004, through LMDC's Web site, *http://www.renewnyc.com/plan_des_dev/frm_comments.asp*, by choosing the category "Environmental/Plan Review."

Public Hearing: To ensure public participation on the Draft GEIS, two public hearings will be held on February 18, 2004, at the Michael Schimmel Center for the Arts at Pace

University located in Lower Manhattan at Spruce Street between Park Row and Gold Street, New York, NY, from 1 p.m. to 5 p.m. and starting at 6 p.m.

Directions: The Schimmel Center is accessible to public transportation, including the subway to Park Place via 1/9, 2/3, Brooklyn Bridge/City Hall via 4/5/6, and Broadway/Nassau Street via A/C.

The public meeting site is accessible to the mobility-impaired. Interpreter services will be available for the hearing-impaired upon advance request.

FOR FURTHER INFORMATION CONTACT: Further information and a copy of the Draft GEIS may be obtained by contacting: William H. Kelley, Planning Project Manager, Lower Manhattan Development Corporation, One Liberty Plaza, 20th Floor, New York, NY 10006; Telephone: (212) 962–2300; Fax: (212) 962–2431; E-mail: *wtcenvironmental@renewnyc.com*. A copy of the Draft GEIS is also available on LMDC's Web site: *http://www.RenewNYC.com* in the "Planning, Design & Development" section. Copies of the Draft GEIS may be purchased for the cost of reproduction.

A copy of the Draft GEIS is also available for public review at the following locations:

Chatham Square Library,
33 East Broadway,
New York, NY 10002

New Amsterdam Library,
9 Murray Street,
New York, NY 10007

Hamilton Fish Library,
415 East Houston Street,
New York, NY 10002

Hudson Park Library,
66 Leroy Street,
New York, NY 10007

Community Board #1,
49–51 Chambers Street #715,
New York, NY 10007

Community Board #2,
3 Washington Square Park,
New York, NY 10012

Community Board #3,
59 East 4th Street,
New York, NY 10003

SUPPLEMENTARY INFORMATION: The World Trade Center Memorial and Redevelopment Plan (Proposed Action) would provide for the construction on the Project Site of a World Trade Center Memorial (Memorial) and memorial-related improvements, up to 10 million square feet of above-grade Class A office space, plus associated below-grade parking, storage, mechanical, loading, and other non-office space, up to 1 million square feet of retail space, a hotel with up to 800 rooms and up to 150,000 square feet of conference space, new open space areas, museum and cultural facilities, and certain infrastructure improvements. The proposed action would be assisted in part by HUD Community Development Block Grant funds appropriated by Congress for World Trade Center disaster recovery and rebuilding efforts.

The Project Site consists of the World Trade Center Site (WTC Site) and the Adjacent Sites in Lower Manhattan, New York, New York. The WTC Site is an approximately 16 acre parcel bounded by Liberty Street, Church Street, Vesey Street, and Route 9A. The Adjacent Sites include the Southern Site and the below-grade portion of Site 26 at Battery Park City. The Southern Site comprises two adjacent blocks south of the WTC Site—one bounded by Liberty, Washington, Albany, and Greenwich Streets, and the other bounded by Liberty, Cedar, and Washington Streets and Route 9A—and portions of two streets: Liberty Street between those blocks and the WTC Site, and Washington Street between Cedar and Liberty Streets. Site 26 is bounded by the one-half block of North End Avenue, Murray and Vesey Streets, and Route 9A on the eastern side of the Embassy Suites Hotel.

The proposed design would extend Fulton and Greenwich Streets through the WTC Site, dividing the site into quadrants. The Memorial, museum, and cultural buildings would occupy the southwest quadrant where the Twin Towers once stood. At the northwest corner of the WTC Site would be the tallest structure in the complex, Freedom Tower. The three other proposed towers would descend in height clockwise to the fifth tower on the Southern Site.

The Southern Site would be reconfigured by the opening of Cedar Street between Greenwich and Washington Streets and the closing of Washington Street between Liberty and Cedar Streets. This would allow the creation of a single large open space on the new block south of Liberty Street as well as the tower site between Cedar and Albany Streets.

The Proposed Action also provides for infrastructure and utilities to support the operations of the Project Site as a whole, including below-grade freight servicing and loading and a below-grade bus parking garage serving the Memorial, a parking garage for building tenants and safety and security-related facilities.

The Draft GEIS analyzes the Proposed Action's potential impacts to land use and public policy, urban design and visual resources, historic resources, open space, shadows, community facilities, socioeconomic conditions, neighborhood character, hazardous materials, infrastructure/safety/security, traffic and parking, transit and pedestrians, air quality, noise, coastal zone, floodplain, natural resources, electromagnetic fields, environmental justice, and construction. The Draft GEIS also considers mitigation measures, alternatives, unavoidable adverse impacts, short-term effects vs. long-term benefits, irreversible and irretrievable commitments of resources, indirect and cumulative effects and other areas of potential environmental impact.

Alternatives that will be looked at in the Draft GEIS will include a no-action alternative, and a reasonable range of other alternatives, including a Memorial-only alternative, a restoration alternative, a rebuilding alternative, a WTC Site-only alternative, an enhanced green construction alternative, and a reduced impact alternative.

The estimated total cost for construction of the Proposed Action is expected to be in excess of $8 billion.

Questions may be directed to the individual named above under the heading "For Further Information Contact."

Dated: January 16, 2004.

Roy A. Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 04–1443 Filed 1–22–04; 8:45 am]

BILLING CODE 4210–29–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4901–N–04]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, room 7266, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Shirley Kramer, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this notice. Included in the request for review should be the property address (including ZIP Code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Energy:* Mr. Tom Knox, Department of Energy, Office of Engineering & Construction Management, CR–80, Washington, DC 20585; (202) 586–8715; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0052; *Interior:* Ms. Linda Tribby, Acquisition & Property Management, Department of the Interior, 1849 C Street, NW., MS5512, Washington, DC 20240; (202) 219–0728; *Navy:* Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: January 15, 2004.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM, FEDERAL REGISTER REPORT FOR 1/23/2004

Suitable/Available Properties

Buildings (by State)

Georgia

East Parcel
Boyett Village Family
Housing Complex
Maple Avenue
Albany Co: GA
Landholding Agency: GSA
Property Number: 54200410003
Status: Surplus
Comment: 119 residential units & support facilities, possible lead based paint, utility upgrade required by local utility commission (estimates range from $1.6 million to $2.7 million)
GSA Number: 4–N–GA–581B

West Parcel
Boyett Village Family
Housing Complex
Maple Avenue
Albany Co: GA
Landholding Agency: GSA
Property Number: 54200410004
Status: Surplus
Comment: 300 residential units & support facilities, possible lead based paint, utility upgrade required by local utility commission (estimates range from $1.6 million to $2.7 million)
GSA Number: 4–N–GA–581B

Land (by State)

Alaska

White Alice Site
Tin City Co: AK 99762–
Landholding Agency: GSA
Property Number: 54200410001
Status: Excess
Comment: 6.31 acres w/4 buildings and 2 large radar dishes, most recent use—communications, remote area
GSA Number: 9–D–AK–764

Arizona

0.44 acre N. of Buckeye Road
Avondale Co: Maricopa, AZ 85323–
Property Number: 61200410001
Status: Excess
Comment: 20 foot wide

Unsuitable Properties

Buildings (by State)

Idaho

TAN 648
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410001
Status: Excess
Reason: contamination

New Mexico

Bldgs. 447, 1483
Los Alamos Natl Laboratory
Los Alamos Co: NM
Landholding Agency: Energy
Property Number: 41200410002
Status: Excess
Reasons: Secured Area, Extensive deterioration

Oregon

Bldg. 0012–0410–00
Homedale Road
Klamath Falls Co: Klamath OR 97603–
Landholding Agency: Interior
Property Number: 61200410002
Status: Unutilized
Reason: Extensive deterioration

Bldg. 0012–0411–00
Homedale Road
Klamath Falls Co: Klamath OR 97603–
Landholding Agency: Interior
Property Number: 61200410003
Status: Unutilized
Reason: Extensive deterioration

Bldg. 0012–0412–00
Homedale Road
Klamath Falls Co: Klamath OR 97603–
Landholding Agency: Interior
Property Number: 61200410004
Status: Unutilized
Reason: Extensive deterioration

Texas

5 Bldgs.
Pantex Plant
#10–002, 11–009, 12–013, 12–078, 12–R–078
Amarillo Co: Carson TX 79120–
Landholding Agency: Energy
Property Number: 41200410003
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material, Secured Area

Virginia

Bldgs. 3375, 3610–3612
Naval Amphibious Base
Little Creek
Norfolk Co: VA 23521–
Landholding Agency: Navy
Property Number: 77200410001
Status: Excess
Reason: Extensive deterioration

Land (by State)

Arizona

Pump House Buffer Zone
S. Ave. A
Yuma Co: AZ 85365–
Landholding Agency: GSA
Property Number: 54200410002
Status: Surplus
Reason: Within airport runway clear zone
GSA Number: 9–I–AZ–04252

Missouri

12 Missile Launch Facilities
Whiteman AFB Co: MO
Landholding Agency: GSA
Property Number: 54200410005
Status: Surplus
Reason: subsurface disturbance not allowed
GSA Number: 7DC006570669

[FR Doc. 04–1393 Filed 1–22–04; 8:45 am]
BILLING CODE 4210–29–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4665–N–14]

Conference Call for the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice of upcoming meeting via conference call.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee) to be held via telephone conference. This meeting is open to the general public without participation.

DATES: The conference call will be held on Friday, February 13, 2004, from 11 a.m. to 3 p.m.

ADDRESSES: Information concerning the conference call can be obtained from the Department's Consensus Committee Administering Organization, the National Fire Protection Association (NFPA). Interested parties can log onto NFPA's Web site for instructions on how to participate and for contact information for the conference call: *http://www.nfpa.org/ECommittee/HUDManufacturedHousing/hudmanufacturedhousing.asp.* Alternately you may contact Jill McGovern of NFPA by phone at (617) 984–7404 (this is not a toll-free number) for conference call information.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Administrator, Office of Manufactured Housing Programs, Office of the Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and 41 CFR 102–3.150. The Manufactured Housing Consensus Committee was established under section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 4503(a)(3). The Consensus Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured housing construction and safety standards and procedural and enforcement regulations, and with developing proposed model installation standards. The purpose of this conference call is to discuss the Consensus Committee's review and recommendations to the Secretary on the draft Proposed Installation Standards.

Tentative Agenda

A. Roll Call.

B. Discussion of Proposed Letter for Recommended Considerations for HUD's Installation Program.

C. Adjournment.

Dated: January 16, 2004.

Sean Cassidy,

General Deputy Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 04–1444 Filed 1–22–04; 8:45 am]
BILLING CODE 4210–27–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4665–N–15]

Upcoming Meeting of the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice of upcoming meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee). The meeting is open to the public and the site is accessible to individuals with disabilities.

DATES: The meetings will be held on Tuesday, February 24, 2004, from 8 a.m. to 5 p.m., Wednesday, February 25, 2004, from 8 a.m. to 5 p.m., and Thursday, February 26, 2004, 8 a.m. to 12 noon.

ADDRESSES: These meetings will be held at the Radisson Hotel "Old Town", 901 North Fairfax Street, Alexandria, Virginia, telephone (703) 683–6000.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Administrator, Office of Manufactured Housing Programs, Office of Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and 41 CFR § 102–3.150. The Manufactured Housing Consensus Committee was established under section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 4503(a)(3). The Consensus

Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured housing construction and safety standards and procedural and enforcement regulations, and with developing proposed model installation standards.

Tentative Agenda

A. Welcome and Opening Remarks
B. Subcommittee meetings
C. Public Testimony
D. Full Committee meeting
E. Reports to Full Committee and actions
F. Adjournment

Dated: January 16, 2004.

Sean Cassidy,

General Deputy Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 04–1445 Filed 1–22–04; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by February 23, 2004.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax (703) 358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

PRT–080333

Applicant: Shriver Center, University of Massachusetts, Waltham, MA 02452.

The applicant requests a permit to import milk samples from captive born quokka (*Setonix brachyurus*) from the University of Western Australia for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Endangered Marine Mammals and Marine Mammals

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered marine mammals and/or marine mammals. The applications were submitted to satisfy requirements of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*) and/or the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*), and the regulations governing endangered species (50 CFR part 17) and/or marine mammals (50 CFR part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

PRT–081115

Applicant: Seward Association for the Advancement of Marine Science, dba. Alaska SeaLife Center, Seward, AK, PRT–081115.

The applicant requests a permit to import biological and tissue samples from Northern sea otters (*Enhydra lutris lutris*) and walrus (*Odobenus rosmarus*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Concurrent with the publication of this notice in the **Federal Register**, the Division of Management Authority is forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

081749

Applicant: Paul Thompson, Charlotte, NC.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Foxe Basin polar bear population in Canada prior to February 18, 1997, for personal use.

PRT–080754

Applicant: James E. Martin, Gastonia, NC.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Foxe Basin polar bear population in Canada prior to February 18, 1997, for personal use.

PRT–081757

Applicant: James H. Goodwin Jr., Cleveland, NC.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Foxe Basin polar bear population in Canada prior to February 18, 1997, for personal use.

Dated: January 9, 2004.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 04–1474 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for endangered species.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below; as authorized by the provisions of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*), and/or the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permit(s) subject to

certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

Endangered Species

Permit No.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
070854	George Carden Circus International	68 FR 64638; November 14, 2003	January 6, 2004.
074414	Little Rock Zoological Garden	68 FR 62096; October 31, 2003	December 17, 2003.
078155	John W. Miller	68 FR 61011; October 24, 2003	December 29, 2003.
078689	Kevin F. Tenborg	68 FR 64638; November 14, 2003	December 17, 2003.
079014	Virginia Tech	68 FR 65466; November 20, 2003	December 22, 2003.

Dated: January 9, 2004.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 04–1473 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of a Draft Environmental Impact Statement/ Environmental Impact Report on the Initial Stewardship Project for the South Bay Salt Ponds, San Francisco Bay, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The U.S. Fish and Wildlife Service and the California Department of Fish and Game are proposing an interim management strategy for 15,100 acres of former commercial salt ponds in south San Francisco Bay which will be utilized while a long-term restoration plan is developed and implemented. This Initial Stewardship Plan (ISP) would use existing and new water control structures to release any remaining saline pond waters to the Bay and to prevent further salt concentration by circulating waters through the ponds. The ponds are located at the Don Edwards San Francisco Bay National Wildlife Refuge and at the Eden Landing State Ecological Reserve.

A draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR), has been prepared jointly by the Service and the California Department of Fish and Game to analyze the impacts of the ISP and is available for public review. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public. The analyses provided in the draft EIS/EIR are intended to inform the public of our proposed action, alternatives, and associated impacts; address public comments received during the scoping period for the draft EIS/EIR; disclose the direct, indirect, and cumulative environmental effects of the proposed action and each of the alternatives; and indicate any irreversible commitment of resources that would result from implementation of the proposed action.

Note that the draft EIS/EIR is being submitted for public review under separate Federal and State processes. The following addresses and due dates are applicable to the Federal NEPA review process.

Public Meeting: A public meeting to solicit comments on the draft Environmental Impact Statement will be held on February 4, 2004, from 7 p.m. to 9 p.m. at the Visitor Center of the Don Edwards San Francisco Bay NWR, #1 Marshlands Road, Fremont, California. Call (510) 792–0222 if directions are needed. Persons needing reasonable accommodations in order to attend and participate in this public meeting should contact the Refuge Manager at (510) 792–0222 sufficiently in advance of the meeting to allow time to process the request.

DATES: A public meeting to solicit comments on the draft Environmental Impact Statement will be held February 4, 2004, from 7 p.m. to 9 p.m. in Fremont, California.

For the Federal process, we will accept public comments until at least 45 days after the Environmental Protection Agency (EPA) publishes its corresponding notice, which sets the public comment deadline for our EIS. In accordance with NEPA, we have filed the EIS with EPA. Each Friday, EPA publishes a **Federal Register** notice that lists EISs received during the previous week. The EPA notice officially starts the public comment periods for these documents. Therefore, in accordance with that process, the EPA notice will announce the closing date for receipt of public comments on our EIS.

ADDRESSES: Public meeting location will be at the Visitor Center of the Don Edwards San Francisco Bay National Wildlife Refuge, #1 Marshlands Road, Fremont, California.

Send comments to Refuge Manager, U.S. Fish and Wildlife Service, San Francisco Bay NWR Complex, P.O. Box 524, Newark, California 94560. Written comments may be sent by facsimile to (510) 792–5828 or by e-mail to *sfbaynwrc@r1.fws.gov.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the Federal National Environmental Policy Act (NEPA) process may be directed to Margaret Kolar, Refuge Complex Manager, San Francisco Bay NWR Complex, at the above address; telephone (510) 792–0222. Questions related to the California Environmental Quality Act (CEQA) process may be directed to Carl Wilcox, Habitat Conservation Manager, California Department of Fish and Game, Region 3 Headquarters, P.O. Box 47, Yountville, CA 94599; telephone (707) 944–5500.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Individuals wishing copies of the draft Environmental Impact Statement should contact the Service by letter, facsimile or e-mail to the San Francisco Bay National Wildlife Refuge Complex (*see* **ADDRESSES**). The document is also available for public inspection, by appointment, during regular business hours, at the San Francisco Bay National Wildlife Refuge Complex. Copies are also available for viewing at public libraries in the cities of Hayward, Union City, San Jose, Alviso, Mountain View, Sunnyvale, and Menlo Park. The document may also be viewed on the restoration project Web site *www.southbayrestoration.org.*

Background

On March 16, 2003, the State of California and the United States of America acquired 16,500 acres of commercial salt ponds from Cargill, Inc. The purpose of the acquisition was to protect, restore and enhance the property for fish and wildlife, as well as to provide opportunities for wildlife-

oriented recreation and education. Of the acquired lands, 15,100 acres are located in South San Francisco Bay with the remaining lands located in Napa County in the North Bay. The draft Environmental Impact Report/ Environmental Impact Statement (EIR/ EIS) on the Initial Stewardship Project of the South Bay Salt Ponds addresses the 15,100 acres in South San Francisco Bay.

Under commercial salt production, Cargill managed the South Bay salt ponds as shallow water ponds with various salinity levels. The salinity levels varied both geographically, based on the location of the pond within the system, and temporally, based on seasonal and climatic conditions. Although these ponds were managed for commercial salt production, they provided habitat for many water bird species including waterfowl and shorebirds. Ponds that were owned by Cargill in fee title were closed to public access. Other ponds, for which Cargill only held salt-making rights and which were part of the Don Edwards San Francisco Bay National Wildlife Refuge, were open to several types of public use.

The restoration of the salt ponds is taking place in three independent stages. First, Cargill is reducing the salinity levels in the ponds by moving the saltiest brines to its plant site in Newark, California. After the salinities are reduced to levels that are allowed to be discharged to the Bay, Cargill will no longer manage the ponds for salt production. Management of the Baumberg ponds will be turned over to the California Department of Fish and Game and management of the Alviso ponds and West Bay ponds will be turned over to the U.S. Fish and Wildlife Service.

In the second stage of restoration, the ponds will be managed by the agencies in a manner that provides habitat values while the long-term restoration plan is being developed and implemented. In this initial stewardship stage, Bay waters will be circulated through the ponds following installation of water control structures and the existing levees will be maintained for minimum flood protection. The draft EIR/EIS covers only this second stage of restoration, *i.e.*, initial stewardship.

The third stage of restoration is the actual long-term restoration of the salt ponds to a mix of tidal marshes, managed ponds and other habitats. The planning process for this long-term restoration has just begun and will include a substantial amount of data collection, studies, modeling efforts, and public involvement. The long-term planning process will include development of a separate EIR/EIS.

Implementation of the long-term restoration plan is expected to be conducted in phases beginning in 5 years, but with some phases extending beyond 20 years. Therefore, some ponds may be managed under the Initial Stewardship Plan for as little as 5 years, while others may require such management for over 20 years.

Alternatives Analyzed

The draft EIS/EIR considers four alternatives for initial stewardship: a no action alternative, a seasonal pond alternative, and two pond management alternatives which vary based on the dates for initial release of saline pond waters.

Under the no action alternative, there would be no flow circulation through the pond systems. Remaining brines would dry through the evaporation process and the ponds would then fill seasonally with rainwater in winter. No new public access would be available. No action would be conducted by the agencies, including no levee maintenance, and some levees would likely fail during this period. The existing open water ponds in South San Francisco Bay would be dry during most of the year.

In the seasonal pond alternative, there would be no flow circulation through the pond systems. Remaining brines would dry through the evaporation process and the ponds would then fill seasonally with rainwater in winter . No new public access would be available. The only action taken by the agencies would be to maintain the levees at their current standard of maintenance to prevent release of existing brines, to assure continued public access, and to maintain a minimum level of flood control. The existing open water ponds in South San Francisco Bay would be dry during most of the year.

Under the two pond management alternatives, bay waters would be circulated through the ponds, the pond levees would continue to be maintained at the current level, existing public access would continue and the ponds previously kept closed by Cargill would be open to some limited public access. The majority of the existing open water ponds would remain in open water habitat throughout the year. The two action alternatives differ in the timing of the initial release of the existing low to mid salinity brines in the ponds.

In the simultaneous March/April initial release alternative, the contents of most of the Alviso and Baumberg ponds would be released simultaneously in March and April. The ponds would then be managed as a mix of continuous circulation ponds, seasonal ponds and batch ponds, though management of some ponds could be altered through adaptive management during the continuous circulation period. Higher salinity ponds in Alviso and in the West Bay would be discharged in March and April in a later year when salinities in the ponds have been reduced to appropriate levels. The Island ponds (A–19, 20, and 21) would be breached and open to tidal waters.

In the phased release alternative, many of the lower salinity ponds in Alviso and Baumberg would be discharged in July, and the medium salinity ponds would be discharged the following March and April. The ponds would then be managed in the same manner as in the simultaneous March/ April release alternative during the continuous circulation period.

The Service invites the public to comment on the draft Environmental Impact Statement during a 45-day public comment period. The Service will evaluate the comments submitted thereon to prepare a Final Environmental Impact Statement. A decision will be made no sooner than 30 days after the publication of the Final Environmental Impact Statement.

This notice is provided pursuant to regulations for implementing the National Environmental Policy Act of 1969 (40 CFR 1506.6).

Dated: January 12, 2004.

Steve Thompson,

Manager, California/Nevada Operations Office.

[FR Doc. 04–1034 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–100–5882–AF; HAG04–0069]

Notice of Public Meeting, Roseburg Resource Advisory Committee Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notification of a meeting for the Roseburg District Bureau of Land Management (BLM) Resource Advisory Committee under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Pub.L. 106–393).

SUMMARY: This notice is published in accordance with Section 10(a)(2) of the Federal Advisory Committee Act. Meeting notice is hereby given for the Roseburg District BLM Resource Advisory Committee pursuant to

Section 205 of the Secure Rural School and Community Self Determination Act of 2000, Public Law 106–393 (the Act). Topics to be discussed by the Roseburg District BLM Resource Advisory Committee include specific information of specific projects and/or decisions on specific projects.

DATES: The Roseburg Resource Advisory Committee will meet at the BLM Roseburg District Office, 777 NW. Garden Valley Boulevard, Roseburg, Oregon 97470 on February 23, 2004 from 9 a.m. to 4 p.m. For briefing information please refer to HAG–03–0134.

SUPPLEMENTARY INFORMATION: Pursuant to the Act, five Resource Advisory Committees have been formed for western Oregon BLM district that contain Oregon & California (O&C) Grant Lands and Coos Bay Wagon Road lands. The Act establishes a six-year payment schedule to local counties in lieu of funds derived from the harvest of timber on Federal lands, which have dropped dramatically over the past 10 years.

The Act creates a new mechanism for local community collaboration with Federal land management activities in the selection of projects to be conducted on Federal lands or that will benefit resources on Federal lands using funds under Title II of the Act. The Roseburg District BLM Resource Advisory Committee consists of 15 local citizens (plus 6 alternates) representing a wide array of interests.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the Roseburg District BLM Resource Advisory Committee may be obtained from E. Lynn Burkett, Public Affairs Officer, Roseburg District Office, 777 NW. Garden Valley Blvd., Roseburg, Oregon 97470 or *elynn_burkett@blm.gov,* or on the Web at *http://www.or.blm.gov.*

Dated: January 15, 2004.

Mark Buckbee,

Acting Roseburg District Manager.

[FR Doc. 04–1304 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–085–5882–PE–SP01; HAG 04–0074]

Salem, OR Resource Advisory Committee Meeting

AGENCY: Bureau of Land Management.

ACTION: Meeting notice for the Salem, Oregon, Bureau of Land Management (BLM) Resource Advisory Committee under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (PL 106–393).

SUMMARY: This notice is published in accordance with Section 10(a)(2) of the Federal Advisory Committee Act. Meeting notice is hereby given for the Salem Oregon BLM Resource Advisory Committee pursuant to Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000, Pub. L. 106–393 (the Act). Topics to be discussed by the Salem BLM Resource Advisory Committee include: reviewing 2004 project applications, developing funding recommendations for 2004 projects, monitoring progress of previously approved projects, and scheduling field reviews of projects.

DATES: The Salem Resource Advisory Committee will meet at the BLM Salem District Office, 1717 Fabry Road, Salem, Oregon 97306, from 8:30 a.m. to 3 p.m., on February 26, 2004, June 17, 2004 and if an additional meeting is needed it will be held on June 24, 2004.

SUPPLEMENTARY INFORMATION: Pursuant to the Act, five Resource Advisory Committees have been formed for western Oregon BLM districts that contain Oregon & California (O&C) Grant Lands and Coos Bay Wagon Road lands. The Act establishes a six-year payment schedule to local counties in lieu of funds derived from the harvest of timber on federal lands, which have dropped dramatically over the past 10 years.

The Act creates a new mechanism for local community collaboration with federal land management activities in the selection of projects to be conducted on federal lands or that will benefit resources on federal lands using funds under Title II of the Act. The BLM Resource Advisory Committees consist of 15 local citizens (plus 6 alternates) representing a wide array of interests.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the Salem BLM Resource Advisory Committee may be obtained from Paul Jeske, Salem District Designated Federal Official (503–375–5644) or Trish Hogervorst, Salem BLM Public Affairs Officer, (503–375–5657) at 1717 Fabry Rd. SE, Salem, OR 97306.

Dated: January 15, 2004.

Brad Keller,

Acting District Manager.

[FR Doc. 04–1423 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0039

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval for the collection of information on Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans, 30 CFR 784.

DATES: Comments on the proposed information collection must be received by March 23, 2004, to be assured of consideration.

ADDRESSES: Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Room 210–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtreleas@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection request, explanatory information and related form, contact John A. Trelease, at (202) 208–2783, or electronically at *jtreleas@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [*see* 5 CFR 1320.8 (d)]. This notice identifies information collections that OSM will be submitting to OMB for extension. These collections are contained in 30 CFR 784.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents and costs. OSM will request a 3-year term of approval for this information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection, and (4)

ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans, 30 CFR 784.

OMB Control Number: 1029–0039.

Summary: Sections 507(b), 508(a) and 516(b) of Public Law 95–87 require underground coal mine permit applicants to submit an operations and reclamation plan and establish performance standards for the mining operation. Information submitted is used by the regulatory authority to determine if the applicant can comply with the applicable performance and environmental standards required by the law.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: 80 Underground coal mining permit applicants and 24 State regulatory authorities.

Total Annual Responses: 80.

Total Annual Burden Hours: 82,480.

Total Annual Cost Burden: $680,000

Dated: January 20, 2004.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. 04–1492 Filed 1–22–04; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF JUSTICE

Notice of Proposed Settlement Agreement Under the Oil Pollution Act of 1990 [33 U.S.C. 2701 et seq.]

Notice is hereby given that the United States Department of Justice, on behalf of the United States Department of Interior Fish and Wildlife Service, and the California Department of Fish and Game, the California Regional Water Quality Control Board, Lahontan Region, the Nevada Division of Environmental Protection, and the Nevada Department of Wildlife and Advanced Fuel Filtration Systems, Inc. have reached a settlement regarding claims for injuries to natural resources arising from an oil spill into the East Walker River.

The five government agencies who are parties to the settlement are acting in their capacities as designated natural resource trustees under the Oil Pollution Act of 1990, 33 U.S.C. 2701, *et seq.* to recover damages for natural resources, as authorized by 33 U.S.C. 2702(b)(2)(A). The oil spill occurred on De ember 30, 2000 when a tank truck operated by Advanced Fuel Filtration Systems overturned near Bridgeport, California and spilled approximately 6100 gallons of fuel oil.

Under the proposed settlement agreement, Advanced Fuel Filtration Systems will pay $350,000 to the Natural Resource Damage Assessment and Restoration Fund, established by 43 U.S.C. 1474b, to be used by the natural resource trustee agencies to restore, rehabilitate or acquire the equivalent of, those resources injured by the spill and to compensate the public for lost recreational opportunities. It will also pay to the California Department of Fish and Game $68,000 for reimbursement of past assessment costs. It has previously paid to the United States Department of the Interior $50,000 for assessment costs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to the Settlement Agreement Among the United States Department of the Interior, et al., and Advanced Fuel Filtration Systems, DJ # 90–5–1–1–08070. The Settlement Agreement may be examined at the U.S. Fish and Wildlife Service, 1340 Financial Blvd., Suite 234, Reno, Nevada (contact Damian Higgins, 775–861–6300). During the public comment period, the Settlement Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $1.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen M. Mahan,

Assistant Section Chief, Environmental, Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 04–1418 Filed 1–22–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States of America* v. *Clatsop County* (D. Or.), CV–04–42–HU, was lodged in the United States District Court for the District of Oregon on January 14, 2004.

The proposed Consent Decree concerns a complaint filed by the United States against Clatsop County, Oregon, pursuant to Clean Water Act Section 309, 33 U.S.C. 1319, to obtain injunctive relief from and impose a civil penalty against the Defendant for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendant to conduct appropriate restoration and mitigation and to pay a civil penalty. The Consent Decree also provides for the Defendant to perform supplemental environmental projects.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to David Kaplan, Senior Trial Counsel, United States Department of Justice, Environmental Defense Section, P.O. Box 23986, Washington, DC 20026–3986, and refer to *United States of America* v. *Clatsop County,* DJ Reference No. 90–5–1–1–16817.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Oregon (Portland), Mark O. Hatfield U.S. Courthouse, 1000 SW. Third Avenue, Portland, Oregon. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/open.html.*

Russell Young,

Assistant Chief, Environmental Defense Section, Environment and Natural Resources Division, United States Department of Justice.

[FR Doc. 04–1417 Filed 1–22–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,326]

Bojud Knitting Mills, Inc., Amsterdam, NY; Notice of Negative Determination Regarding Application for Reconsideration

By application of September 8, 2003, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on August 13, 2003, and published in the **Federal Register** on September 2, 2003 (68 FR 52228).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The petition for the workers of Bojud Knitting Mills, Inc., Amsterdam, New York was denied because criterion (1) was not met. Employment at the subject plant increased from 2001 to 2002, and in January to July of 2003 relative to the same period of 2002.

The petitioner implies that the petitioning worker group met the criterion concerning an immediate threat of layoffs, as workers were laid off soon after the negative determination; specifically, he states that workers were laid off in the last week of August and the first week of September.

A company official was contacted in regard to this issue and indicated that employment increased in January through August of 2003 relative to the same period in 2002, but employment levels did decline in September of 2003. The official further clarified that future "employment declines are very hard to predict as the volume of employees is based on customer orders."

Further, the official confirmed that which was discovered in the initial investigation, which was that the company did not shift production, nor did it import like or directly competitive products.

Finally, results of a survey of major declining customers conducted at the time of the initial investigation established that customer imports did not contribute importantly to layoffs at the subject firm.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 23rd day of December, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–1436 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,771]

Central-PA Distribution & Warehouse, LLC, Reedsville, PA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Central-Pa Distribution & Warehouse, LLC, Reedsville, Pennsylvania. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–52,771; Central-Pa Distribution & Warehouse, LLC, Reedsville, Pennsylvania (January 8, 2004)

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1431 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,082]

Computer Sciences Corporation Workers Employed at Pratt & Whitney; West Palm Beach, FL; Notice of Negative Determination Regarding Application for Reconsideration

By application postmarked September 5, 2003, petitioners requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA). The denial notice applicable to workers of Computer Sciences Corporation employed at Pratt & Whitney, West Palm Beach, Florida was signed on August 4, 2003, and published in the **Federal Register** on August 18, 2003 (68 FR 49522).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The TAA petition was filed on behalf of workers at Computer Sciences Corporation employed at Pratt & Whitney, West Palm Beach, Florida engaged in information technology services for Pratt & Whitney. The petition was denied because the petitioning workers did not produce an article within the meaning of Section 222 of the Act.

In the request for reconsideration, the petitioners alleged that the petitioning worker group did produce a product, describing their function specifically as "writing software programs." The petitioner also infers that the fact that these software programs are copyrighted is proof of their status as a product and not a service. Further conversations with the petitioners indicated that they were coordinating a shift of work functions to India and Connecticut prior to their layoff.

A conversation with the company official indicated that some of the petitioning workers performed computer "source coding" for a mainframe owned by Pratt & Whitney,

and that this mainframe was moved to Connecticut, necessitating a separation for workers at the West Palm Beach facility. The official also stated that other workers were engaged in creating design specifications for Pratt & Whitney's SAP applications, and that some "source coding services" were performed in India.

The Department has traditionally deemed custom software design and programming as a service. Electronically generated software code is not a tangible commodity. This is supported by the fact that they are not marketable products listed on the Harmonized Tariff Schedule of the United States (HTS), published by the United States International Trade Commission (USITC), Office of Tariff Affairs and Trade Agreements, which describes all articles imported to or exported from the United States.

Further support that Computer Sciences Corporation workers in West Palm Beach did not produce an article is found in examining what items are subject to a duty. Throughout the Trade Act, an article is often referenced as something that can be subject to a duty. To be subject to a duty on a tariff schedule, an article will have a value that makes it marketable, fungible, and interchangeable for commercial purposes.

However, although a wide variety of tangible products are described as articles and characterized as dutiable in the HTS, customized software code such as that created by the petitioning worker group is not listed in the HTS. Such items are not the type of work products that customs officials inspect and that the Trade Adjustment Assistance program was generally designed to address.

Further, a discussion with an official at the U.S. Customs Service clarified that, when software is considered dutiable, the tariff is based on the cost of the media (such as paper, CD, or computer disk) and not on the value of the information contained on the media. As the customized computer code in question for this worker group is transmitted electronically, no value could be assessed in terms of import impact.

In addition, the 2002 edition of the North American Industrial Classification System (NAICS), a standard used by the Department to categorize products and services, designates "establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer" as "Custom Computer Programming Services" (NAICS 541511).

Only in very limited instances are service workers certified for TAA, namely the worker separations must be caused by a reduced demand for their services from a parent or controlling firm or subdivision whose workers produce an article and who are currently under certification for TAA.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC this 17th day of December, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–1437 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,362]

Cookson Electronics, Assembly Material Group, a Division of Frys Metals, Inc., d/b/a Alpha Metals, Jersey City, NJ; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Cookson Electronics, Assembly Material Group, a division of Frys Metals, Inc., d/b/a Alpha Metals, Jersey City, New Jersey. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–52,362; Cookson Electronics, Assembly Material Group, a div. of Frys Metals, Inc., d/b/a Alpha Metals, Jersey City, NJ (January 8, 2004).

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1435 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,627]

Flextronics Logistics, Including Leased Workers of Wood Personnel, Mount Juliet, TN; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Flextronics Logistics, including leased workers of Wood Personnel, Mount Juliet, Tennessee. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–52,627; Flextronics Logistics, including leased Workers of Wood Personnel, Mount Juliet, Tennessee (January 7, 2004)

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1433 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,187]

Harriet & Henderson Yarns, Inc., Corporate Office, Henderson, NC; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Harriet & Henderson Yarns, Inc., Corporate Office, Henderson North Carolina. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–53,187; Harriet & Henderson Yarns, Inc. Corporate Office, Henderson, North Carolina (January 8, 2004)

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1429 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,709]

Kana Software, Inc., Research & Development Department, Menlo Park, CA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Kana Software, Inc., Research & Development Department, Menlo Park, California. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–52,709; Kana Software, Inc., Research & Development, Menlo Park, California (December 31, 2003)

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1432 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 2, 2004.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 2, 2004.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 12th day of January, 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

APPENDIX

[Petitions Instituted Between 12/22/2003 and 12/24/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
53,849	Smurfit-Stone (FL)	Jacksonville, FL	12/22/2003	12/19/2003
53,850	Combined Specialty Group, Inc. (GA)	Alpharetta, GA	12/22/2003	12/19/2003
53,851	Dura/Amco Joint Venture (UAW)	Adrian, MI	12/22/2003	12/17/2003
53,852	Solid Wood Systems, Inc. (Comp)	High Point, NC	12/22/2003	12/15/2003
53,853	Four Leaf Textiles, LLC (Comp)	Spindale, NC	12/22/2003	12/19/2003
53,854	Warnaco (CT)	Milford, CT	12/22/2003	12/18/2003
53,855	American Fast Print (Wkrs)	Spartanburg, SC	12/22/2003	11/28/2003
53,856	Rock-Tenn Co. (Wkrs)	El Paso, TX	12/22/2003	10/29/2003
53,857	Parkdale America (Comp)	Caroleen, NC	12/22/2003	12/12/2003
53,858	Elo TouchSystems, Inc. (Comp)	Fremont, CA	12/22/2003	12/11/2003
53,859	Crane Plumbing (Wkrs)	Mansfield, OH	12/22/2003	12/06/2003
53,860	U2 Technology, Inc. (Comp)	Wasilla, AK	12/22/2003	12/17/2003
53,861	Franklin Mint (Wkrs)	Franklin Center, PA	12/23/2003	12/12/2003
53,862	Questar Medical, Inc. (MN)	Eden Prarie, MN	12/23/2003	12/22/2003
53,863	Meadow River Enterprises, Inc. (Wkrs)	Lewisburg, WV	12/23/2003	12/16/2003
53,864	Lu-Mac, Inc. (Comp)	Ford City, PA	12/23/2003	12/22/2003
53,865	American Standard (Wkrs)	Chandler, AZ	12/23/2003	12/17/2003
53,866	Schott Scientific Glass, Inc. (USWA)	Parkersburg, WV	12/23/2003	12/22/2003
53,867	Foredtert Malt Co., Inc. (UAW)	Milwaukee, WI	12/23/2003	12/19/2003
53,868	Signage, Inc. (Comp)	Centerville, TN	12/23/2003	12/19/2003
53,869	Florida Tile Industries, Inc. (FL)	Lakeland, FL	12/23/2003	12/19/2003
53,870	Hoffman LaRoche, Inc. (NJ)	Nutley, NJ	12/23/2003	12/22/2003
53,871	PolyOne, Inc. (NJ)	Burlington, NJ	12/23/2003	12/23/2003
53,872	Metso Mineral Industries, Inc. (Comp)	Colo. Springs, CO	12/23/2003	12/22/2003
53,873	Olympic West Sportswear, Inc. (Comp)	Puyallup, WA	12/23/2003	12/22/2003
53,874	Cascade West Sportswear, Inc. (Comp)	Puyallup, WA	12/23/2003	12/22/2003
53,875	Cascada de Mexico, Inc. (Comp)	Puyallup, WA	12/23/2003	12/22/2003
53,876	Schlegel Systems, Inc. (Wkrs)	Rochester, NY	12/24/2003	12/15/2003
53,877	Unifrax Corp. (Comp)	Niagara Falls, NY	12/24/2003	12/17/2003
53,878	NVF Company (PACE)	Kennett Square, PA	12/24/2003	12/16/2003
53,879	Johnson-Rose Corp. (Comp)	Lockport, NY	12/24/2003	12/17/2003

APPENDIX—Continued

[Petitions Instituted Between 12/22/2003 and 12/24/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
53,880	Smurfit-Stone Container Corp. (Wkrs)	Philadelphia, PA	12/24/2003	12/15/2003
53,881	Tillotson Rubber (Comp)	Fall River, MA	12/24/2003	12/08/2003
53,882	International Mill Service (USWA)	Midland, PA	12/24/2003	12/04/2003
53,883	H and J Leather (Wkrs)	Johnstown, NY	12/24/2003	12/15/2003
53,884	S. J. Bailey and Son, Inc. (Wkrs)	Carbondale, PA	12/24/2003	12/17/2003

[FR Doc. 04–1428 Filed 1–22–04; 8:45 am]
BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,574]

Waggoner/Parker Fisheries, Kenai, AK; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Waggoner/Parker Fisheries, Kenai, Alaska. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–52,574; Waggoner/Parker Fisheries, Kenai, Alaska (December 31, 2003)

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1434 Filed 1–22–04; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,093]

The William Carter Company, Operations Division, Central Planning Department, Griffin, GA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at The William Carter Co., Operations Div., Central Planning Department, Griffin, Georgia. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–53,093; The William Carter Co., Operations Division, Central Planning Department, Griffin, Georgia (January 8, 2004)

Signed at Washington, DC this 14th day of January 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–1430 Filed 1–22–04; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6472]

Ericsson, Inc., Brea, CA; Notice of Negative Determination on Reconsideration on Remand

The United States Court of International Trade (USCIT) granted the Secretary of Labor's motion for a voluntary remand for further investigation in *Former Employees of Ericsson, Inc.* v. *Elaine Chao, U.S. Secretary of Labor* (Court No. 02–00809).

The Department's initial negative determination for the workers of Ericsson, Inc. (hereafter "Ericsson") was issued on September 24, 2002 and published in the **Federal Register** on October 10, 2002 (67 FR 63160). The determination was based on the finding that workers did not produce an article within the meaning of Section 250(a) of the Trade Act of 1974, as amended. The Department determined that the workers develop computer software for other Ericsson units. The petitioners did not appeal to the Department for administrative reconsideration.

By letter to the U.S. Court of International Trade, filed on December 18, 2002, the petitioner requested judicial review. The petitioner asserted that the Department did not conduct a full investigation of the petition, that the workers were misclassified as service providers, and that the Department incorrectly applied the eligibility criteria.

On remand, the Department conducted an investigation to determine whether the petitioners were production workers and, if so, whether the workers were eligible to apply for NAFTA-TAA. The remand investigation consisted of independent research and analysis of software as a commodity and multiple requests of additional information from the petitioners and the subject company regarding the functions of the subject worker group.

The initial investigation revealed that Ericsson is a global supplier of mobile communication systems and solutions, that the subject facility developed software applications for other Ericsson units, the absence of production at the subject facility, and that the petitioning worker group developed software components which enable base station units (controllers) to route cellular phone calls for customers with service contracts with Ericsson. The investigation also revealed that the subject facility did not support an affiliated facility covered by an existing certification.

The remand investigation revealed that the petitioning workers designed and programmed software which enabled base stations (routing equipment) to properly route cellular phone messages pursuant to customers' telecommunication needs. The software was not sold as manufactured products to the general public or sold as a component to an article that is available to the general public.

While the Department considers workers who are engaged in the mass copying of software and manufacturing of the medium upon which the software is stored, such as compact disks and floppy disks, to be production workers, the Department does not consider the design and development of the software itself to be production and, therefore, does not consider software designers and developers to be production workers.

The U.S. Customs Service does not regard software design and development

as a tangible commodity and determines the value of software based only on the cost of the carrier media, such as compact discs, floppy disks, records, and tapes. Further, computer software is not listed on the Harmonized Tariff Schedule of the United States (HTS), a code that represents an international standard maintained by most industrialized countries as established by the International Convention on the Harmonized Commodity Description and Coding.

Throughout the Trade Act, an article is often referenced as something that can be subject to a duty. To be subject to a duty on a tariff schedule, an article will have a value that makes it marketable, fungible and interchangeable for commercial purposes. While a wide variety of tangible products are described as articles and characterized as dutiable in the HTS, informational products that could historically be sent in letter form and that can currently be electronically transmitted are not listed in the HTS. Such products are not the type of employment work products that customs officials inspect and that the TAA program was generally designed to address.

Conclusion

After reconsideration on remand, I affirm the original notice of negative determination of eligibility to apply for adjustment assistance for workers and former workers of Ericsson, Inc., Brea, California.

Signed at Washington, DC this 14th day of January 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–1438 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register,** or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this date may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Connecticut
- CT030001 (Jun. 13, 2003)
- CT030003 (Jun. 13, 2003)
- CT030004 (Jun. 13, 2003)
- CT030005 (Jun. 13, 2003)

New Jersey
- NJ030001 (Jun. 13, 2003)
- NJ030003 (Jun. 13, 2003)
- NJ030005 (Jun. 13, 2003)

Volume II

Maryland
- MD030002 (Jun. 13, 2003)
- MD030008 (Jun. 13, 2003)
- MD030016 (Jun. 13, 2003)
- MD030031 (Jun. 13, 2003)
- MD030036 (Jun. 13, 2003)
- MD030043 (Jun. 13, 2003)
- MD030046 (Jun. 13, 2003)
- MD030047 (Jun. 13, 2003)

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- PA030009 (Jun. 13, 2003)
- PA030010 (Jun. 13, 2003)
- PA030011 (Jun. 13, 2003)
- PA030012 (Jun. 13, 2003)
- PA030013 (Jun. 13, 2003)
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- PA030029 (Jun. 13, 2003)
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- PA030033 (Jun. 13, 2003)
- PA030038 (Jun. 13, 2003)
- PA30042 (Jun. 13, 2003)
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UT030011 (Jun. 13, 2003)
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UT030023 (Jun. 13, 2003)
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WA030003 (Jun. 13, 2003)
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WA030008 (Jun. 13, 2003)
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WA030011 (Jun. 13, 2003)
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WA030023 (Jun. 13, 2003)
WA030025 (Jun. 13, 2003)
WA030026 (Jun. 13, 2003)
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General Wage Determination Publication

General wage determinations issued under the David-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage determinations Issued Under the Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 16th day of January 2004.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–1309 Filed 1–22–04; 8:45 am]

BILLING CODE 4510–27–M

NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES

Public Hearing

ACTION: Notice of public hearing.

SUMMARY: The National Commission on Terrorist Attacks Upon the United States will hold its seventh public hearing on January 26–27, 2004 in Washington, DC. The two-day investigative hearing will develop facts and circumstances relating to border and aviation security—two central aspects of the Commission's mandate. Representatives of the media should register in advance of the hearing by visiting the Commission's Web site at *www.9-11commission.gov*. Seating for the general public will be on a first-come, first-served basis. Press availability will occur at the conclusion of the hearing.

DATE: January 26–27, 2004, 9 a.m. to 5 p.m. Press availability to follow.

Location: Hart Senate Office Building, Room 216, Washington, DC 20510.

FOR FURTHER INFORMATION CONTACT: Al Felzenberg, (202) 401–1725 or (202) 236–4878 (cellular).

SUPPLEMENTARY INFORMATION: Please refer to Public Law 107–306 (November 27, 2003), title VI (Legislation creating the Commission), and the Commission's Web site: *www.9-11commission.gov*.

Dated: January 15, 2004.

Philip Zelikow,

Executive Director.

[FR Doc. 04–1425 Filed 1–22–04; 8:45 am]

BILLING CODE 8800–01–M

NUCLEAR REGULATORY COMMISSION

In the Matter of All Licensees Authorized To Manufacture or Initially Transfer Items Containing Radioactive Material for Sale or Distribution and Possess Certain Radioactive Material of Concern and All Other Persons Who Obtain Safeguards Information Described Herein; Order Issued on November 25, 2003 Imposing Requirements for the Protection of Certain Safeguards Information (Effective Immediately)

I

The Licensees identified in Attachment 1 [1] to this Order hold licenses issued in accordance with the Atomic Energy Act of 1954 by the U.S. Nuclear Regulatory Commission (NRC or Commission) or an Agreement State authorizing them to manufacture or initially transfer items containing radioactive material for sale or distribution. The NRC intends to issue security Orders to certain manufacturing and distribution licensees in the near future. Orders will be issued to both NRC and Agreement State materials licensees who may possess radioactive material of concern. The Orders will require compliance with specific Additional Security Measures to enhance the security of certain radioactive materials. The NRC will issue Orders to both NRC and Agreement State Licensees under its authority to protect the common defense and security, which has not been relinquished to the Agreement States. Before issuing Orders for Additional Security Measures, the Commission seeks comments from affected licensees on the draft Additional Security Measures, Implementing Guidance, and Regulatory Issue Summary Table "Threat Conditions and Specific Actions for Manufacturing and Distribution Licensees." However, the Commission has determined that these draft documents are Safeguards Information, will not be released to the public, and must be protected from unauthorized disclosure. Therefore, the Commission is imposing the requirements, as set forth in Attachment 2 of this Order, so that affected Licensees can receive these draft documents for review and comment. This Order also imposes requirements for the protection of Safeguards Information in the hands of any person,[2] whether or not a licensee of the Commission, who produces, receives, or acquires Safeguards Information.

II

The Commission has broad statutory authority to protect and prohibit the unauthorized disclosure of Safeguards Information. Section 147 of the Atomic Energy Act of 1954, as amended, grants the Commission explicit authority to "issue such orders, as necessary to prohibit the unauthorized disclosure of safeguards information * * *" This authority extends to information concerning special nuclear material, source material, and byproduct material, as well as production and utilization facilities. Licensees and all persons who produce, receive, or acquire Safeguards Information must ensure proper handling and protection of Safeguards Information to avoid unauthorized disclosure in accordance with the specific requirements for the protection of Safeguards Information contained in Attachment 2. The Commission hereby provides notice that it intends to treat all violations of the requirements contained in Attachment 2 applicable to the handling and unauthorized disclosure of Safeguards Information as serious breaches of adequate protection of the public health and safety and the common defense and security of the United States. Access to Safeguards Information is limited to those persons who have established the need to know the information, and are considered to be trustworthy and reliable. A need to know means a determination by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment. Licensees and all other persons who obtain Safeguards Information must ensure that they develop, maintain and implement strict policies and procedures for the proper handling of Safeguards Information to prevent unauthorized disclosure, in accordance with the requirements in Attachment 2. All licensees must ensure that all contractors whose employees may have access to Safeguards Information either adhere to the Licensee's policies and procedures on Safeguards Information or develop, maintain and implement their own acceptable policies and procedures. The Licensees remain responsible for the conduct of their contractors. The policies and procedures necessary to ensure compliance with applicable requirements contained in Attachment 2 must address, at a minimum, the following: the general performance requirement that each person who produces, receives, or acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure; protection of Safeguards Information at fixed sites, in use and in storage, and while in transit; correspondence containing Safeguards Information; access to Safeguards Information; preparation, marking, reproduction and destruction of documents; external transmission of documents; use of automatic data processing systems; and removal of the Safeguards Information category.

In order to provide assurance that the Licensees are implementing prudent measures to achieve a consistent level of protection to prohibit the unauthorized disclosure of Safeguards Information, all Licensees who hold licenses issued by the U.S. Nuclear Regulatory Commission or an Agreement State authorizing them to manufacture or initially transfer items containing radioactive material for sale or distribution and may possess certain radioactive material of concern shall implement the requirements identified in Attachment 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that in light of the common defense and security matters identified above, which warrant the issuance of this Order, the public health, safety and interest require that this Order be effective immediately.

III

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR part 30, and 10 CFR part 32, it is hereby ordered, effective immediately, that all licensees identified in Attachment 1 to this order and all other persons who produce, receive, or acquire the additional security measures identified above (whether draft or final) or any related safeguards information shall comply with the requirements of Attachment 2.

[1] Attachment 1 contains OFFICIAL USE ONLY sensitive information and will not be released to the public.

[2] Person means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission or the Department, except that the Department shall be considered a person with respect to those facilities of the Department specified in section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244), any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

IV

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within twenty (20) days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law on which the Licensee or other person adversely affected relies and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, and to the Licensee if the answer or hearing request is by a person other than the Licensee. Because of possible disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to (301) 415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of the General Counsel either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), the Licensee may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty (20) days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated this 25th of November 2003.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 2—Modified Handling Requirements for the Protection of Certain Safeguards Information (SGI–M)

General Requirement

Information and material that the U.S. Nuclear Regulatory Commission (NRC) determines are safeguards information must be protected from unauthorized disclosure. In order to distinguish information needing modified protection requirements from the safeguards information for reactors and fuel cycle facilities that require a higher level of protection, the term "Safeguards Information-Modified Handling" (SGI–M) is being used as the distinguishing marking for certain materials licensees. Each person who produces, receives, or acquires SGI–M shall ensure that it is protected against unauthorized disclosure. To meet this requirement, licensees and persons shall establish and maintain an information protection system that includes the measures specified below. Information protection procedures employed by State and local police forces are deemed to meet these requirements.

Persons Subject to These Requirements

Any person, whether or not a licensee of the NRC, who produces, receives, or acquires SGI-M is subject to the requirements (and sanctions) of this document. Firms and their employees that supply services or equipment to materials licensees would fall under this requirement if they possess facility SGI–M. A licensee must inform contractors and suppliers of the existence of these requirements and the need for proper protection. (See more under Conditions for Access.)

State or local police units who have access to SGI–M are also subject to these requirements. However, these organizations are deemed to have adequate information protection systems. The conditions for transfer of information to a third party, *i.e.*, need-to-know, would still apply to the police organization as would sanctions for unlawful disclosure. Again, it would be prudent for licensees who have arrangements with local police to advise them of the existence of these requirements.

Criminal and Civil Sanctions

The Atomic Energy Act of 1954, as amended, explicitly provides that any person, "whether or not a licensee of the Commission, who violates any regulations adopted under this section shall be subject to the civil monetary penalties of section 234 of this Act." Section 147a. of the Act. Furthermore, willful violation of any regulation or order governing safeguards information is a felony subject to criminal penalties in the form of fines or imprisonment, or both. *See* sections 147b. and 223 of the Act.

Conditions for Access

Access to SGI–M beyond the initial recipients of the order will be governed by the background check requirements imposed by the order. Access to SGI–M by licensee employees, agents, or contractors must include both an appropriate need-to-know determination by the licensee, as well as a determination concerning the trustworthiness of individuals having access to the information. Employees of an organization affiliated with the licensee's company, *e.g.*, a parent company, may be considered as employees of the licensee for access purposes.

Need-to-Know

Need-to-know is defined as a determination by a person having responsibility for protecting SGI–M that a proposed recipient's access to SGI–M is necessary in the performance of official, contractual, or licensee duties of employment. The recipient should be made aware that the information is SGI–M and those having access to it are subject to these requirements as well as criminal and civil sanctions for mishandling the information.

Occupational Groups

Dissemination of SGI–M is limited to individuals who have an established need-to-know and who are members of certain occupational groups. These occupational groups are:

(I) An employee, agent, or contractor of an applicant, a licensee, the Commission, or the United States Government;

(II) A member of a duly authorized committee of the Congress;

(III) The Governor of a State or his designated representative;

(IV) A representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who has been certified by the NRC;

(V) A member of a State or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies; or

(VI) A person to whom disclosure is ordered pursuant to section 2.744(e) of part 2 of part 10 of the Code of Federal Regulations.

(VII) State Radiation Control Program Directors (and State Homeland Security Directors) or their designees.

In a generic sense, the individuals described above in (II) through (VII) are considered to be trustworthy by virtue of their employment status. For non-governmental individuals in group (I) above, a determination of reliability and trustworthiness is required. Discretion must be exercised in granting access to these individuals. If there is any indication that the recipient would be unwilling or unable to provide proper protection for the SGI–M, they are not authorized to receive SGI–M.

Information Considered for Safeguards Information Designation

Information deemed SGI–M is information the disclosure of which could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of materials or facilities subject to NRC jurisdiction.

SGI–M identifies safeguards information which is subject to these requirements. These requirements are necessary in order to protect quantities of nuclear material significant to the health and safety of the public or common defense and security.

The overall measure for consideration of SGI–M is the usefulness of the information (security or otherwise) to an adversary in planning or attempting a malevolent act. The specificity of the information increases the likelihood that it will be useful to an adversary.

Protection While in Use

While in use, SGI–M shall be under the control of an authorized individual. This requirement is satisfied if the SGI–M is attended by an authorized individual even though the information is in fact not constantly being used. SGI–M, therefore, within alarm stations, continuously manned guard posts or ready rooms need not be locked in file drawers or storage containers.

Under certain conditions the general control exercised over security zones or areas would be considered to meet this requirement. The primary consideration is limiting access to those who have a need-to-know. Some examples would be:

Alarm stations, guard posts and guard ready rooms;

Engineering or drafting areas if visitors are escorted and information is not clearly visible; Plant maintenance areas if access is restricted and information is not clearly visible;

Administrative offices (*e.g.*, central records or purchasing) if visitors are escorted and information is not clearly visible;

Protection While in Storage

While unattended, SGI–M shall be stored in a locked file drawer or container. Knowledge of lock combinations or access to keys protecting SGI–M shall be limited to a minimum number of personnel for operating purposes who have a "need-to-know" and are otherwise authorized access to SGI–M in accordance with these requirements. Access to lock combinations or keys shall be strictly controlled so as to prevent disclosure to an unauthorized individual.

Transportation of Documents and Other Matter

Documents containing SGI–M when transmitted outside an authorized place of use or storage shall be enclosed in two sealed envelopes or wrappers. The inner envelope or wrapper shall contain the name and address of the intended recipient, and be marked both sides, top and bottom with the words "Safeguards Information—Modified Handling." The outer envelope or wrapper must be addressed to the intended recipient, must contain the address of the sender, and must not bear any markings or indication that the document contains SGI–M.

SGI–M may be transported by any commercial delivery company that provides nation-wide overnight service with computer tracking features, U.S. first class, registered, express, or certified mail, or by any individual authorized access pursuant to these requirements.

Within a facility, SGI–M may be transmitted using a single opaque envelope. It may also be transmitted within a facility without single or double wrapping, provided adequate measures are taken to protect the material against unauthorized disclosure. Individuals transporting SGI–M should retain the documents in their personal possession at all times or ensure that the information is appropriately wrapped and also secured to preclude compromise by an unauthorized individual.

Preparation and Marking of Documents

While the NRC is the sole authority for determining what specific information may be designated as "SGI–M," originators of documents are responsible for determining whether those documents contain such information. Each document or other matter that contains SGI–M shall be marked "Safeguards Information—Modified Handling" in a conspicuous manner on the top and bottom of the first page to indicate the presence of protected information. The first page of the document must also contain (i) the name, title, and organization of the individual authorized to make a SGI–M determination, and who has determined that the document contains SGI–M, (ii) the date the document was originated or the determination made, (iii) an indication that the document contains SGI–M, and (iv) an indication that unauthorized disclosure would be subject to civil and criminal sanctions. Each additional page shall be marked in a conspicuous fashion at the top and bottom with letters denoting "Safeguards Information—Modified Handling."

In addition to the "Safeguards Information—Modified Handling" markings at the top and bottom of page, transmittal letters or memoranda which do not in themselves contain SGI–M shall be marked to indicate that attachments or enclosures contain SGI–M but that the transmittal does not (*e.g.*, "When separated from SGI–M enclosure(s), this document is decontrolled").

In addition to the information required on the face of the document, each item of correspondence that contains SGI–M shall, by marking or other means, clearly indicate which portions (*e.g.*, paragraphs, pages, or appendices) contain SGI–M and which do not. Portion marking is not required

for physical security and safeguards contingency plans.

All documents or other matter containing SGI–M in use or storage shall be marked in accordance with these requirements. A specific exception is provided for documents in the possession of contractors and agents of licensees that were produced more than one year prior to the effective date of the order. Such documents need not be marked unless they are removed from file drawers or containers. The same exception applies to old documents stored away from the facility in central files or corporation headquarters.

Since information protection procedures employed by State and local police forces are deemed to meet NRC requirements, documents in the possession of these agencies need not be marked as set forth in this document.

Removal From SGI–M Category

Documents containing SGI–M shall be removed from the SGI–M category (decontrolled) only after the NRC determines that the information no longer meets the criteria of SGI–M. Licensees have the authority to make determinations that specific documents *which they created* no longer contain SGI–M information and may be decontrolled. Consideration must be exercised to ensure that any document decontrolled shall not disclose SGI–M in some other form or be combined with other unprotected information to disclose SGI–M.

The authority to determine that a document may be decontrolled may be exercised only by, or with the permission of, the individual (or office) who made the original determination. The document should indicate the name and organization of the individual removing the document from the SGI–M category and the date of the removal. Other persons who have the document in their possession should be notified of the decontrolling of the document.

Reproduction of Matter Containing SGI–M

SGI–M may be reproduced to the minimum extent necessary consistent with need without permission of the originator. Newer digital copiers which scan and retain images of documents represent a potential security concern. If the copier is retaining SGI–M information in memory, the copier cannot be connected to a network. It should also be placed in a location that is cleared and controlled for the authorized processing of SGI–M information. Different copiers have different capabilities, including some which come with features that allow the memory to be erased. Each copier would have to be examined from a physical security perspective.

Use of Automatic Data Processing (ADP) Systems

SGI–M may be processed or produced on an ADP system provided that the system is assigned to the licensee's or contractor's facility and requires the use of an entry code/password for access to stored information. Licensees are encouraged to process this information in a computing environment that has adequate computer security controls in place to prevent unauthorized access to the information. An ADP system is defined here as a data processing system having the capability of long term storage of SGI–M. Word processors such as typewriters are not subject to the requirements as long as they do not transmit information off-site. (Note: if SGI–M is produced on a typewriter, the ribbon must be removed and stored in the same manner as other SGI–M information or media.) The basic objective of these restrictions is to prevent access and retrieval of stored SGI–M by unauthorized individuals, particularly from remote terminals. Specific files containing SGI–M will be password protected to preclude access by an unauthorized individual. The National Institute of Standards and Technology (NIST) maintains a listing of all validated encryption systems at *http://csrc.nist.gov/cryptval/140–1/1401val.htm.* SGI–M files may be transmitted over a network if the file is encrypted. In such cases, the licensee will select a commercially available encryption system that NIST has validated as conforming to Federal Information Processing Standards (FIPS). SGI–M files shall be properly labeled as "Safeguards Information—Modified Handling" and saved to removable media and stored in a locked file drawer or cabinet.

Telecommunications

SGI–M may not be transmitted by unprotected telecommunications circuits except under emergency or extraordinary conditions. For the purpose of this requirement, emergency or extraordinary conditions are defined as any circumstances that require immediate communications in order to report, summon assistance for, or respond to a security event (or an event that has potential security significance).

This restriction applies to telephone, telegraph, teletype, facsimile circuits, and to radio. Routine telephone or radio transmission between site security personnel, or between the site and local police, should be limited to message formats or codes that do not disclose facility security features or response procedures. Similarly, call-ins during transport should not disclose information useful to a potential adversary. Infrequent or non-repetitive telephone conversations regarding a physical security plan or program are permitted provided that the discussion is general in nature.

Individuals should use care when discussing SGI–M at meetings or in the presence of others to insure that the conversation is not overheard by persons not authorized access. Transcripts, tapes or minutes of meetings or hearings that contain SGI–M should be marked and protected in accordance with these requirements.

Destruction

Documents containing SGI–M should be destroyed when no longer needed. They may be destroyed by tearing into small pieces, burning, shredding or any other method that precludes reconstruction by means available to the public at large. Piece sizes one half inch or smaller composed of several pages or documents and thoroughly mixed would be considered completely destroyed.

[FR Doc. 04–1415 Filed 1–22–04; 8:45 am]
BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Review Standard for Extended Power Uprates; Availability of Review Standard

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of Issuance of Review Standard.

SUMMARY: The NRC is announcing the availability of Office of Nuclear Reactor Regulation Review Standard (RS)–001, Revision 0, "Review Standard for Extended Power Uprates," dated December 2003. RS–001, Revision 0, fully addressed the public comments received on the draft version of RS–001.

This document is available for public inspection (1) at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike, Rockville, Maryland, (2) from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html,* using the Accession No. ML033640024, and (3) at the NRC's Web site, *http://www.nrc.gov/*

reactors/operating/licensing/power-uprates.html. Persons who do not have access to ADAMS or who encounter problems accessing the document 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.*

FOR FURTHER INFORMATION CONTACT: Mohammed A. Shuaibi, Senior Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation, and Anthony C. McMurtray, Senior Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation. Mr. Shuaibi may be reached by telephone at (301) 415–2859 or e-mail at *mas4@nrc.gov.* Mr. McMurtray may be reached by telephone at (301) 415–4106 or e-mail at *acm2@nrc.gov.*

SUPPLEMENTARY INFORMATION: The process of increasing the licensed power level at a commercial nuclear power plant is called a "power uprate." Power uprates can be classified into three categories based on the magnitude of the power increase and the methods used to achieve the increase. Measurement uncertainty recapture power uprates result in power level increases that are less than 2 percent and are achieved by implementing enhanced techniques for calculating reactor power. Stretch power uprates typically result in power level increases that are up to 7 percent and do not generally involve major plant modifications. Extended power uprates (EPUs) result in power level increases that are greater than stretch power uprates, have been approved for increases as high as 20 percent, and usually require significant modifications to major plant equipment. RS–001 is applicable to EPUs.

RS–001 establishes standardized review guidance for the staff's reviews of EPU applications to enhance the consistency, quality, and completeness of the reviews. It serves as a tool for the staff's use when processing EPU applications in that it provides detailed references to various NRC documents containing specific information related to the areas of review.

RS–001 also makes available to licensees the guidance used by the staff for reviewing and accepting EPU applications. Making this information available should help licensees prepare complete EPU applications that address the topics needed for the NRC staff's review. By addressing the areas in the review standard, a licensee could minimize the NRC staff's need for requests for additional information and thereby improve the efficiency of the staff's review.

Dated at Rockville, Maryland, this 15th day of January, 2004.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–1414 Filed 1–22–04; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Public Availability of Fiscal Year (FY) 2003 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (Public Law 105–270) ("FAIR Act")

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice of public availability of agency inventory of activities that are not inherently governmental and of activities that are inherently governmental.

SUMMARY: In accordance with the FAIR Act, agency inventories of activities that are not inherently governmental are now available to the public from the agencies listed below for FY 2003. The FAIR Act requires that OMB publish each fiscal year an announcement of public availability of agency inventories of activities that are not inherently governmental. After review and consultation with OMB, agencies are required to make their inventories available to the public. Agencies have also included activities that are inherently governmental. This is the second release of the FAIR Act inventories for FY 2003. Interested parties who disagree with the agency's initial judgment can challenge the inclusion or the omission of an activity on the list of activities that are not inherently governmental and, if not satisfied with this review, may demand a higher agency review/appeal.

The Office of Federal Procurement Policy has made available a FAIR Act User's Guide through its Internet site: *http://www.whitehouse.gov/OMB/procurement/fair-index.html.* This User's Guide will help interested parties review FY 2003 FAIR Act inventories and gain access to agency inventories through agency Web site addresses.

Joshua B. Bolten,

Director.

SECOND FAIR ACT RELEASE 2003

American Battle Monuments Commission	Mr. William Athas, (703) 696–6869, www.abmc.gov.
Arlington National Cemetery	Mr. Rory Smith, (703) 614–5060, www.arlingtoncemetery.org.
Armed Forces Retirement Home	Mr. Steve McManus, (202) 730–3533, www.afrh.com.
Broadcasting Board of Governors	Mr. Stephen Smith, (202) 619–1088, www.bbg.gov.
Department of Defense	Mr. Paul Soloman, (703) 602–3666, web.lmi.org/fairnet.
Department of Defense (Inspector General)	Major Eric Kase, (703) 604–9744, www.dodig.osd.mil.
Department of Energy	Mr. Dennis O'Brien, (202) 586–1690, www.doe.gov.
Department of Health and Human Services	Mr. Michael Colvin, (202) 690–7887, www.hhs.gov/ogam/oam/fair/.
Department of Homeland Security	Mr. David Childs, (202) 772–9785, http://www.dhs.gov/dhspublic/display?theme=37.
Department of Labor	Mr. Al Stewart, (202) 693–4028, www.dol.gov.
Department of State	Mr. Eugene Batt (202) 663–2308, www.state.gov.
Department of Transportation (IG)	Ms. Jackie Weber, (202) 366–1495, www.oig.dot.gov.
Environmental Protection Agency	Ms. Barbara Stearrett, (202) 564–4496, www.epa.gov.
Environmental Protection Agency (Inspector General)	Ms. Elissa Karpf, (202) 566–2604, www.epa.gov/oigearth.
Farm Credit Administration	Mr. Philip Shebest, (703) 883–4146, www.fca.gov.
Federal Retirement Thrift Investment Board	Mr. Richard White, (202) 942–1633, www.tsp.gov.
General Services Administration	Mr. Paul Boyle, (202) 501–0324, www.gsa.gov.
Intelligence Agencies	Mr. Jim Meehan, (703) 482–5886, No website available.
International Trade Commission	Mr. Stephen McLaughlin, (202) 205–3131, www.usitc.gov.

SECOND FAIR ACT RELEASE 2003—Continued

Kennedy Center	Mr. Jared Barlage, (202) 416–8731, www.kennedy-center.org.
National Transportation Safety Board	Ms. Barbara Czech, (202) 314–6169, www.ntsb.gov.
Office of Personnel Management	Mr. Alfred Chatterton III, (202) 606–1004, www.opm.gov.
Office of the U.S. Trade Representative	Ms. Susan Buck, (202) 395–9412, www.ustr.gov.
Peace Corps	Mr. George Schutter, (202) 692–1630, www.peacecorps.gov.
Railroad Retirement Board	Mr. Henry Valiulius, (312) 751–4520, www.rrb.gov.
Railroad Retirement Board (Inspector General)	Ms. Henrietta Shaw, (312) 751–4345, www.rrb.gov/oig/Rrboig.htm.
Selective Service System	Mr. Calvin Montgomery, (703) 605–4038, www.sss.gov.
Small Business Administration	Mr. Robert J. Moffitt, (202) 205–6610, www.sba.gov.
Small Business Administration (Inspector General)	Ms. Janis Coughlin, (202) 205–7373, www.sba.gov/ig.
U.S. Trade Development Agency	Ms. Barbara Bradford, (703) 875–4357, www.tda.gov.

[FR Doc. 04–1400 Filed 1–22–04; 8:45 am]
BILLING CODE 3110–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49078; File No. SR–CBOE–2003–58]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Its Summary Fine Schedule for Position Limit Violations

January 14, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 10, 2003, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend its summary fine schedule for position limit violations. The text of the proposed rule change is below. Additions are *italicized;* deletions are in brackets.

* * * * *

Chapter XVII—Discipline

Rule 17.50 Imposition of Fines for Minor Rule Violations

(a)–(f) No change.

(g) The following is a list of the rule violations subject to, and the applicable fines that may be imposed by the Exchange pursuant to, this Rule:

(1) Violation of position limit rules. (Rule 4.11)

(a) For violations occurring in the accounts of non-member customers (*i.e.*, customers that are not Exchange members):

Number of Cumulative Violations In Any Twelve (12) Month *Rolling* Period*.	Fine Amount (imposed on Exchange member firm).
First Offense [1–6]	Letter of Caution[, up to 5% in excess of the applicable limit; above that level, $1 per contract].
Second Offense [7–12]	*$500* [1 per contract over limit].
Third Offense [13+]	*$1,000* [5 per contract over limit].
Fourth and Each Subsequent Offense	*$2,500*.

(b) For violations occurring in all other accounts:

Number of Cumulative Violations In Any Twelve (12) Month *Rolling* Period*.	Fine Amount.
First Offense [1–3*]	Letter of Caution[, up to 5% in excess of the applicable limit; above that level, $1 per contract].
Second Offense [4–6]	*$1,000* [1 per contract over limit].
Third Offense [7–9]	*$2,500* [2.50 per contract over limit].
Fourth and Each Subsequent Offense [10+]	*$5,000* [5 per contract over limit].

*A violation [in this category] that consists of *(i)* a 1 trade date overage, *(ii) a consecutive string of trade date overage violations where the position does not change or where a steady reduction in the overage occurs, or (iii) a consecutive string of trade date overage violations resulting from other mitigating circumstances, may be deemed to constitute one offense, provided that the violations are inadvertent.* [or a 2 consecutive trade date overage will be counted as a single violation. At staff's discretion, an informal Staff Interview may be conducted rather than a Letter of Caution issued for the 3rd violation.]

[Fines imposed for violations of Rule 4.11 shall be in the minimum amount of $100.]

(2)–(10) No change.

* * * * *

Interpretations and Policies:

.01 [(a) Violations of the position limit rule that continue over consecutive business days will be subject to a separate fine, pursuant to subsection (g)(1) of this Rule and except as provided in the footnote to (g)(1)(b) for member accounts, for each day during which the violation occurs and is continuing.] For purposes of subsection (g)(1)(a), all accounts of non-member broker-dealers will be treated as customer accounts. In calculating fine

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

thresholds under subsection (g)(1)(a) for each Exchange member, all violations occurring in any twelve-month *rolling* period in all of that member's non-member customer accounts are to be added together.

(b) [A member whose position limit summary fine(s) meets one of the levels below shall have the opportunity to submit one written offer of settlement in accordance with the provisions of Rule 17.8(a)—Submission of Offer, provided, however, that the Interpretations and Policies to Rule 17.8 shall not apply to an offer made hereunder and the member must submit the offer within 30 days of the date of service of the written statement informing the member of the fine(s) imposed. The member may also appear once before the Business Conduct Committee to make an oral statement in support of the offer. A member may make one offer:

(1) when the fine calculated pursuant to subsection (g)(1) of this Rule would be greater than $2,500 per day and not more than $5,000 per day; or

(2) when position limit violations continue over 5 or more consecutive trade dates and the fine calculated pursuant to subsection (g)(1) would be greater than $10,000 in the aggregate and not more than $5,000 on any day.]

Any member who is issued a summary fine notice for the same conduct covered in sub-paragraph (g)(5) that meets one of the levels below shall have the opportunity to submit one written offer of settlement to the Business Conduct Committee in accordance with the provisions of Rule 17.8(a)—Submission of Offer, provided, however, that the Interpretation and Policies to Rule 17.8 shall not apply to an offer made hereunder and the member must submit the offer within 30 days of the date of service of the written notice informing the member of the fine(s) imposed. The member may also appear once before the Business Conduct Committee to make an oral statement in support of the offer. In considering an offer of settlement, the Business Conduct Committee shall consider the Principal Considerations in Determining Sanctions as set forth in Interpretation and Policy .01 of Rule 17.11. A member may make one offer:

(1) When the summary fine amount would be greater than $2,500 but not more than $5,000 for a single offense, regardless of whether the single offense is the result of one violation or multiple violations aggregated together; or

(2) When the total fine for multiple offenses would be greater than $10,000 in the aggregate and not more than $5,000 for any single offense, again regardless of whether any single offense is the result of one violation or multiple violations aggregated together.

A decision of the Business Conduct Committee accepting an offer of settlement hereunder shall be reported on a current basis pursuant to Rule 19d–1 under the Securities Exchange Act of 1934. The member shall report a decision accepting an offer of settlement on the member's broker-dealer and Form U–4 (uniform application for securities industry registration or transfer) forms as a decision in a contested Exchange disciplinary proceeding.

.02–.04 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, the CBOE included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's disciplinary rules authorize the imposition of fines for minor rule violations, which are set forth in CBOE Rule 17.50. With respect to option position limit violations, current CBOE Rule 17.50(g)(1) sets forth a graduated fine schedule that increases the dollar amount of the fine as the number of cumulative violations increase. The dollar amount of the fines range from $1.00 to $5.00 per contract for every contract exceeding the applicable position limit. Pursuant to CBOE Rule 17.50(a),[3] a violation where the fine amount exceeds $5,000 is not a minor rule violation under CBOE Rule 17.50 and is subject to the disciplinary procedures under CBOE Rule 17.2 *et seq.*

Based on its experience with processing position limit violations, the Exchange has found that most position limit violations are technical in nature. Accordingly, the Exchange believes that they should be processed under a summary fine schedule. For example, the Exchange often encounters situations that involve inadvertent calculation errors or computer systems problems, which result in sizable position limit overages and a consecutive string of single trade date violations. The violations are often sizeable and occur over a string of days because the member is unaware of the problem that caused the violation. In these situations, once the Exchange has identified the overage and notified the member, the member has taken appropriate action to bring the position into compliance and, if the overage was based on a computer systems problem, implemented appropriate procedures to prevent a recurrence.

Notwithstanding the unintentional nature of the violations, the Exchange's current rules provide for the imposition of fines for position limit violations in accordance with the fine schedule set forth in CBOE Rule 17.50(g). For violations occurring in the accounts of non-member customers, CBOE Rule 17.50(g)(1)(a) deems one violation to equal a single date overage. For violations occurring in all other accounts, CBOE Rule 17.50(g)(1)(b) deems one violation to equal either a one trade date overage or a two consecutive trade date overage. Therefore, a single position limit overage that continues over a string of consecutive days will significantly increase the probability that the fine will exceed the $5,000 threshold set forth in CBOE Rule 17.50(a) as a result of reaching the next level in the graduated fine schedule. In these situations, the Exchange rules require the Exchange to remove the violation from the summary fine process of CBOE Rule 17.50(g) and place it under the disciplinary process set forth in CBOE Rule 17.2 *et seq.*

The Exchange believes that removal of these types of violations from the summary fine process is incongruous with what it believes is the unintentional nature of the majority of the position limit violations that the Exchange comes across. To realign CBOE Rule 17.50(g) with the current landscape, the Exchange proposes to establish a fixed dollar fine amount per each offense, with the maximum fine amount equaling $2,500 for violations occurring in the accounts of non-member customers and $5,000 for violations occurring in all other accounts. The cap on the fine amount would permit the Exchange to process

[3] CBOE Rule 17.50(a) provides in relevant part: "In lieu of commencing a disciplinary proceeding pursuant to Exchange Rule 17.2 *et seq.*, the Exchange may, subject to the requirements set forth herein, impose a fine, not to exceed $5,000, on any member or person associated with or employed by a member with respect to any rule violation listed in section (g) of this Rule. * * *"

the majority of position limit violations under the summary fine process without having to subject the violation to the disciplinary procedures as provided in CBOE Rule 17.2 *et seq.* In addition to restructuring the fine amounts, the proposed rule change provides in the footnote to CBOE Rules 17.50(g)(1)(a) and (b) that (i) a one-trade date overage, (ii) a consecutive string of trade date overage violations where the position does not change or where a steady reduction in the overage occurs,[4] or (iii) a consecutive string of trade violations resulting from other mitigating circumstances, may be deemed to constitute one offense, provided that the violations are inadvertent. Proposed subsection (ii) addresses the majority of violations that the Exchange comes across and proposed subsection (iii) addresses the infrequent, inadvertent violations that may not fall within proposed subsections (i) and (ii). Contemporaneous with the imposition of the fine, the Exchange's regulatory staff will work with the subject member to correct the problem that caused the position limit violation. The Exchange notes that American Stock Exchange LLC Rule 590(g) imposes a similar fine schedule for a violation of its position limit rule.

CBOE Rule 17.50(f) retains the Exchange's authority to remove the position limit overage violation from the summary fine process of CBOE Rule 17.50(g). Under CBOE Rule 17.50(f), the Exchange "may, whenever it determines that any violation is intentional, egregious, or otherwise not minor in nature, proceed under the Exchange's formal disciplinary rules as set forth in Exchange Rule 17.2 *et seq.*, rather than under Exchange Rule 17.50." Therefore, the Exchange may remove the violation from the summary fine process whenever it determines that the violation is intentional, egregious or otherwise not minor in nature.

The Exchange also proposes to delete the first paragraph of subsection (b) of Interpretation .01 to CBOE Rule 17.50 because the Exchange believes that offers of settlement are inappropriate under the proposed fine schedule. Subsection (b) currently serves to mitigate hefty fines caused by unintentional overages such as those that occur in the examples provided above. Since the proposed rule change replaces the graduated fine schedule with the set fine schedule, each offense is capped at a dollar amount and does not need to be mitigated by an offer of settlement.

2. Statutory Basis

The Exchange believes the proposed rule change will enable the Exchange to deal more efficiently with the majority of position limit violations and to provide the Exchange with a more equitable method of dealing with inadvertent position limit overages, which is consistent with section 6(b) of the Act[5] in general and furthers the objectives of section 6(b)(5) of the Act[6] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–CBOE–2003–58. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to file number SR–CBOE–2003–58 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1462 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[4] The Exchange notes that proposed subsection (ii) of the footnote to Rules 17.50(g)(1)(a) and (b) is designed to replace the first sentence of Interpretation .01 to Rule 17.50, which is being deleted in the proposed rule change. The first sentence of Interpretation .01 to Rule 17.50 currently serves to mitigate the substantial fines that would result from sizeable overages and/or consecutive day overages. As provided in the proposed footnote to Rules 17.50(g)(1)(a) and (b), the Exchange will now deem such inadvertent consecutive day overages and/or sizeable overages as one offense, with a corresponding set fine. To the extent a position limit overage is not covered in proposed subsections (i) and (ii) of the footnote to Rules 17.50(g)(1)(a) and (b), such as if the position limit overage increases over a period of consecutive days, the Exchange would apply proposed subsection (iii) of the footnote to Rules 17.50(g)(1)(a) and (b) to the extent the increased option position is inadvertent.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49080; File No. SR–DTC–2003–09]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Establish a New Service To Destroy Certain Certificates and To Implement a Fee for Custody of Certain Certificates Not To Be Destroyed

January 14, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] 15 U.S.C. 78s(b)(1), notice is hereby given that on June 12, 2003, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (File No. SR–DTC–2003–09) as described in Items I, II, and III below, which Items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

DTC is filing this proposed rule change to establish a new service that will allow DTC to destroy certain certificates representing position in securities for which transfer agent services have not been available for a period of time. The filing is also being made to implement a fee relating to custody of certificates in such issues that are not designated for destruction by DTC participants.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC 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

This proposed new DTC service will allow DTC to destroy certain certificates representing position in securities for which transfer agent services are no longer available. This will allow participants to avoid fees to which they would otherwise be subject relating to DTC's ongoing custody of such issues.

(1) *Background.* Over the years, DTC has moved aggressively to reduce the number of securities certificates held in its vaults, principally through expansion of the Book-Entry-Only (BEO) program, bearer-to-registered conversions, and Fast Automated Securities Transfer (FAST) program. These efforts have been spurred by the desire of the industry and regulators to move towards a book-entry or dematerialized environment. Certificate reduction reduces risk and cost. As a result of these efforts, DTC has significantly reduced the number of corporate, municipal, and bearer certificates held by DTC.

At the same time, however, the number and percentage of certificates held in the depository's vaults representing securities for which transfer agent services are not available has grown considerably. (These certificates are referred to in this filing as "non-transferable securities certificates.") Typically, these are equity securities of a company that has become inactive or insolvent. Today, DTC holds 1.2 million such certificates, representing nearly 22% of the depository's entire certificate inventory. Significant risks and costs are associated with the ongoing maintenance of custody, control, and audit of these certificates.

To address the costs and risks presented by the rising inventory of non-transferable certificates, DTC, having considered helpful input provided by many participants and industry groups, has developed its Destruction of Non-Transferable Securities Certificates program, which is the subject of this filing.

(2) *Previous SEC Orders Approving Certificate Destruction.* DTC has twice in the past adopted programs pursuant to which it destroys certificates. The SEC has approved DTC programs to destroy certificates representing worthless warrants, rights, and put options whose expiration dates have passed[2] to destroy matured book-entry-only debt certificates.[3] DTC destroyed 5,652 certificates in the first half of 2003 pursuant to these programs.

(3) *PREM.* Many participants currently use DTC's Position Removal (PREM) function to delete positions in issues of non-transferable securities certificates from their participant accounts. Today, those positions are then moved to a DTC internal PREM account. However, the certificates representing those positions are still held in DTC's vaults with all the risks and costs associated with storing such certificates, maintaining the related accounts, and monitoring the status of such issues.

(4) *Modifying the PREM Process.* Under today's process, the only effects of a participant's "deleting" its position in an issue using PREM are to eliminate the custody fees associated with the position and to eliminate the reflection of the position on the participant's securities position listing statements. Under the proposed program, DTC will notify its participants that using PREM to delete a position or leaving a position in PREM constitutes an acknowledgement by the participant that DTC may cease crediting the security to the participant's securities account and that DTC may at its option based upon PREM criteria include the certificates representing the position in its certificate destruction program. Upon receipt of Commission approval, DTC will implement the program beginning first with issues in which all participant positions have been put in PREM.

(5) *Destruction Process.* Authorized DTC personnel will oversee and witness the destruction of the certificates. DTC will maintain detailed ledger control over the certificates through the point of destruction. In addition, prior to destruction the certificates will be computer imaged by DTC. An accurate record of all certificates will be maintained. The record will be searchable by certificate number and by date of destruction. DTC will retain copies of the computer images of these certificates and of related positional information following destruction of the certificates. The images will be kept for at least six years and will be kept for the first six months in a place that is easily accessible by authorized DTC personnel. Such records will be: (i) Available at all times for examination by the Commission or other appropriate regulatory agency in an easily readable projection enlargement; (ii) arranged and indexed in a manner that permits immediate location of any particular record; (iii) immediately provided upon request by the Commission or other appropriate regulatory agency; and (iv) copied and stored separately from the original records.

Participants will be relieved of future DTC fees for any positions that the participant moves to PREM. If at a later

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 28642 (November 21, 1990), 55 FR 49725 [File No. SR–DTC–90–11].

[3] Securities Exchange Act Release No. 44169 (April 10, 2001), 66 FR 19592 [File No. SR–DTC–99–6].

date and in the unlikely event that transfer agent services are resumed for a security issue where the depository has already destroyed certificates, DTC will use its best efforts to replace the destroyed certificates and to return the position to the appropriate participants.

(6) *Withdrawing Certificates.* Alternatively, a participant may wish to withdraw its position in an issue of non-transferable securities certificates that is subjected to the fee which is described below. DTC will attempt to honor the request for participants if certificates in proper denominations are available in DTC's inventory. If proper denominations are not available, which as a practical matter may typically be the case, DTC will hold a certificate of greater value than that represented by the participant's long position and will charge the participant fees as described below.

(7) *Checking for Issues of Non-Transferable Securities Certificates.* Participants can systemically identify issues of non-transferable securities certificates by accessing either the Corporate and Municipal Eligible Security Files or the Corporate and Municipal Change Files. If appropriate, participants can then move their positions in any such issues to PREM and avoid the fees associated with the continued custody of the positions. Participants can also subsequently elect to deposit into DTC additional certificates of non-transferable securities issues and then move them to PREM so that they may be destroyed.

(8) *Fee.* Since much of DTC's cost to custody certificates is now directly attributable to non-transferable securities certificates, DTC will increase its monthly charge (in addition to all other applicable fees) for each position of a security that has been non-transferable for six or more years and that is not in PREM. This fee will increase from $.17 to $1.00 per position per month in such issues (in addition to any other applicable fees).[4] DTC anticipates that the fee will increase on January 1, 2005, to $5.00 per position per month in such issues. Today, 93% of all non-transferable securities certificates are in PREM.

(9) *The Benefits.* As a result of this new procedure, DTC will provide uniform and consistent controls and procedures (as well as physical safeguards) for issues of non-transferable securities.

DTC believes that this new service will also reduce both DTC expenses and overall industry costs. DTC will eliminate the cost of custodying and handling such securities and the associated insurance costs. In addition, DTC's destruction of such certificates on a centralized basis will provide the industry with scale economies for this process. Finally, this will allow DTC to reduce the risks associated with the ongoing maintenance of custody, control, and audit of these 1.2 million certificates.

DTC believes that the proposed rule change is consistent with the requirements of section 17A of the Act[5] and the rules and regulations thereunder applicable to DTC because it will permit DTC and its participants by ensuring that DTC can improve the efficiency of its operations.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, in the public interest, and for the protection of investors.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

DTC solicited comments from all DTC participants concerning the program through an Important Notice dated January 22, 2003. A copy of the DTC Important Notice is attached as Exhibit B to its proposed rule change. In addition, DTC worked with the Securities Industry Association Securities Operations Division's Regulatory and Clearance Committee and DTC's Securities Processing Advisory Board. Feedback from participants and from such industry groups, while generally positive and supportive, also led DTC to refine the proposal by extending the time period during which the securities must be in non-transferable status before they can be destroyed (*i.e.*, six years) and by extending the timing of the implementation of the related fee.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register**, or within such longer period: (i) As the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which DTC consents, the Commission will:

(i) By order approve such proposed rule change or

(ii) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comments should refer to File No. SR–DTC–2003–09. 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 effectively, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, at the address above.

Copies of such filing will also be available for inspection and copying at the principal office of DTC and on DTC's Web site at *DTCC.com.* All submissions should refer to the file Number SR–DTC–2003–09 and should be submitted by February 13, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1460 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[4] The fee of $1.00 per position was filed with the Commission under Section 19(b)(3)(A) of the Act on December 29, 2003, and as such was effective when filed (File No. SR–DTC–2003–15).

[5] 15 U.S.C. 78q–1.

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49091; File No. SR–NASD–2003–196]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Modify Fees for Persons That Are Not NASD Members Using the Financial Information Exchange ("FIX") Protocol To Connect to Nasdaq

January 16, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2003, the National Association of Securities Dealers, Inc. ("NASD") through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III, below, which the Nasdaq has prepared. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is filing this proposed rule change to modify fees for NASD members using the Financial Information Exchange ("FIX") protocol to connect to Nasdaq.[3] Nasdaq will implement the change immediately upon Commission approval.

The text of the proposed rule change is below. Proposed new language is in *italics*.

* * * * *

7000. CHARGES FOR SERVICES AND EQUIPMENT

Rule 7010. System Services

(a)–(e) No change.

(f) Nasdaq Workstation™ Service

(1) No change.

(2) The following charges shall apply for each subscriber using CTCI and/or FIX:

Options	Price
Option 1: Dual 56kb lines (one for redundancy), single hub and router, and optional single FIX port.	$1275/month.
Option 2: Dual 56kb lines (one for redundancy), dual hubs (one for redundancy), dual routers (one for redundancy), and optional single FIX port.	$1600/month.
Option 3: Dual T1 lines (one for redundancy), dual hubs (one for redundancy), dual routers (one for redundancy), and optional single FIX port. Includes base bandwidth of 128kb.	$8000/month (CTCI or CTCI/FIX lines). $4000/month (FIX-only lines).
FIX Port Charge	$300/port/month.
Option 1, 2, or 3 with Message Queue software enhancement	Fee for Option 1, 2, or 3 (including any Bandwidth Enhancement Fee) plus 20%.
Disaster Recovery Option: Single 56kb line with single hub and router and optional single FIX port. (For remote disaster recovery sites only.)	$975/month.
Bandwidth Enhancement Fee (for T1 subscribers only)	$600/month per 64kb increase above 128kb T1 base.
Installation Fee	$2000 per site for dual hubs and routers. $1000 per site for single hub and router.
Relocation Fee (for the movement of TCP/IP-capable lines within a single location)	$1700 per relocation.

FIX connectivity through Options 1, 2, or 3 or the Disaster Recovery Option will not be available to new subscribers that are (i) NASD members after January 1, 2004, or (ii) not NASD members after the effective date of SR–NASD–2003–196.

(g)–(u) 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, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. Nasdaq 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

Earlier this year, Nasdaq expanded the connectivity options available to subscribers by introducing the FIX protocol as a means of accessing SuperMontage.[4] The FIX protocol was first developed in 1992, and since that time has become the dominant protocol for messaging among equity market participants. FIX is now used by over 50% of all U.S. firms in the equity securities business, and its users include market makers and other broker-dealers, institutional investors, electronic communications networks ("ECNs"), and national securities exchanges.

Under the pricing schedule for FIX that has been in effect since August 2003, firms had several options for establishing FIX connectivity, including the ability to use new or existing CTCI circuits for FIX messaging, to establish FIX-only circuits, or to connect to Nasdaq indirectly through third-party private networks (often referred to as "extranets") or service bureaus that provide the option of FIX connectivity to their subscribers. Although Nasdaq's introduction of FIX has been quite successful, the preferred method of establishing connectivity has been through extranets. Nasdaq believes that extranet connectivity has proven popular because it is generally more economical to a firm than the other options.

Under this method, a firm establishes a connection with any of the private network providers that offer their subscribers connectivity to Nasdaq. Nasdaq likewise establishes a connection to the extranet, and both Nasdaq and firms accessing Nasdaq through the extranet pay the extranet

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Nasdaq is also submitting a comparable rule change for NASD members. *See* SR–NASD–2003–195.

[4] Securities Exchange Act Release Nos. 48387 (August 21, 2003), 68 FR 51619 (August 27, 2003) (SR–NASD–2003–117); 48637 (October 15, 2003), 68 FR 60430 (October 22, 2003) (SR–NASD–2003–118).

the charges that it assesses for connectivity. Thus, the extranet becomes a connectivity service provider both to Nasdaq and FIX users, and is paid by each accordingly. In addition, Nasdaq assesses the end user a port charge of $300 per month for each port (*i.e.*, each connection to a server) that uses FIX. Each firm determines the number of ports that it requires, based on its message traffic needs.

Because FIX connectivity through extranets has proven to be the preferred method, Nasdaq has decided to phase out the other options that currently exist. Accordingly, after January 1, 2004, Nasdaq will no longer offer new subscribers that are NASD members the option of using FIX through CTCI or FIX-only circuits.[5] This comparable rule change for non-members will take effect upon approval by the Commission. Existing subscribers will be permitted to continue to use their circuits at current prices. Nasdaq expects that all existing subscribers will transition to extranet connectivity shortly, however, because of the economies available through this method. When all existing FIX circuits have been terminated, Nasdaq will file a follow-up amendment to remove all references to FIX in Rule 7010(f) other than the FIX port charge.

Currently, several non-member service bureaus provide their subscribers with connectivity to Nasdaq through FIX, but all of them connect to Nasdaq through extranets. Since the extranet charges the service bureau for required connectivity and the Nasdaq FIX port charge is assessed to the member firm receiving the service, there is no Nasdaq charge to the service bureau. Connectivity through extranets will continue to be available to all service bureaus that decide to offer FIX connectivity.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[6] in general, and with section 15A(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. Under the modified fee schedule, firms with existing FIX circuits may continue to use them at current prices, but Nasdaq believes that they are likely to switch to more economical extranet connectivity. All firms using extranet connectivity pay Nasdaq the same fee of $300 per FIX port.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Nasdaq neither solicited nor received written comments on this proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NASD–2003–196. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail, but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of Nasdaq. All submissions should refer to File No. SR–NASD–2003–196 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1457 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* note 3, *supra*.

[6] 15 U.S.C. 78o–3.

[7] 15 U.S.C. 78o–3(b)(5).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49092; File No. SR–NASD–2003–195]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Fees for NASD Members Using the Financial Information Exchange ("FIX") Protocol To Connect to Nasdaq

January 16, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2003, the National Association of Securities Dealers, Inc. ("NASD") through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which the Nasdaq has prepared. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the rule effective upon Commission receipt of this filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is filing this proposed rule change to modify fees for NASD members using the Financial Information Exchange ("FIX") protocol

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

to connect to Nasdaq.[5] Nasdaq will implement the change on January 1, 2004.

The text of the proposed rule change is below. Proposed new language is in *italics*.

* * * * *

7000. CHARGES FOR SERVICES AND EQUIPMENT

Rule 7010. System Services

(a)–(e) No change.

(f) Nasdaq Workstation™ Service

(1) No change.

(2) The following charges shall apply for each subscriber using CTCI and/or FIX:

Options	Price
Option 1: Dual 56kb lines (one for redundancy), single hub and router, and optional single FIX port.	$1275/month.
Option 2: Dual 56kb lines (one for redundancy), dual hubs (one for redundancy), dual routers (one for redundancy), and optional single FIX port.	$1600/month.
Option 3: Dual T1 lines (one for redundancy), dual hubs (one for redundancy), dual routers (one for redundancy), and optional single FIX port. Includes base bandwidth of 128kb.	$8000/month (CTCI or CTCI/FIX lines) $4000/month (FIX-only lines).
FIX Port Charge	$300/port/month.
Option 1, 2, or 3 with Message Queue software enhancement Disaster Recovery Option: Single 56kb line with single hub and router and optional single FIX port. (For remote disaster recovery sites only.).	Fee for Option 1, 2, or 3 (including any Bandwidth Enhancement Fee) plus 20% $975/month.
Bandwidth Enhancement Fee (for T1 subscribers only)	$600/month per 64kb increase above 128kb T1 base.
Installation Fee	$2000 per site for dual hubs and routers; $1000 per site for single hub and router.
Relocation Fee (for the movement of TCP/IP—capable lines within a single location).	$1700 per relocation.

FIX connectivity through Options 1, 2, or 3 or the Disaster Recovery Option will not be available to new subscribers that are NASD members after January 1, 2004.

(g)–(u) No change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq 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

Earlier this year, Nasdaq expanded the connectivity options available to subscribers by introducing the FIX protocol as a means of accessing SuperMontage.[6] The FIX protocol was first developed in 1992, and since that time has become the dominant protocol for messaging among equity market participants. FIX is now used by over 50% of all U.S. firms in the equity securities business, and its users include market makers and other broker-dealers, institutional investors, electronic communications networks ("ECNs"), and national securities exchanges.

Under the pricing schedule for FIX that has been in effect since August 2003, firms had several options for establishing FIX connectivity, including the ability to use new or existing CTCI circuits for FIX messaging, to establish FIX-only circuits, or to connect to Nasdaq indirectly through third-party private networks (often referred to as "extranets") or service bureaus that provide the option of FIX connectivity to their subscribers. Although Nasdaq's introduction of FIX has been quite successful, the preferred method of establishing connectivity has been through extranets. Nasdaq believes that extranet connectivity has proven popular because it is generally more economical to a firm than the other options.

Under this method, a firm establishes a connection with any of the private network providers that offer their subscribers connectivity to Nasdaq. Nasdaq likewise establishes a connection to the extranet, and both Nasdaq and firms accessing Nasdaq through the extranet pay the extranet the charges that it assesses for connectivity. Thus, the extranet becomes a connectivity service provider both to Nasdaq and FIX users, and is paid by each accordingly. In addition, Nasdaq assesses the end user a port charge of $300 per month for each port (*i.e.*, each connection to a server) that uses FIX. Each firm determines the number of ports that it requires, based on its message traffic needs.

Because FIX connectivity through extranets has proven to be the preferred method, Nasdaq has decided to phase out the other options that currently exist. Accordingly, after January 1, 2004, Nasdaq will no longer offer new subscribers that are NASD members the option of using FIX through CTCI or FIX-only circuits. A comparable rule change for non-members will take effect upon approval by the Commission.[7] Existing subscribers will be permitted to continue to use their circuits at current prices. Nasdaq expects that all existing subscribers will transition to extranet connectivity shortly, however, because of the economies available through this method. When all existing FIX circuits have been terminated, Nasdaq will file a follow-up amendment to remove all references to FIX in Rule 7010(f) other than the FIX port charge.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[8] in

[5] Nasdaq is also submitting a comparable rule change for non-members. *See* SR–NASD–2003–196.

[6] Securities Exchange Act Release Nos. 48387 (August 21, 2003), 68 FR 51619 (August 27, 2003) (SR–NASD–2003–117); 48637 (October 15, 2003), 68 FR 60430 (October 22, 2003) (SR–NASD–2003–118).

[7] *See* note 5, *supra*.

[8] 15 U.S.C. 78o–3.

general, and with section 15A(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. Under the modified fee schedule, firms with existing FIX circuits may continue to use them at current prices, but Nasdaq believes that they are likely to switch to more economical extranet connectivity. All firms using extranet connectivity pay Nasdaq the same fee of $300 per FIX port.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Nasdaq neither solicited nor received written comments on this proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to section 19(b)(3)(A)(ii) of the Act [10] and Rule 19b–4(f)(2) [11] thereunder. Accordingly, the proposal has taken effect upon filing with the Commission. At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NASD–2003–195. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail, but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of Nasdaq. All submissions should refer to File No. SR–NASD–2003–195 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1458 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78o–3(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49081; File No. SR–NASD–2004–05]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Amend NASD Rule 2370 Relating to Certain Lending Arrangements Between Registered Persons and Customers

January 14, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2004, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.[3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act to approve the proposed rule change prior to the 30th day after its publication in the **Federal Register**. 15 U.S.C. 78s(b)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD proposes to amend NASD Rule 2370 to exempt certain types of permissible lending arrangements from the rule's notice and approval requirements and also to indicate that the scope of the rule is limited to lending arrangements between registered persons and their customers, rather than any customer of the firm. The text of the proposed rule change appears below. New text is in italics. Deleted text is in brackets.

* * * * *

2370. Borrowing From or Lending to Customers

(a) No person associated with a member in any registered capacity may borrow money from or lend money to any customer of [the member] *such person* unless: (1) The member has written procedures allowing the borrowing and lending of money between such registered persons and customers of the member; *and* (2) the lending or borrowing arrangement meets one of the following conditions: (A) The customer is a member of such person's immediate family; (B) the customer is a financial institution regularly engaged in the business of providing credit, financing, or loans, or other entity or person that regularly arranges or extends credit in the ordinary course of business; (C) the customer and the registered person are both registered persons of the same member firm; (D) the lending arrangement is based on a personal relationship with the customer, such that the loan would not have been solicited, offered, or given had the customer and the associated person not maintained a relationship outside of the broker/customer relationship; or (E) the lending arrangement is based on a business relationship outside of the broker-customer relationship[; and (3) the m].

(b) Procedures

(1) *M*embers [has] *must* pre-approve[d] in writing the lending or borrowing arrangements *described in subparagraphs (a)(2)(C), (D), and (E) above.*

(2) With respect to the lending or borrowing arrangements described in subparagraph (a)(2)(A) above, a member's written procedures may indicate that registered persons are not required to notify the member or receive member approval either prior to or subsequent to entering into such lending or borrowing arrangements.

(3) With respect to the lending or borrowing arrangements described in subparagraph (a)(2)(B) above, a member's written procedures may indicate that registered persons are not required to notify the member or receive member approval either prior to or subsequent to entering into such lending or borrowing arrangements, provided that, the loan has been made on commercial terms that the customer generally makes available to members of the general public similarly situated as to need, purpose and creditworthiness. For purposes of this subparagraph, the member may rely on the registered person's representation that the terms of the loan meet the above-described standards.

[(b)]*(c)* No change in text.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Current NASD Rule 2370 prohibits registered persons from borrowing money from or lending money to a customer (collectively referred to herein as "lending arrangements") unless the member has written procedures allowing such lending arrangements consistent with the rule, and the loan falls within one of five permissible types of lending arrangements. The five types of permissible lending arrangements are: the customer is a member of the registered person's immediate family (as defined in the rule); the customer is in the business of lending money; the customer and the registered person are both registered persons of the same firm; the lending arrangement is based on a personal relationship outside of the broker-customer relationship; or the lending arrangement is based on a business relationship outside of the broker-customer relationship. In addition, NASD Rule 2370 requires members to pre-approve each loan in writing. This regulatory framework gives members greater control over, and more specific supervisory responsibilities for, lending arrangements between registered persons and their customers. Members that choose to permit their registered persons to borrow from or lend to customers consistent with the requirements of the rule must evaluate, before granting approval, whether the lending arrangement falls within one of the five types of permissible arrangements.

In adopting NASD Rule 2370, NASD considered the potential for misconduct when registered persons and customers enter into lending arrangements.[4] NASD has brought disciplinary action against registered persons who have violated just and equitable principles of trade by taking unfair advantage of their customers by inducing them to lend money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers. The potential for misconduct also exists when a registered person lends money to a customer.

Since NASD Rule 2370 became effective on November 10, 2003,[5] it has become apparent to both members and NASD staff that the notice and approval requirements with respect to lending arrangements between family members and lending arrangements between registered persons and a financial institution regularly engaged in the business of providing credit, financing, or loans, or other entity or person that regularly arranges or extends credit in the ordinary course of business place onerous recordkeeping requirements on firms and also may invade the legitimate privacy interests of customers and registered persons. NASD, therefore, proposes that NASD Rule 2370 be amended to exempt these two categories of lending arrangements from the notice and approval requirement of NASD Rule 2370, provided that the lending arrangement between a registered person and a financial institution loan has been made on commercial terms that the customer generally makes available to members of the general public similarly situated as to need, purpose and creditworthiness.

NASD believes that the potential for misconduct is greatly reduced, or eliminated, when loans occur between family members. Therefore, NASD proposes to amend NASD Rule 2370 to exempt certain types of permissible lending arrangements from the rule's notice and approval requirements. With respect to lending arrangements between family members, as described in subparagraph (a)(2)(A) to NASD Rule 2370, NASD is of the view that it would be sufficient for purposes of compliance with NASD Rule 2370 if a member's written procedures indicate that the member permits such lending arrangements and that registered persons need not notify the member or receive member approval either prior to or subsequent to such lending arrangements.

In addition, NASD believes that the potential for misconduct is greatly reduced, or eliminated, when registered persons borrow from banks or other financial institutions in the business of lending money, provided the terms of the lending arrangement are those that would also be available to the general public doing business with those institutions who are similarly situated as to need, purpose and creditworthiness. Such transactions would include, but not be limited to, mortgages, personal loans, home equity lines of credit, and credit card accounts, and would also include lending arrangements with an affiliate of the customer. Thus, with respect to lending arrangements described in subparagraph (a)(2)(B) to NASD Rule 2370, NASD is of the view that a member's written procedures may indicate that registered persons are permitted to enter into such lending arrangements and are not required to notify the member or receive member approval either prior to or subsequent to entering into such lending arrangements, provided that the loan has been made on commercial terms that the customer generally makes available to members of the general public similarly situated as to need, purpose and creditworthiness. For purposes of this subparagraph, the member may rely on the registered person's representation that the terms of the loan meet the above-described standards. The fact that a registered person can negotiate a better rate or terms for a loan that is not the product of the broker-customer relationship would not vitiate the idea that the loan occurred on terms generally offered to the public.

NASD has also concluded that the potential for misconduct is most significant when a registered person enters into a lending arrangement with his or her own customer. Moreover, the NASD states that its members, especially those members with a significant number of institutional customers, have pointed out that

[4] *See* Securities Exchange Act Release No. 48242 (August 29, 2003), 68 FR 52806 (September 5, 2003) (Order approving SR–NASD–2003–92).

[5] *See* NASD Notice to Members 03–62 (October 8, 2003).

individual registered persons may not even know nor, for privacy reasons, should know, the name of every customer. Thus, in some firms, registered persons would be put in the position of reporting, and getting approval for, every credit card, every mortgage, and every home equity line of credit, in case the banking institution was a firm customer. NASD states that this was not the intent of the rule. Thus, NASD proposes to amend NASD Rule 2370 to indicate that the scope of the rule is limited to lending arrangements between registered persons and their customers, rather than any customer of the firm. It is the member's responsibility to determine whether a particular individual represents or services a customer.

NASD would also like to make clear that the purpose of NASD Rule 2370 is to give members the opportunity to evaluate the appropriateness of particular lending arrangements between their registered persons and customers and the potential for unnecessary and ill-advised conflicts of interest between both the registered person and his customer and the registered person and the member with which he is associated. NASD Rule 2370 does not require that members necessarily have oversight of the terms of the loan, or its execution or administration. However, the absence of such requirements in the rule does not signify the conclusion of NASD that, under certain circumstances, such action by members may be appropriate and necessary in accordance with the member's supervisory obligations. It continues to be the prerogative of member firms to exclude any or all lending arrangements between registered persons and their customers.

(2) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] which requires, among other things, that NASD 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 is designed to accomplish these ends by (1) continuing to prohibit registered persons from borrowing money from or lending money to a customer unless the member has written procedures allowing such lending arrangements consistent with the rule, and the loan falls within one of five permissible types of lending arrangements and (2) maintaining the notice and approval requirement except where the lending arrangement is between: (a) Registered persons and family members; or (b) between registered persons and lending institutions, provided the terms of such arrangements are those that the customer would also generally make available to members of the general public similarly situated as to need, purpose and creditworthiness.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which NASD consents, the Commission will:

(A) by order approve such proposed rule change; or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NASD–2004–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Association. All submissions should refer to File No. SR–NASD–2004–05 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1461 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78o–3(b)(6).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49085; File No. SR–NASD–2003–165]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to a Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto To Establish a New "Discretionary" Order in Nasdaq's SuperMontage System

January 15, 2004.

On November 7, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), 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 order type, the discretionary order ("DO"), in Nasdaq's National Market Execution System ("NNMS" or "SuperMontage"). Nasdaq filed Amendment Nos. 1, 2, and 3 to the proposal on November 14, 2003,[3] November 21, 2003,[4] and November 28,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 14, 2003 ("Amendment No. 1").

[4] *See* letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England,

2003, respectively.[5] The proposed rule change, as amended, was published for comment in the **Federal Register** on December 9, 2003.[6] The Commission received no comment letters on the proposal. Nasdaq also submitted Amendment No. 4 to the proposed rule change on January 9, 2004.[7] This order approves the proposed rule change, as amended.[8]

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association[9] and, in particular, the requirements of section 15A of the Act[10] and the rules and regulations thereunder. Specifically, the Commission believes that the proposed rule change is consistent with section 15A(b)(6) of the Act,[11] which, among other things, requires that NASD's rules be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes Nasdaq's proposed DOs are substantially similar to an order type approved for the Archipelago Exchange, the trading facility for Pacific Exchange Equities, Inc.[12] Further, the Commission believes that DOs should provide market participants increased flexibility in expressing their trading interest by allowing them to enter orders with a displayed bid or offer price and a non-displayed discretionary price range within which the participant is also willing to buy or sell. This may, in turn, enhance order interaction in Nasdaq.

The Commission notes that DOs may be entered, but not displayed or executed, prior to the market open. Under the proposal, DOs entered prior to the market open that would create locked or crossed markets if they were displayed will be held in a time-priority queue (along with Immediate-or-Cancel orders) for processing at 9:30 a.m. If a DO locks or crosses the market after the opening it would be processed quickly and automatically pursuant to NASD Rule 4710(b)(3)(A). As a result, DOs entered prior to the open should not increase the frequency of locked and crossed markets at the open.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[13] that the proposed rule change and Amendment Nos. 1, 2, 3, and 4 thereto (File No. SR–NASD–2003–165) are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1463 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

Assistant Director, Division, Commission, dated November 20, 2003 ("Amendment No. 2").

[5] *See* letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated November 26, 2003 ("Amendment No. 3").

[6] *See* Securities Exchange Act Release No. 48868 (December 3, 2003), 68 FR 68677.

[7] *See* letter from John M. Yetter, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 8, 2004 ("Amendment No. 4"). In Amendment No. 4, Nasdaq amended the proposed rule text to reflect the Commission's approval of SR–NASD–2003–143. *See* Securities Exchange Act Release No. 49020 (January 5, 2004) 69 FR 1769 (January 12, 2004). The Commission notes that this is a technical, non-substantive amendment and not subject to notice and comment.

[8] Nasdaq intends to implement the DO within three weeks of Commission approval, and will inform market participants of the exact implementation date via a Head Trader alert on *http://www.nasdaqtrader.com*. Telephone conversation between John Yetter, Assistant General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division, Commission on January 15, 2004.

[9] In approving this proposed rule change, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78*o*–3.

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] *See* Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (Order approving SR–PCX–00–25).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49088; File No. SR–NASD–2003–162]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Prime and ADAP Data Feeds in NASD Rule 7010(q)

January 16, 2004.

On October 29, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] to rename the Nasdaq Prime data feed as the TotalView Data Feed, to expand it to include quotes and orders at all price levels associated with an individual issue traded on Nasdaq, and to discontinue the Nasdaq Aggregated Depth at Price ("ADAP") data feed. On December 5, 2003, Nasdaq submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on December 17, 2003.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.[5]

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,[6] and, in particular, with the requirements of section 15A of the Act.[7] Specifically, the Commission finds that the proposal is consistent with sections 15A(b)(5)[8] and 15A(b)(6)[9] of the Act in that the proposal provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls, promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 4, 2003.

[4] *See* Securities Exchange Act Release No. 48902 (December 10, 2003), 68 FR 70324.

[5] Nasdaq intends to expand the TotalView Data Feed on or after April 1, 2004 and to discontinue the ADAP data feed on or after February 16, 2004. In each case, Nasdaq will issue a vendor alert announcing the actual date of the change at least three days before it is implemented. Nasdaq has represented that if it eliminates the ADAP data feed prior to the expansion of the TotalView Data Feed, distributors that wish to continue to distribute only the aggregate data (*i.e.*, the aggregate size of attributable and non-attributable quotes and orders at five price levels) may do so by using the aggregate data available from the current Nasdaq Prime data feed.

[6] 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).

[7] 15 U.S.C. 78*o*–3.

[8] 15 U.S.C. 78*o*–3(b)(5).

[9] 15 U.S.C. 78*o*–3(b)(6).

system, and protects investors and the public interest.

The Commission believes that expanding the Nasdaq Prime data feed to cover all price levels, rather than just the top five price levels, may enhance the transparency of the Nasdaq market. The Commission notes that the fees charged by Nasdaq for the data feeds will not be changed. Therefore, distributors and subscribers would receive more data for the same price. Further, distributors that would like to distribute only the aggregate data (*i.e.*, the aggregate size of attributable and non-attributable quotes and orders at five price levels), formerly the ADAP feed, may continue to do so by using the aggregate data from the Nasdaq TotalView Data Feed for the same distributor fee Nasdaq charges today.[10]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[11] that the proposed rule change (SR–NASD–2003–162), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1464 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–49075, File No. SR–NASD–2003–181)

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NASD Rule 4613A(c) To Clarify That NASD May Suspend Quotations in NASD's Alternative Display Facility Displayed by an Electronic Communication Network That Are No Longer Reasonably Related to the Prevailing Market

January 14, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder[2] notice is hereby given that on December 4, 2003, 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, II, and III below, which Items have been prepared by NASD. NASD has designated this proposed rule change as concerned solely with the administration of the self-regulatory organization under section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(3) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD proposes to amend NASD Rule 4613A(c) to clarify that NASD may suspend quotations in NASD's Alternative Display Facility ("ADF") displayed by any market participant, including an Electronic Communication Network ("ECN"), that are no longer reasonably related to the prevailing market. The proposed rule change would apply during the time that the NASD ADF operates on a pilot basis. The Commission previously approved the ADF as a nine-month pilot to quote and trade Nasdaq-listed securities only.[5] The Commission subsequently approved an extension of the pilot until January 26, 2004.[6]

The text of the proposed rule appears below. Proposed new text is in italics. Deleted text is in brackets.

* * * * *

4613A. Character of Quotations

(a) through (b), No change.

(c) Quotations Reasonably Related to the Market

A*n NASD Market Participant* [Registered Reporting ADF Market Maker] shall enter and maintain quotations that are reasonably related to the prevailing market. In the event it appears that a*n NASD market Participant's* [Registered Reporting ADF Market Maker's] quotations are no longer reasonably related to the prevailing market, NASD may require the [m]NASD Market [maker] *Participant* to re-enter its quotations. If a*n NASD Market Participant*[Registered Reporting ADF Market Maker] whose quotations are no longer reasonably related to the prevailing market fails to re-enter its quotations, NASD may suspend the *NASD Market Participant's*[market maker's] quotations in one or all securities. *For the purposes of this paragraph (c), "NASD Market Participant" shall have the meaning as set forth in Rule 4300A(d)(4).*

(1) In the event that a*n NASD Market Participant's* [Registered Reporting ADF Market Maker's] ability to enter or update quotations is impaired, the NASD *Market Participant* [Registered Reporting ADF Market Maker] shall immediately contact NASD Alternative Display Facility operations to request the withdrawal of its quotations.

(2) In the event that a*n NASD Market Participant's* [Registered Reporting ADF Market Maker's] ability to enter or update quotations is impaired and the *NASD Market Participant* [Registered Reporting ADF Market Maker] elects to continue to participate through NASD's Alternative Display Facility, the *NASD Market Participant* [Registered Reporting ADF Market Maker] shall execute an offer to buy or sell received from another NASD member at its quotations as disseminated through NASD's Alternative Display Facility.

(d) through (c) 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 IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

On July 24, 2002, the Commission approved SR–NASD–2002–97, which authorizes NASD to operate the ADF on a pilot basis for nine months, pending the anticipated approval of SR–NASD–2001–90, which proposes to operate the ADF on a permanent basis.[7] On April 10, 2003, the Commission approved SR–NASD–2003–53, authorizing extension of the ADF pilot period until January 26, 2004.[8] As described in detail in SR–

[10] When the TotalView Data Feed is expanded to cover all price levels, a distributor that would like to distribute only the aggregate data would distribute the aggregate size of attributable and non-attributable quotes and orders at all price levels.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78(s)(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

[5] *See* Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002)(SR–NASD–2002–97).

[6] *See* Securities Exchange Act Release No. 47663 (April 10, 2003), 68 FR 19043 (April 17, 2003)(SR–NASD–2003–67).

[7] *See* Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

[8] *See supra* note 6.

NASD–2001–90, the ADF is quotation collection, trade comparison, and trade reporting facility developed by NASD in accordance with the Commission's approval of Nasdaq's SuperMontage [9] and in conjunction with Nasdaq's application to register as a national securities exchange.[10]

For the duration of the pilot period, the ADF will provide NASD market participants [11] (*e.g.*, market makers and ECNs) the ability to post quotations in Nasdaq securities and will provide all members that participate in the ADF the ability to view quotations and report transactions in Nasdaq securities to the exclusive Securities Information Processor ("SIP") for Nasdaq-listed securities for consolidation and dissemination of data to vendors and ADF market participants. The ADF also will provide for trade comparison through the Trade Reporting and Comparison Service ("TRACS"). The ADF further will provide for real-time data delivery to NASD for regulatory purposes, including enforcement of the firm quote rule and other related rules. NASD anticipates that the ADF will operate on a pilot basis until the date the Commission should approve SR–NASD–2001–90, providing for the operation of the ADF on a permanent basis and an expansion of ADF-eligible securities to include all exchange-listed securities.

Quotations Reasonably Related to the Market

NASD Rule 4613A(c) permits NASD to suspend an ADF market maker's quotations in one or all securities when those quotations are no longer reasonably related to the prevailing market and where that market maker fails to remedy the disparity by re-entering its quotations. The rule also requires that ADF market makers contact ADF Market Operations and request the withdrawal of their quotes if their ability to enter or update quotes is impaired. In the event that an ADF market maker elects to continue to participate in the ADF under such circumstances, the market maker must execute any orders received against the displayed quote. In accordance with ADF market participant subscriber agreements, as well as NASD's plenary obligations to operate a fir and efficient over-the-counter market, NASD states that it also has maintained similar authority with respect to ECN market participants. NASD represents that the proposed rule change only makes express its existing interpretation of NASD Rule 4613A(c), that it believes is consistent with the terms and conditions of ADF market participant subscriber agreements, that ECN quotations are also subject to these requirements in such circumstances.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[12] which requires, among other things, that NASD rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will foster greater confidence in the markets by making clear that NASD can take appropriate remedial action with regard to quotations by any ADF market participant that may compromise the integrity of the ADF.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, 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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) [13] of the Act and subparagraph (f)(1) of Rule 19b–4 [14] thereunder, in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. At any time within 60 days of this filing, the Commission may summarily abrogate much rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comments letters should refer to File No. SR–NASD–2003–181. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendment, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–181 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1465 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–M

[9] *See* Securities Exchange Act Release NO. 43863 (January 19, 2001), 66 ER 8020 (January 26, 2001) (SR–NASD–99–53).

[10] *See* Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001) (File No. 10–131).

[11] *See* NASD Rule 4300(A)(d)(4).

[12] 15 U.S.C. 78*o*–3(b)(6).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(1).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49086; File No. SR–NASD–2003–157]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Thereto, by the National Association of Securities Dealers, Inc., Relating to the Permanent Fee Structure for the Trade Reporting and Compliance Engine (TRACE)

January 15, 2004.

I. Introduction

On October 14, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NASD Rule 7010(k) relating to fees for the Trade Reporting and Compliance Engine ("TRACE") prior to the expiration of the pilot program for fees on January 31, 2004 and seeking permanent approval of the fee structure. NASD amended the proposed rule change on October 22, 2003.[3] Notice of the proposed rule change and Amendment No. 1 thereto, including a discussion of the proposal in greater detail, was published for comment in the **Federal Register** on November 4, 2003.[4] The Commission received two comment letters regarding the proposal.[5]

On December 30, 2003, NASD filed Amendment No. 2 to the proposed rule change and a response to the two comment letters.[6] This order approves the proposed rule change, as amended by Amendment No. 1, accelerates approval of Amendment No. 2, and solicits comments from interested persons on Amendment No. 2.

II. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations promulgated thereunder applicable to a registered securities association and, in particular, with the requirements of section 15A(b)(6) of the Act.[7] Specifically, the Commission finds that approval of the proposed rule change is consistent with section 15A(b)(6) of the Act in that it is 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.[8] In addition, the Commission finds that approval of the proposed rule change is consistent with section 15A(b)(5) of the Act,[9] which requires, among other things, that NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that NASD operates or controls.

TRACE became effective on July 1, 2002.[10] Fees proposed by NASD for participants and users of the TRACE facility were originally approved by the Commission on June 28, 2002 on a six-month pilot basis.[11] The pilot program was modified and extended in four subsequent rule filings until January 31, 2004.[12] During the pilot period, NASD has revisited concerns expressed at the time of the approval of the initial pilot regarding whether the TRACE fees satisfy the statutory standards regarding equitable allocation, unfair discrimination, and reasonableness. NASD has adjusted the TRACE fees based upon its experience during the pilot period in an effort to make the initial fee structure more fair and reasonable.[13] The Commission believes that the fees allow users flexibility in how they will interact with the system, and are scaled according to objective criteria applied across-the-board to all categories of users. Accordingly, the Commission finds that the TRACE fees satisfy the statutory standards regarding equitable allocation, unfair discrimination and reasonableness.

As previously noted, the Commission received two comment letters, from TBMA and Advantage Data, on the proposed rule change.[14] TBMA's Comment Letter stated that NASD has failed to establish that (i) the developmental and operating costs for TRACE, and therefore the fee structure that supports those costs, are reasonable; and (ii) the fees equitably allocate the expenses among TRACE users.

NASD represented in its response to TBMA's Letter that for the first twelve months of operation (period ending June 30, 2003), TRACE generated revenues of approximately $12.4 million reflecting approximately $2.0 million, $8.9 million, and $1.5 million for System Fees, Transaction Reporting Fees, and Market Data Fees, respectively, and that aggregate revenue was 70 percent higher than had been estimated in the pre-launch 2002 forecast. NASD also represented that for the first twelve months of operation (period ending June 30, 2003), TRACE expenses were approximately $12.4 million. This was comprised of $9.8 million in operating expenses plus an accrual for the recovery of original investment of $2.6 million (based on a four-year recovery of the investment and an appropriate cost of capital). NASD also represented that there was an 11 percent or $800 thousand increase in the investment costs over the pre-launch 2002 forecast (from an estimated $7.2 million to an actual of $8.0 million), and that operating expenses were 60 percent higher than the pre-launch 2002 forecast.

NASD stated in its response that levels of trade reporting activity have been 82 percent higher than anticipated

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katharine A. England, Assistant Director, Division of Market Regulation, SEC, dated October 22, 2003 ("Amendment No. 1"). Amendment No. 1 makes certain technical corrections and deletes the phrase "(including in some cases members)" in describing the proposed rule text providing that certain summary market information of Delayed-Time TRACE transaction data may be published or distributed by newspapers, press associations, newsletters, or similar media sources without charge.

[4] Securities Exchange Act Release No. 48714 (October 29, 2003), 68 FR 62483.

[5] See letter from Michele C. David, Vice President and Assistant General Counsel, The Bond Market Association ("TBMA"), to Jonathan G. Katz, Secretary, SEC, dated November 25, 2003 ("TBMA's Letter") and letter from Rene L. Robert, President and CEO, Advantage Data, Inc. ("Advantage Data"), to Secretary, SEC, dated November 20, 2003 ("Advantage Data's Letter").

[6] See letter from Marc Menchel, Executive Vice President, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated December 29, 2003 ("Amendment No. 2"). Amendment No. 2 amends the proposed rule change to provide that the proposed BTDS Professional Delayed-Time Data Display Fee will operate as a nine-month pilot program.

[7] 15 U.S.C. 78o–3(b)(6).

[8] In approving this proposed rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78o–3(b)(5).

[10] See Securities Exchange Act Release No. 46144 (June 28, 2002), 67 FR 44907 (July 5, 2002) (File No. SR–NASD–2002–46).

[11] See Securities Exchange Act Release No. 46145 (June 28, 2002), 67 FR 44911 (July 5, 2002) (File No. SR–NASD–2002–63).

[12] See Securities Exchange Act Release No. 46893 (November 22, 2002), 67 FR 72008 (December 3, 2002) (File No. SR–NASD–2002–167); Securities Exchange Act Release No. 47056 (December 19, 2002), 67 FR 79205 (December 27, 2002) (File No. SR–NASD–2002–176); Securities Exchange Act Release No. 47444 (March 4, 2003), 68 FR 11602 (March 11, 2003) (File No. SR–NASD–2003–25); and Securities Exchange Act Release No. 48110 (June 30, 2003), 68 FR 40315 (July 7, 2003) (File No. SR–NASD–2003–97).

[13] *Id.*

[14] See *supra*, note 5.

in the pre-launch 2002 forecast prepared by NASD, with TRACE currently processing approximately 28,000 trades per day. In addition, NASD represents that approximately 1,900 NASD member firms have registered for TRACE reporting, over 29,000 corporate debt issues are subject to TRACE reporting requirements, and approximately 4,900 corporate bonds are eligible for dissemination. In addition, NASD stated that the service needs of participants and media have been significantly greater than NASD anticipated.

TBMA's Letter also stated that broker-dealers have an economic interest in net revenues from the sale of TRACE data, that net revenues from the sale of TRACE data should be shared with broker-dealers and that NASD should not make a profit on the system and reporting fees of TRACE. NASD represented in its response that it is a not-for-profit association, owned by its members and dedicated to focusing on its primary mission of regulating markets and members. NASD stated that it has no profit motivation in operating TRACE.

NASD stated that it believes the proposed fees for TRACE are reasonable and non-discriminatory. Further, NASD believes the proposed fees have been reasonably allocated, based on total TRACE revenues annually. This allocation is based on NASD's costs to develop and operate the system, maintain the system and database, and engage in oversight of the fixed income market.

During the pilot period, NASD submitted four rule filings with the SEC to reduce both Transaction Reporting Fees and System Fees to reflect actual usage of the new system. The Commission believes that NASD has adequately addressed TBMA's concerns regarding whether the TRACE fees satisfy the statutory standards regarding equitable allocation, unfair discrimination, and reasonableness.[15] Moreover, NASD has agreed to continue to assess the TRACE fee structure to ensure that the fees remain reasonable.

Advantage Data's Letter questions the appropriateness of charging fees for TRACE transaction data delayed by four hours. NASD stated in its response that professional participants in the TRACE system have stated to NASD staff that Delayed-Time data is valuable to the bond market for pricing thinly traded bonds, spotting trends, and creating derivative products. NASD also represented that professional subscribers to Real-Time TRACE transaction data will not also be charged for Delayed-Time data. In addition, NASD stated that it continues to provide Real-Time TRACE transaction data to non-professionals for $1.00 per month, per user ID. NASD represented that Delayed-Time TRACE transaction data will continue to be provided at no charge to non-professionals and professionals will continue not to be charged for delayed data that is received after 11:59 p.m. Eastern Time of the same calendar day in which the transactions are reported and disseminated.

NASD believes that the proposed BTDS Professional Delayed-Time Data Display Fee leads to a more equitable allocation of market data fees among TRACE participants and that members who use Delayed-Time TRACE transaction data should bear some costs for the TRACE system. Amendment No. 2 provides that the TRACE BTDS Professional Delayed-Time Data Display Fee, which has not previously been charged, will operate as a nine-month pilot to enable the Commission to revisit issues relating to consistency with the Act at the end of that period.

Advantage Data's Letter also raised concerns about NASD's mandated use of CUSIP data in TRACE reporting, the ongoing review of NASDAQ's management of TRACE, delays in disseminating TRACE information and the ownership of data derived by NASD. As noted by NASD in its response, NASD has addressed those concerns in prior rule filings and the issues have been addressed in prior approval orders.[16] In addition, this proposed rule change does not address those issues. The Commission expects to continue its review of NASD's operation of TRACE in the context of future proposed rule filings filed by NASD as well as the Commission's ongoing oversight of NASD as a self-regulatory organization.

III. Accelerated Approval of Amendment No. 2

For these reasons, the Commission finds good cause, consistent with sections 15A(b)(6) and 19(b)(2) of the Act, to accelerate approval of Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 2 responds to comments and provides that the TRACE BTDS Professional Delayed-Time Data Display Fee will operate as a nine-month pilot program.[17] Conversion of the TRACE BTDS Professional Delayed-Time Data Display Fee to a pilot program will enable the Commission to re-evaluate issues relating to consistency with the Act at the end of the pilot program and recommend any needed changes to NASD at the end of that time.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NASD–2003–157. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All submissions should refer to file number SR-NASD–2003–157 and should be submitted by February 13, 2004.

V. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[18] that the

[15] NASD also provided the Commission's Division of Market Regulation with additional information in response to questions raised by the Division's staff.

[16] *See* Securities Exchange Act Release-No. 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001), (File No. SR–NASD–99–65); and Securities Exchange Act Release No. 47302 (January 31, 2003), 68 FR 6233 (February 6, 2003), (File No. SR–NASD–2002–174).

[17] This pilot will begin February 1, 2004 and end on October 31, 2004. *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated January 15, 2004.

[18] *Id.*

proposed rule change (SR–NASD–2003–157), as amended by Amendment No. 1 be and hereby is approved, and Amendment No. 2 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1468 Filed 1–22–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49094; File No. SR–NSCC–2003–05]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change Permitting Elimination of All Hard Copies of Important Notices

January 16, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on March 14, 2003, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend NSCC's rules and procedures to provide that notices sent in electronic format meet NSCC's notification obligations.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

NSCC currently distributes notices in a hard copy form via U.S. mail to members outside of the New York area, to the Direct Drop Boxes of each member with a New York presence, and via fax when necessary. The proposed rule change would modify NSCC's Rule 45 to allow NSCC to post notices on its Web site and to have these postings satisfy NSCC's notification obligations. The rule change would require members to access that Web site throughout the day.

NSCC believes that the proposed rule change would facilitate the timely dissemination of information necessary for participation in NSCC and therefore is consistent with the requirements of the Act and the rules and regulations thereunder.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would have an impact on or impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve the proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NSCC–2003–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *www.nscc.com/legal/.* All submissions should refer to the File No. SR–NSCC–2003–05 and should be submitted by February 13, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1467 Filed 1–22–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49093; File No. SR–NYSE–99–12]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. To Amend Exchange Rule 350 ("Compensation or Gratuities to Employees of Others")

January 16, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

[3] 17 CFR 200.30–3(a)(12).

("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 26, 1999, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On February 5, 2003, The Exchange filed Amendment No. 1 to the proposed rule change.[3] On December 17, 2003, the Exchange filed Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, including Amendments No. 1 and No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to Rule 350 ("Compensation or Gratuities to Employees of Others") that would rescind the requirement that certain designated compensation arrangements involving Floor employees receive the prior written approval of the Exchange. The text of the proposed rule change is below. Proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

Compensation or Gratuities to Employees of Others

Rule 350. (a) No member, allied member, member organization or employee thereof shall:

(1) Employ or compensate any person for services rendered, or

(2) Give any gratuity in excess of $50 per person per year to any principal, officer, or employee of the Exchange or its subsidiaries, or

(3) Give any gratuity in excess of $100 per person per year to any principal, officer or employee of another member or member organization, financial institution, news or financial information media, or non-member broker or dealer in securities, commodities, or money instruments, except as specified below or with the prior written consent of the (employer. [and in the case of Floor employees the prior written consent of the employer and the Exchange.]

A gift of any kind is considered a gratuity.

(b) Compensation for services rendered of up to $200 per person per year may be paid with the prior written consent of the employer [, but not of the Exchange,] to operations employees of other members or member organizations of the following types:

(1) A telephone clerk on the NYSE Floor who provides courtesy telephone relief to a member's clerk, or handles such a member's orders over the member's own wire.

(2) Employees who make out commission bills or prepare Exchange reports for members.

(3) A specialist's Floor clerk who maintains records for a specialist other than his employer, or provides courtesy relief to another specialist's clerk.

(4) When the service rendered by the employee exceeds that which the primary employer is obligated to furnish,

(a) A telephone clerk who handles a member's orders transmitted over the wire of the clerk's employer.

(b) A telephone clerk who handles orders directed by the clerk's employer to the member who receives them.

A Floor employee who receives compensation for services rendered in excess of $200 per year from another member or member organization (not the primary employer), must become employed by and registered with such member or member organization in accordance with Rule 35.

(c) Records shall be retained for at least three years of all such gratuities and compensation for inspection by Exchange examiners.

Supplementary Material:

.10 When close relatives work in different financial organizations, gifts arising from the family relationship are not considered subject to Rule 350.

Employment of or gratuities to personnel working on the Floor of other exchanges and approved by the other exchange under a rule similar to Rule 350 are not considered subject to Rule 350.

Requests for Exchange consent under Section a(1) of this *Rule for the employment or compensation of Exchange employees by members or member organizations* should be [addressed as follows, and] sent *to the Exchange's Human Resources Department* at least 10 days in advance of the proposed date of employment[:].

[(A) Exchange employees—Attention: Personnel Department

(B) Floor employees of other members or member organizations—Attention: Market Operations Division.

Consents under (a)(1) or (b), above, shall include name and position of proposed employee, amount of proposed compensation, name and title of person giving consent for employer, and nature of proposed duties of employee. Approvals under a(1) will not be given in December.

Requests for exceptions to Section a(2) above will be considered only under very unusual circumstances.]

In general, approval to employ an Exchange employee outside of the hours of regular employment by the Exchange will be limited to employment of a routine or clerical nature. Approval will not be given for the employment of an Exchange employee in an advisory or professional capacity with reference to Exchange operations or policies.

When the Exchange has granted permission for part-time employment of an employee of the Exchange [or of another member or member organization] no approval is required for a subsequent gratuity or bonus to such person provided it is in proportion to gratuities given full-time employees of the employing organization.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

Rule 350 (sometimes referred to as the "Rule") designates limits and sets conditions on the payment of compensation and gratuities by members, allied members, member organizations or employees thereof to principals, officers, or employees of other members or member organizations. For instance, the Rule states that any payment exceeding the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 3, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange provided additional details regarding the purpose of the proposed rule change.

[4] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated December 16, 2003 ("Amendment No. 2"). In Amendment No. 2, the Exchange again provided further details regarding the purpose of the proposed rule change, and modified Rule 350.

Rule's designated limits requires the prior written consent of the employer and, in the case of Floor employees,[5] the prior written consent of both the employer and the Exchange. Specifically, the prior written consent of the Exchange is currently required when a member, allied member, member organization, or employee thereof employs or compensates (in excess of $200 per annum) or gives a gratuity (in excess of $100 per annum) to a Floor employee of another member or member organization. The proposed amendments to Rule 350 would rescind the provision requiring Floor employees to obtain the prior written consent of the Exchange for such payments. The prior written consent of the employer would still be required. The amendments would eliminate a provision that, in the context of the Exchange's current regulatory framework, has become outdated, impracticable, and does not serve a regulatory purpose. As discussed below, the regulatory concerns underlying Rule 350's current procedures that require NYSE approval of Floor employee compensation are effectively addressed by the requirements set forth under Rule 35 ("Floor Employees To Be Registered") and the Exchange's ongoing examination program.

In addition, Rule 350(b) states that compensation for services rendered of up to $200 per person per year may be paid with the prior written consent of the employer, but not the Exchange, to operations employees of other members or member organizations for specified functions (*e.g.*, courtesy telephone relief, preparation of commission billing or reports).

When a member or member organization compensates a Floor employee of another member organization in excess of $200 per year, the Exchange believes that such compensation should be made only in the context of an employee/employer relationship. Compensation in excess of $200 is not *de minimis* and implies that a person is regularly providing services in support of the member's or member organization's business.

Accordingly, the proposed rule change includes a provision that a Floor employee of a member or member organization (the primary employer) who receives compensation for services rendered in excess of $200 per year from another member or member organization must become employed by and registered with such member or member organization (who becomes the secondary employer) pursuant to Rule 35.

Proposal

The proposed amendments to Rule 350 would rescind the provision that requires the prior written consent of the Exchange for payment of compensation or gratuities above the Rule's prescribed levels by a member, allied member, member organization or employee thereof, to Floor employees of another member or member organization. Compliance with this provision currently involves the submittal to the Exchange of "Form 350" by the Floor employee's primary employer. The Form requires a brief outline of the payment arrangement.

The amendments are proposed in consideration of the primary purpose of Rule 350, which is to protect against potential conflicts of interest or other improprieties that might arise in connection with the payment of compensation or gratuities to certain persons. The Exchange believes that determining the propriety of employee compensation and gratuities is a function more appropriately, reasonably, and effectively exercised by the primary member or member organization employer. The employer, by virtue of its direct knowledge of the employee, the employee's duties, and the business relationship with the other individual or entity, is in the best position to evaluate the initial and ongoing propriety of such arrangements. Accordingly, Rule 350 will continue to require that the primary employer approve, in writing, the employment and compensation of Floor employees by any other member or member organization.[6]

Also, if compensation to any Floor employee exceeds $200 per year (as specified in paragraph (b) of the Rule), the Exchange views the arrangement as one of employment. As such, it would trigger certain requirements of Rule 35, including registration of the Floor employee with the secondary employer. The secondary employer is obligated to thoroughly investigate the person's background and submit a Form U–4, fingerprint card and an application for an Exchange-issued identification card to the Exchange's Qualifications and Registrations Department. The Exchange approves the registration of each Floor employee if the qualifying requirements have been met, *i.e.*, training and satisfaction of appropriate examinations. Upon employment, the secondary employer then becomes responsible for supervision of all activities of the Floor employee performed on its behalf.

Further, as previously noted, the proposed rescission would eliminate a provision that has become outdated. Given that an average of over eight hundred Form 350 requests have been received each year over the past three years, it is not practicable for the Exchange to investigate and approve each such request. Due to the sheer number of applications and the historical absence of regulatory "red flags" or actual problems found as a result of such review/approval process, the Exchange believes that it would be more effective to monitor and regulate, on an ongoing basis through routine examinations, the supervisory procedures and recordkeeping responsibilities associated with the arrangements.

In this regard, the Exchange has strengthened its examination program to regulate Floor employees, members, and member organizations. The program has been enhanced and updated to place greater emphasis on dual employment arrangements. Included in the examination scope is a chapter that requires examiners to test that an employer's dual employment approval letters are on file, that compensation is properly recorded on the employer's books and records, that certain records (including Form U–4 and fingerprints) have been filed, and that effective supervisory procedures are in place.

The proposed rule change will not alter the categories of persons covered by Rule 350, nor will it affect the requirement that members and member organizations retain a record of all gratuities and compensation paid for a minimum of three years.

Based on the foregoing, the Exchange believes that the proposed rule change will not compromise the effectiveness of Rule 350.

The Exchange is also proposing to amend Supplementary Material .10 to Rule 350 to clarify that approval requests for dual employment/compensation arrangements involving Exchange employees should be sent to the Exchange's Human Resources Department at least 10 days in advance of the proposed employment date.

[5] The term "Floor employees" generally includes Floor clerks and other operational personnel (*e.g.*, trading assistants, fron-line specialist clerks, and others, such as messengers, who perform clerical and ministerial functions). The dual employment/compensation arrangements addressed by Rule 350 typically involve Floor employees providing support services (such as phone coverage and billing preparation) to members and member organizations other than their primary employer.

[6] This is consistent with the NYSE Rule 346(b) requirement that no member, allied member or employee of a member or member organization be employed or compensated by another person "without making a written request and receiving the prior written consent of his member or member organization employee * * *."

2. Statutory Basis

The proposed rule change is consistent with the requirements of Section 6(b)(5)[7] of the Act which requires that the rules of the 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 in that it establishes appropriate approval and procedures for Floor employees of members and member organizations who seek to be employed, compensated, or paid gratuities by another member or member organization.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NYSE–99–12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to file number SR–NYSE–99–12 and should be submitted by February 13, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1466 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78f(b)(5).

[8] 8 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49090; File No. SR–NQLX–2004–01]

Self-Regulatory Organization; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes by NQLX LLC Relating to Time-Stamping Orders for Block Trades and Exchange for Physical Trades

January 16, 2004.

Pursuant to section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on January 6, 2004, NQLX LLC ("NQLX") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule changes described in Items I, II, and III below, which Items have been prepared by NQLX. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons. On January 5, 2004, NQLX filed the proposed rule changes with the Commodity Futures Trading Commission ("CFTC"), together with a written certification under section 5c(c) of the Commodity Exchange Act[3] ("CEA") in which NQLX indicated that the effective date of the proposed rule change would be January 6, 2004.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

NQLX proposes to amend NQLX Rules 419 and 420 to explicitly require its members to time-stamp orders when negotiations end (rather than begin) for block trades and exchange for physical trades. Because NQLX's rules already require members to time-stamp orders immediately upon receipt, execution, and any modification or cancellation of the order, NQLX believes that these changes will enhance its ability to monitor its members for timely submission to NQLX for acceptance of proposed block and exchange for physical trades as required by its Rules 419 and 420.

The text of the proposed rule change appears below. New text is in italics. Deleted text is in [brackets].

* * * * *

Rule 419 Block Trades

(a)–(f) No changes.

(g) Information Recording, Submission, and Dissemination.

(1) For a Block Trade in addition to the requirements of Rules 408(b) and 408(c), a Member or Person Associated with a Member must record on an Order Ticket the identity of the individual arranging the Block Trade and time stamp the Order when negotiation [begins] *ends*.

(2)–(7) No changes.

Rule 420 Exchange for Physical Trades

(a) No changes

(b) Information Recording, Submission, and Dissemination.

(1) For an Exchange for Physical Trade in addition to the requirements of Rules 408(b) and 408(c), a Member or Person Associated with a Member must record on an Order Ticket the identity of the individual arranging the Exchange for Physical Trade and time stamp the Order when negotiation [begins] *ends*.

(2)–(7) No changes.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

NQLX has prepared statements concerning the purpose of, and statutory basis for, the proposed rule changes,

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] 7 U.S.C. 7a–2(c).

burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

NQLX proposes revising both its rule regarding block trades (NQLX Rule 419(g)(1)) and its rule regarding exchange for physical trades (NQLX Rule 420(b)(1)) to require its members to time-stamp orders when negotiations end (rather than begin) for proposed block trades and exchange for physical trades. Requiring time-stamping when negotiations end for block trades and exchange for physical trades is in addition to the time-stamping of orders required immediately upon receipt, execution, and any modification or cancellation of the order, which is already required of all orders submitted to NQLX for execution.[4] NQLX believes that these proposed rule changes will enhance the exchange's ability to monitor its members for timely submission of proposed block trades and exchange for physical trades to NQLX for acceptance as required by NQLX's Rules 419 and 420, respectively.

NQLX also believes that the proposed rule changes are consistent with the requirements, where applicable, under section 6(h)(3)(J) of the Act[5] and the criteria, where applicable, under section 2(a)(1)(D)(i)(IX) of the CEA,[6] as modified by joint orders of the Commission and the CFTC.[7]

2. Statutory Basis

NQLX files these proposed rule changes pursuant to section 19(b)(7) of the Act.[8] NQLX believes that these proposed rule changes are consistent with the requirements of the Commodity Futures Modernization Act of 2000,[9] including the requirement that NQLX have audit trails necessary and appropriate to facilitate coordinated surveillance to detect, among other things, manipulation.[10] NQLX further believes that its proposed rule changes comply with the requirements under section 6(h)(3) of the Act[11] and the criteria under section 2(a)(1)(D)(i) of the CEA,[12] as modified by joint orders of the Commission and the CFTC. In addition, NQLX believes that its proposed rule changes are consistent with the provisions of section 6 of the Act,[13] in general, and section 6(b)(5) of the Act,[14] in particular, in that they will prevent fraudulent and manipulative acts and practices, will foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities and will protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NQLX does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on Proposed Rule Changes Received From Members, Participants, or Others

NQLX neither solicited nor received written comment on the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

The proposed rule changes became effective on January 6, 2004. Within 60 days of the date of effectiveness of the proposed rule changes, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule changes and require that the proposed rule changes be refiled in accordance with the provisions of section 19(b)(1) of the Act.[15]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes conflict with the Act. Persons making written submissions should file nine copies of the submission with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NQLX–2004–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of these filings will also be available for inspection and copying at the principal office of NQLX. All submissions should refer to File No. SR–NQLX–2004–01 and should be submitted by February 13, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1459 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

[4] *See* NQLX Rules 408(b), 419(g)(1), and 420(b)(1).

[5] 15 U.S.C. 78f(h)(3)(J).

[6] 7 U.S.C. 2(a)(1)(D)(i)(IX).

[7] *See* Joint Order Granting the Modification of Listing Standards Requirements (Exchange-Traded Funds, Trust-Issued Receipts and Shares of Closed-End Funds), Securities Exchange Act Release No. 46090 (June 19, 2002), 67 FR 42760 (June 25, 2002) *and* Joint Order Granting the Modification of Listing Standards Requirements (American Depository Receipts), Securities Exchange Act Release No. 44725 (August 20, 2001), 67 FR 42760 (June 25, 2002).

[8] 15 U.S.C. 78s(b)(7).

[9] Pub. L. 106–554, 114 Stat. 2763 (2000).

[10] 15 U.S.C. 78f(h)(3)(J).

[11] 15 U.S.C. 78f(h)(3).

[12] 7 U.S.C. 2(a)(1)(D)(i).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78s(b)(1).

[16] 17 CFR 200.30–3(a)(75).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49050; File No. SR–PHLX–2003–75]

Self-Regulatory Organizations; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change by the Philadelphia Stock Exchange, Inc.

January 9, 2004.

On November 17, 2003, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend PHLX Rule 1064. Notice of the proposed rule change was published for public comment in the **Federal Register**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

on December 16, 2003.[3] The notice provided that comments on the proposed rule change should be submitted to the Commission by January 6, 2004.

Section 19(b)(2) of the Act[4] provides that within thirty-five days of the publication of notice of the filing of a proposed rule change, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding the Commission shall either approve the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved. That thirty-five day period will end on January 20, 2004, with respect to the proposed rule change. The Commission has received comments on the proposed rule change, which it is still reviewing. The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the comments.

Accordingly, the Commission hereby designates March 15, 2004 as the date by which the Commission shall either approve the proposed rule change or institute proceedings to determine whether to disapprove it.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1456 Filed 1–22–04; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3555]

State of California (Amendment #4)

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective January 14, 2004, the above numbered declaration is hereby amended to establish the incident period for this disaster as beginning October 21, 2003, and continuing through February 2, 2004.

The incident type has also been expanded specifically for flooding, mudflow and debris flow directly related to the wildfires.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage remains as January 9, 2004, and for economic injury the deadline is July 27, 2004.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 15, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–1396 Filed 1–22–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Public Federal Regulatory Enforcement Fairness Roundtable; Region VI Regulatory Fairness Board

The Small Business Administration Region VI Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Roundtable on Thursday, February 12, 2004, at 8:30 a.m. at the New Orleans Airport Plaza Hotel, 2150 Veterans Blvd., Kenner, Louisiana 70062, to provide small business owners and representatives of trade associations with an opportunity to share information concerning the Federal regulatory enforcement and compliance environment.

Anyone wishing to attend or to make a presentation must contact Loretta Poree in writing or by fax, in order to be put on the agenda. Loretta Poree, Business Development Specialist, SBA Louisiana District Office, 365 Canal Street, Suite 2820, New Orleans, LA 70130, phone (504) 589–2853, fax (504) 589–2793, e-mail: *loretta.poree@sba.gov.*

For more information, see our Web site at *www.sba.gov/ombudsman.*

Dated: January 16, 2004.

Peter Sorum,

National Ombudsman (Acting).

[FR Doc. 04–1395 Filed 1–22–04; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Preparation of an Environmental Impact Statement for the East Bay Bus Rapid Transit Project in Berkeley, Oakland, and San Leandro, California

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of Intent (NOI) to prepare Environmental Impact Statement (EIS).

SUMMARY: The Federal Transit Administration (FTA), in cooperation with the Alameda Contra Costa Transit District (AC Transit), will prepare a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the East Bay Bus Rapid Transit Project (East Bay BRT), an approximately 18-mile transit improvement through the cities of Berkeley, Oakland, and San Leandro. Project features include: dedicated bus lanes along arterial streets connecting downtown Berkeley, the University of California, downtown Oakland, downtown San Leandro, and the Bayfair shopping mall in San Leandro; light-rail-like stations and low-level boarding platforms; proof-of-payment fare verification; transit priority signal treatments; and modern, high-capacity, low-floor, multi-door buses. The IES/EIR will evaluate the following alternatives: (1) A No-Project Alternative; (2) a Build Alternative with alignment options,hereinafter referred to as the East Bay BRT Alternative; and (3) any additional reasonable alternatives that emerge from the study process. The East Bay BRT Alternative could be constructed in stages. The staging of improvements will be identified during the studies.

Previous studies relevant to this action include the recently completed AC Transit Berkeley/Oakland/San Leandro Corridor Major Investment Study (AC Transit, September 2002) and the Alternative Modes Analysis (AC Transit and DKS Associates, April 1993). EIS/EIR preparation will be initiated through a formal NEPA scoping process, which solicits input on issues and potential project impacts to consider in the environment studies. Scoping will be accomplished through meetings and correspondence with interested persons, organizations, the general public, and federal, state, and local agencies. Letters describing the proposed action and soliciting comments have been sent to the appropriate federal, state, and local agencies, and to private organizations and individuals.

Scoping under NEPA is being complemented by informational meetings conducted under California CEQA (Californa Environmental Quality Act), which guides the preparation and content of the project EIR. AC Transit has conducted four information meetings in the study corridor, at which presentations were given on the environmental process to be undertaken and general features of the proposed project. Local, state and federal agencies and the general public were invited to these meetings, held May 28, June 2,

[3] *See* Securities Exchange Act Release No. 48875 (December 4, 2003), 68 FR 70072.

[4] 15 U.S.C. 78s(b)(2).

[5] 17 CFR 200.30–3(a)(31).

June 4, and June 5, 2003. Comments on issues and impacts to be considered in preparation of the EIS/EIR were obtained and recorded in the project information database.

DATES: *Comment Due Date*—Written comments on the scope of alternatives and impacts to be considered must be postmarked no later than March 16, 2004 and should be sent to AC Transit at the contact address below.

NEPA Scoping Meeting Date

A public scoping meeting will be held on February 11, 2004, from 6 p.m. to 8 p.m. at the Fruitvale-San Antonio Senior Center, located at 3301 East 12th Street, Suite 201, Oakalnd, CA 94601. The first 30 minutes of the meeting will be an open house and a viewing of exhibits. A brief presentation of the project purpose and alternatives will follow, with meeting participants provided the opportunity to comment on issues of interest. The open house will resume after the presentation and comment period. Project staff will be present to receive formal agency and public input regarding the scope of the environmental studies, key issues, and other suggestions. The meeting room is accessible to persons with disabilities. Any individual with a disability who requires special assistance, such as a sign language interpreter, or any individual who requires English language interpretation should contact Kathy Eichmeier of AC Transit at 510–891–4739 (e-mail) *planning@actransit.org* at least 48 hours in advance of the meeting in order for AC Transit to make necessary arrangements.

ADDRESSES: The scoping meeting will be held at the locations identified in the NEPA SCOPING MEETING DATE section above. Written comments should be sent to: Jim Cunradi, AC Transit Project Manager, East Bay BRT, Alameda Contra Costa Transit District, 1600 Franklin Street, Oakland, CA 94612. Phone: 510–891–4841 or (e-mail) *jcunradi@actransit.org.* To be added to the mailing list for the East Bay BRT Project, contact Mr. Jim Cunradi at the address listed above. Persons with special needs should leave a massage at the phone number above.

FOR FURTHER INFORMATION CONTACT: Paul Page, Federal Transit Administration, Office of Planning and Program Management, Phone: 415–744–2734, Fax: 415–744–2726 or Jim Cunradi, Alameda Contra Costa Transit District, at 510–891–4841 or (e-mail) *jcunradi@actransit.org.* Additional information on the East Bay BRT Project can also be found on the AC Transit Web site at: *http://ww.actransit.org/* (home page) or *http://www.actransit.org/onthehorizon/mis.wu* (BRT project).

SUPPLEMENTARY INFORMATION:

I. Project Background

The proposed project would be located in heavily urbanized areas of three adjacent East Bay cities that are major transit trip generators for AC Transit's fixed-route bus service: Berkeley on the north, Oakland, and San Leandro on the south. Over a two-year period from 1999 to 2001, AC Transit conducted a Major Investment Study (MIS) to examine the feasibility of providing new or improved transit service in an approximately 18-mile corridor connecting the downtown areas of each of these cities and nearby activity centers. The corridor is home to 320,000 people and includes some of the densest residential neighborhoods in the San Francisco Bay Area, often exceeding 25,000 persons per square mile. Major employment centers include downtown Oakland (70,000 employees), the University of California, Berkeley (19,000 employees and 31,000 students), and central Berkeley (13,000 employees). Buses in this corridor currently carry approximately 40,000 riders on the average weekday—nearly 20 percent of AC Transit's total weekday ridership. Heavy passenger loads and worsening traffic conditions have eroded schedule reliability, reduced travel speeds, and increased operating costs.

The MIS evaluated various alignments for transit improvements and a range of transit technologies and obtained public and agency input through an extensive outreach effort. In August 2001, the AC Transit Board of Directors adopted BRT as the preferred modal technology to be implemented along an alignment centered on the arterials of Telegraph Avenue in the north and International Boulevard/E. 14th Street in the south. The board recommended that the East Bay BRT Project and related improvements be studied in more detail with respect to potential environmental effects, engineering design requirements, and preferred operating strategies. The MIS process and findings were documented in several reports, currently available at AC Transit to interested parties. The proposed East Bay BRT Project was also adopted as part of the San Francisco Bay Area's financially constrained 2001 Regional Transportation Plan (adopted in 2001 with an amendment pending to include a strategy to increase transit ridership). The preparation of an EIS/EIR, accompanied by additional engineering design, marks the next phase for implementation of the proposed East Bay BRT Project.

II. Purpose and Need

The primary objectives of the East Bay BRT Project are as follows:

- *Improve transit in high ridership areas.* The study corridor includes some of AC Transit's most heavily used bus routes and some of the highest employment and residential densities in AC Transit's service area. Bus routes frequently operate with standing loads during both peak and off-peak periods. This occurs despite six-minute service frequencies and the use of the largest buses in AC Transit's fleet.
- *Improve the speed and reliability of bus transit.* The average speed of buses in the AC Transit service area has declined at a rate of 1 percent per year for the last two decades. In the study corridor it takes 100 minutes to travel the 18 miles from Berkeley to San Leandro. Frequent stops and starts and slowed, sometimes uneven, operations in congested conditions increase the wear and tear on buses and also fuel consumption. Improving average bus speeds and reducing stops would lead to more efficient operations and allow AC Transit to serve more passengers at a lower cost per passenger.
- *Better serve major travel markets.* The East Bay BRT would improve access to important employment and educational centers. A large travel market, projected to be 115,000 daily trips in 2020, could be better served by a new AC Transit corridor service. Investment in transit facilities and equipment would help transit to capture a larger share of this market, thereby improving the efficiency of the local roadway network and reducing the need for parking.
- *Reduce auto use and congestion.* The East Bay BRT is forecast to substantially increase transit use in the study corridor. A mode shift from non-transit to transit would reduce, or at least slow the growth of, auto traffic in an increasingly congested area. Greater transit and relatively less auto travel would result in reduced vehicular air emissions and improvement in air quality as well as transportation energy savings. This would improve the livability of existing communities.
- *Contribute to transit-oriented development.* Building upon strong existing transit-supportive land use patterns, the cities of Berkeley, Oakland, and San Leandro are attempting to redevelop many areas to encourage even greater use of transit and non-auto modes. The East Bay BRT is intended to

catalyze redevelopment efforts along Telegraph Avenue, International Boulevard/E. 14th Street, and in each of the downtowns. The project would provide nodes for concentrations of jobs, services, and residences and a high level of access for individuals traveling to and from these locations.

• *Improve mobility of low income, ethnic and transit dependent populations.* The proportion of non-white residents in the study corridor is 50 percent greater than in the AC Transit District overall. The proportion of persons living below the poverty level is twice that of the District. Low income is a strong indicator of transit dependency. Transit investment in the corridor would contribute to improved mobility for residents and better access to jobs.

III. Alternatives

Alternatives to be reviewed in the EIS/EIR include a No-Project Alternative; the East Bay BRT Alternative, with any alignment variations that are recommended for detailed evaluation; and any other reasonable alternatives that emerge from the scoping process. The No-Project Alternative assumes a 2025 condition of programmed land use; transit capital and service improvements that are programmed or planned to be implemented by AC Transit and other transit providers in the study area (*e.g.*, the Bay Area Rapid Transit District, or BART, a regional rail service provider); and other transportation system improvements such roadway expansions or upgrades.

The East Bay BRT Alternative would include dedicated transit lanes within existing urban arterials, where practicable; sheltered, low-platform passenger stations with automated bus arrival passenger information signs, lighting, and fare ticketing machines; off-vehicle self-service fare vending and on-board proof-of-payment verification; and transit traffic signal priority to reduce bus delays at signalized intersections, among other features. AC Transit is procuring modern low-floor high-capacity vehicles that would be assigned to the BRT service. Passenger stations would be spaced on average every one-third to one-half mile. BRT transitway and stations improvements would be made entirely within existing public rights-of-way whenever possible; BRT transitway improvements and bus operations outside of existing public-rights of way are not anticipated with the possible exception of required expansion of existing bus storage and maintenance facilities.

IV. Probable Effects

FTA and AC Transit will evaluate the transportation, environmental, social, and economic impacts of the alternatives. The Build Alternative is expected to increase bus transit ridership, improve mobility for area residents, many of whom are transit dependent, and enhance access to major employment and activity centers. Environmental impacts are anticipated in the following areas: traffic operations; parking; local access and circulation; visual and aesthetic effects; historic and cultural resources; disturbance of pre-existing hazardous wastes; and temporary construction-phase impacts. Impacts will be evaluated for both the construction period and for the long-term period of operation. Mitigation measures will be identified and evaluated for avoiding and reducing adverse effects.

To ensure the full range of issues related to this proposed action is addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments, suggestions, and questions concerning this proposed action and the EIS/EIR should be directed to the contacts listed above.

V. FTA Procedures

In accordance with FTA policy, all federal laws, regulations and executive orders affecting project development, including but not limited to the regulations of the Council on Environmental Quality and FTA implementing NEPA (40 CFR parts 1500–1508 and 23 CFR part 771), the conformity requirements of the Clean Air Act, section 4040 of the Clean Water Act, Executive Orders 11988, 11990 and 12898 regarding floodplains, wetlands, and environmental justice, respectively, the National Historic Preservation Act, the Endangered Species Act, and section 4(f) of the Department of Transportation Act, will be addressed to the maximum extent practicable during the NEPA process. Prior transportation planning studies may be pertinent to establishing the purpose and need for the proposed action and the range of alternatives to be evaluated in detail in the EIS/EIR. The Draft EIS/EIR will be prepared simultaneously with conceptual engineering for the alternatives, including bus stop and alignment options. The Draft EIS/EIR process will address the potential use of federal funds for the proposed action, as well as assessing social, economic, and environmental impacts of the proposed East Bay BRT Project. The East Bay BRT Project will be refined to minimize and mitigate any adverse impacts. After publication, the Draft EIS/EIR will be available for public and agency review and comment, and a public hearing will be held. Based on the Draft EIS/EIR and comments received, AC Transit will select a locally preferred alternative (LPA) for further assessment in the Final EIS/EIR, which will be based on preliminary engineering of the LPA and other remaining alternatives, and AC Transit will apply for FTA approval to initiate Preliminary Engineering of the preferred alternative.

Issued on: January 13, 2004.

Leslie T. Rogers,

Regional Administrator, Region IX, Federal Transit Administration.

[FR Doc. 04–1397 Filed 1–22–04; 8:45 am]

BILLING CODE 4910–57–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2004–16876]

Reports, Forms, and Recordkeeping Requirements

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

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before March 23, 2004.

ADDRESSES: Comments must refer to the docket notice numbers cited at the beginning of this notice and be submitted to Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB Clearance Number. It is requested, but not required, that 2 copies of the comment be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Gayle Dalrymple, NHTSA, 400 Seventh Street, SW., Room 5309, NVS–123, Washington, DC 20590. Ms. Dalrymple's telephone number is (202) 366–5559. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected;

(iv) How 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, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

Title: Exemption for the Make Inoperative Prohibition.

OMB Control Number: 2127–0635.

Affected Public: Businesses that modify vehicles so that the vehicles may be used by persons with disabilities.

Form Number: None.

Abstract: On February 27, 2001, NHTSA published a final rule (66 FR 12638) to facilitate the modification of motor vehicles so that persons with disabilities can drive or ride in them as passengers. In that final rule, the agency issued a limited exemption from a statutory provision that prohibits specified types of commercial entities from either removing safety equipment or features installed on motor vehicles pursuant to the Federal motor vehicle safety standards or altering the equipment or features so as to adversely affect their performance. The exemption is limited in that it allows repair businesses to modify only certain types of federally-required safety equipment and features, under specified circumstances. The regulation is found at 49 CFR part 595 subpart C—Vehicle Modifications to Accommodate People With Disabilities.

This final rule included two new "collections of information," as that term is defined in 5 CFR part 1320 Controlling Paperwork Burdens on the Public: modifier identification and a document to be provided to the owner of the modified vehicle stating the exemptions used for that vehicle and any reduction in load carrying capacity of the vehicle of more than 100 kg (220 lbs).

Modifiers who take advantage of the exemption created by this rule are required to furnish NHTSA with a written document providing the modifier's name, address, and telephone number, and a statement that the modifier is availing itself of the exemption. The rule requires:

"S595.6 Modifier Identification

(a) Any motor vehicle repair business that modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle and intends to avail itself of the exemption provided in 49 CFR 595.7 shall furnish the information specified in paragraphs (a)(1) through (3) of this section to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

(1) Full individual, partnership, or corporate name of the motor vehicle repair business.

(2) Residence address of the motor vehicle repair business and State of incorporation if applicable.

(3) A statement that the motor vehicle repair business modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle and intends to avail itself of the exemption provided in 49 CFR 595.7.

(b) Each motor vehicle repair business required to submit information under paragraph (a) of this section shall submit the information not later than August 27, 2001. After that date, each motor vehicle repair business that modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle and intends to avail itself of the exemption provided in 49 CFR 595.7 shall submit the information required under paragraph (a) not later than 30 days after it first modifies a motor vehicle to enable a person with a disability to operate, or ride as a passenger in, the motor vehicle. Each motor vehicle repair business who has submitted required information shall keep its entry current, accurate and complete by submitting revised information not later than 30 days after the relevant changes in the business occur."

This requirement is a one-time submission unless changes are made to the business as described in paragraph (b). NHTSA estimates that there are currently 471 businesses making modifications to motor vehicles to accommodate persons with disabilities. Of those 471, we estimate 85 percent will need to use the exemptions provided by 49 CFR 595.7 (400 businesses). The initial registration of modifiers wishing to use the exemptions occurred in 2001. Now, we assume that five percent of the 400 businesses currently modifying vehicles will need to change their information or new registrants will elect to use the exemptions. We estimate registrations from 20 businesses each year of: 20 businesses × 10 minutes/business = 3.33 hours.

We estimate the material cost associated with each submission to be 47 cents per responding business, or $9.40 nationwide annually.

Burden means the total time, effort, or financial resources expended by person to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instruction; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

We seek comment on:

1. Is our estimate of 471 businesses engaged in vehicle modification to accommodate people with disabilities correct?

2. Are we correct in assuming that a maximum of 85 percent of those 471 businesses, or 400 businesses, will need to use the exemptions provided by 49 CFR 595.7?

3. Are our estimates of the burden hours and material cost of compliance with 49 CFR 595.6 reasonable?

Modifiers who avail themselves of the exemptions in 49 CFR 595.7 are required to keep a record, for each applicable vehicle, listing which standards, or portions thereof, no longer comply with the Federal motor vehicle safety standards and to provide a copy to the owner of the vehicle modified (*see* 49 CFR 595.7 (b) and (e) as published in the final rule).

We estimate that:

1. There are approximately 2,700 vehicles modified for persons with disabilities per year by 471 businesses,

2. If 85 percent of the 471 businesses use the exemptions provided by 49 CFR 595.7, those 400 businesses will modify 2300 vehicles annually, and

3. The burden for producing the record required by 49 CFR 595.7 in accordance with paragraph (e) for those vehicles will be 767 hours per year nationwide.

In the final rule we anticipated that the least costly way for a repair business to comply with this portion of the new rule would be to annotate the vehicle modification invoice as to the exemption, if any, involved with each item on the invoice. The cost of preparing the invoice is not a portion of our burden calculation, as that preparation would be done in the normal course of business. The time needed to annotate the invoice, we estimate, is 20 minutes. Therefore, the burden hours for a full year are calculated as: 2300 vehicles × 20 minutes/vehicle = 766.7 hours.

This burden includes the calculation required by 49 CFR 595.7(e)5, but not the gathering of the information required for the calculation. That information would be gathered in the normal course of the vehicle modification. The only extra burden required by the rule is the calculation of the reduction in load carrying capacity and conveying this information to the vehicle owner. Again we are assuming that annotation on the invoice is the least burdensome way to accomplish this customer notification.

There will be no additional material cost associated with compliance with this requirement since no additional materials need be used above those used to prepare the invoice in the normal course of business. We are assuming it is normal and customary in the course of vehicle modification business to prepare an invoice, to provide a copy of the invoice to the vehicle owner, and to keep a copy of the invoice for five years after the vehicle is delivered to the owner in finished form.

We seek comment on whether our assumptions about the following are reasonable:

1. The document required by 49 CFR 595.7(b) and specified in paragraph (e) will need to be prepared for approximately 2300 vehicles modified nationwide per year,

2. Annotation of each vehicle modification invoice as to which exemptions were used will take an average of 20 minutes, and

3. It is normal in the course of vehicle modification business to prepare an invoice, to provide a copy of the invoice to the vehicle owner, and to keep a copy of the invoice for five years after the vehicle is delivered to the owner in finished form.

Estimated Annual Burden: 770 hours, and $9.40.

Number of Respondents: 400.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: January 16, 2004.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 04–1399 Filed 1–22–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 16, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before February 23, 2004 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0159.

Form Number: IRS Form 3520.

Type of Review: Extension.

Title: Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.

Description: Form 3520 is filed by U.S. persons who create a foreign trust, transfer properly to a foreign trust, receive a distribution from a foreign trust, or receive a large gift from a foreign source. IRS uses the form to identify U.S. persons who may have transactions that may trigger a taxable event in the future.

Respondents: Business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 2,000.

Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping—42 hr., 34 min.
Learning about the law or the form—4 hr., 38 min.
Preparing the form—6 hr., 28 min.
Sending the form to the IRS—18 min.

Frequency of Response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 108,300 hours.

OMB Number: 1545–1224.

Regulation Project Number: INTL–112–88 Final.

Type of Review: Extension.

Title: Allocation and Apportionment of Deduction for State Income Taxes.

Description: This regulation provides guidance on when and how the deduction for state income taxes is to be allocated and proportioned between gross income from sources within and without the United States in order to determine the amount of taxable income from those sources. The reporting requirements in the regulation affect those taxpayers claiming foreign tax credits who elect to use an alternative method from that described in the regulation to allocate and apportion deductions for state income taxes.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 1,000.

Estimated Burden Hours Respondent: 1 hour.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 1,000 hours.

OMB Number: 1545–1566.

Notice Number: Notice 97–66.

Type of Review: Extension.

Title: Certain Payments Made Pursuant to a Securities Lending Transaction.

Description: Notice 97–66 modifies final regulations which are effective

November 145, 1997. The Notices relaxes the statement requirement with respect to substitute interest payments relating to securities loans and repurchased transactions. It also provides a withholding mechanism to eliminate excessive withholding on multiple payments in a chain of substitute dividend payments.

Respondents: Business or other for-profit, Not-for-profit-institutions.

Estimated Number of Respondents: 377,500.

Estimated Burden Hours Respondent: 10 minutes.

Frequency of Response: Other (once).

Estimated Total Reporting Burden: 61,750 hours.

Clearance Officer: Robert M. Coar, (202) 622–3579, Internal Revenue Service, Room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–1427 Filed 1–22–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8868.

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 8868, Application for Extension of Time To File an Exempt Organization Return.

DATES: Written comments should be received on or before March 23, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Application for Extension of Time To File an Exempt Organization Return.

OMB Number: 1545–1709.

Form Number: 8868.

Abstract: Sections 6081 and 1.6081 of the Internal Revenue Code and regulations permit the Internal Revenue Service to grant a reasonable extension of time to file a return. Form 8868 provides the necessary information for a taxpayer to apply for an extension to file a fiduciary or certain exempt organization return.

Current Actions: There are no changes being made to the form at this time.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 248,932.

Estimated Time Per Respondent: 5 hrs., 31 mins.

Estimated Total Annual Burden Hours: 1,373,335.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 15, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1486 Filed 1–22–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request For Form 8038–T

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 8038–T, Arbitrage Rebate and Penalty in Lieu of Arbitrage Rebate.

DATES: Written comments should be received on or before March 23, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Arbitrage Rebate and Penalty in Lieu of Arbitrage Rebate.

OMB Number: 1545–1219.

Form Number: 8038–T.

Abstract: Form 8038–T is used by issuers of tax exempt bonds to report and pay the arbitrage rebate and to elect and/or pay various penalties associated with arbitrage bonds. The issuers include state and local governments.

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: State, local or tribal governments.

Estimated Number of Respondents: 2,500.

Estimated Time Per Response: 30 hours, 1 minute.

Estimated Total Annual Burden Hours: 75,050.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 15, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1487 Filed 1–22–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8610 and Schedule A (Form 8610)

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 8610, Annual Low-Income Housing Credit Agencies Report, and Schedule A (Form 8610), Carryover Allocation of Low-Income Housing Credit.

DATES: Written comments should be received on or before March 23, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 8610, Annual Low-Income Housing Credit Agencies Report, and Schedule A (Form 8610), Carryover Allocation of Low-Income Housing Credit.

OMB Number: 1545–0990.

Form Number: Form 8610 and Schedule A (Form 8610).

Abstract: State housing credit agencies (Agencies) are required by Code section 42 (l)(3) to report annually the amount of low-income housing credits that they allocated to qualified buildings during the year. Agencies report the amount allocated to the building owners and to the IRS in part I of Form 8609. Carryover allocations are reported to the Agencies in carryover allocation documents. The Agencies report the carryover allocations to the IRS on Schedule A (Form 8610). Form 8610 is a transmittal and reconciliation document for Forms 8609, Schedule A (Form 8610), binding agreements, and election statements.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local or tribal governments.

Estimated Number of Respondents: 53.

Estimated Time Per Respondent: 106 hours, 23 minutes.

Estimated Total Annual Burden Hours: 5,638.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 15, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1488 Filed 1–22–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8859

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 8859, District of Columbia First-Time Homebuyer Credit.

DATES: Written comments should be received on or before March 23, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: District of Columbia First-Time Homebuyer Credit.

OMB Number: 1545–1584.

Form Number: 8859.

Abstract: Form 8859 is used to claim the District of Columbia first-time homebuyer credit. The information collected will be used to verify that the credit was computed correctly.

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: Individuals or households.

Estimated Number of Responses: 1,900.

Estimated Time Per Response: 1 hour, 8 min.

Estimated Total Annual Burden Hours: 2,166.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 15, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1489 Filed 1–22–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8861

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, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8861, Welfare-to-Work Credit.

DATES: Written comments should be received on or before March 23, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert Coar, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Welfare-to-Work Credit.

OMB Number: 1545–1569.

Form Number: 8861.

Abstract: Section 51A of the Internal Revenue Code allows employers an income tax credit of 35% of the first $10,000 of firs-year wages and 50% of the first $10,000 of second-year wages paid to long-term family assistance recipients. Form 8861 is used to compute the credit.

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: 500.

Estimated Time Per Respondent: 11 hr., 45 min.

Estimated Total Annual Burden Hours: 5,875.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 15, 2004.

Robert Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–1490 Filed 1–22–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0222]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The National Cemetery Administration (NCA), 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 for which approval has expired, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information to obtain a government provided headstone or grave marker for eligible veterans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 23, 2004.

ADDRESSES: Submit written comments on the collection of information to Jocelyn Hearn, National Cemetery Administration (402B1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Please refer to "OMB Control No. 2900–0222" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Mechelle Powell at (202) 501–1960 or Fax (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–21), 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, NCA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of NCA's functions, including whether the information will have practical utility; (2) the accuracy of NCA'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.

Title: Application for Standard Government Headstone or Marker for Installation in a Private or State Veterans' Cemetery, VA Form 40–1330.

OMB Control Number: 2900–0222.

Type of Review: Extension of a currently approved collection.

Abstract: The form is used by the next of kin or other responsible parties to apply for Government-provided headstones or markers for unmarked graves of eligible veterans. The information is used by VA to determine the veteran's eligibility for, and entitlement to this benefit.

Affected Public: Individuals or Households.

Estimated Annual Burden: 83,500 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 334,000.

Dated: January 13, 2004.
By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 04–1388 Filed 1–22–04; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Friday,
January 23, 2004

Part II

Department of Health and Human Services

Office of the Secretary

45 CFR Part 162

HIPAA Administrative Simplification: Standard Unique Health Identifier for Health Care Providers; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 162

[CMS–0045–F]

RIN 0938–AH99

HIPAA Administrative Simplification: Standard Unique Health Identifier for Health Care Providers

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Final rule.

SUMMARY: This final rule establishes the standard for a unique health identifier for health care providers for use in the health care system and announces the adoption of the National Provider Identifier (NPI) as that standard. It also establishes the implementation specifications for obtaining and using the standard unique health identifier for health care providers. The implementation specifications set the requirements that must be met by "covered entities": Health plans, health care clearinghouses, and those health care providers who transmit any health information in electronic form in connection with a transaction for which the Secretary has adopted a standard (known as "covered health care providers"). Covered entities must use the identifier in connection with standard transactions.

The use of the NPI will improve the Medicare and Medicaid programs, and other Federal health programs and private health programs, and the effectiveness and efficiency of the health care industry in general, by simplifying the administration of the health care system and enabling the efficient electronic transmission of certain health information. This final rule implements some of the requirements of the Administrative Simplification subtitle F of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

EFFECTIVE DATE: May 23, 2005, except for the amendment to § 162.610, which is effective on January 23, 2004. Health care providers may apply for NPIs beginning on, but no earlier than, May 23, 2005.

FOR FURTHER INFORMATION CONTACT: Patricia Peyton, (410) 786–1812.

SUPPLEMENTARY INFORMATION:

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $10. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**. This **Federal Register** document is also available from the **Federal Register** online database through GPO access, a service of the U.S. Government Printing Office. The Web site address is *http://www.access.gpo.gov/nara/index.html*. This document is also available from the Department's Web site at *http://aspe.hhs.gov/admnsimp/*.

I. Background

In order to administer its programs, a health plan assigns identification numbers to its providers of health care services and its suppliers. A health plan may be, among other things, a Federal program such as Medicare, a State Medicaid program, or a private health plan. The identifiers it assigns are frequently not standardized within a single health plan or across health plans, which results in the single health care provider having different identification numbers for each health plan, and often having multiple billing numbers issued within the same health plan. This complicates the health care provider's claims submission processes and may result in the assignment of the same identification number to different health care providers by different health plans.

A. NPI Initiative

In July 1993, the Centers for Medicare & Medicaid Services (CMS) (formerly the Health Care Financing Administration (HCFA)), undertook a project to develop a health care provider identification system to meet the needs of the Medicare and Medicaid programs and, ultimately, the needs of a national identification system for all health care providers. Active participants in the project represented both government and the private sector. The project participants decided to develop a new identifier for health care providers because existing identifiers did not meet the criteria for national standards. The new identifier, known as the National Provider Identifier (NPI), did not have the limitations of the existing identifiers, and it met the criteria that had been recommended by the Workgroup for Electronic Data Interchange (WEDI) and the American National Standards Institute (ANSI).

B. The Results of the NPI Initiative

As a result of the project, and before the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, which was enacted on August 21, 1996, required the adoption and use of a standard unique identifier for health care providers, CMS and the other project participants accepted the NPI as the standard unique health identifier for health care providers. CMS decided to implement the NPI for Medicare, and began work on developing the National Provider System (NPS), which was intended to capture health care provider data and be equipped with the technology necessary to maintain and manage the data. The NPS was intended to be able to accept health care provider data in order to uniquely identify a health care provider and assign it an NPI. The NPS was intended to be designed so it could be used by other Federal and State agencies, and by private health plans, if deemed appropriate, to enumerate their health care providers that did not participate in Medicare.

C. Legislation

The Congress included provisions to address the need for a standard unique health identifier for health care providers and other health care system needs in the Administrative Simplification provisions of HIPAA. Through subtitle F of title II of that law, the Congress added to title XI of the Social Security Act (the Act) a new part C, entitled "Administrative Simplification." (Pub. L. 104–191 affects several titles in the United States Code.) The purpose of part C is to improve the Medicare and Medicaid programs in particular, and the efficiency and effectiveness of the health care system in general, by encouraging the development of a health information system through the establishment of standards and implementation specifications to facilitate the electronic transmission of certain health information.

Part C of title XI consists of sections 1171 through 1179 of the Act. These sections define various terms and impose requirements on the Secretary of the Department of Health and Human Services (HHS), health plans, health care clearinghouses, and certain health care providers concerning the adoption of standards and implementation specifications relating to health

information. Section 1173(b) of the Act requires the Secretary to adopt standards providing for a standard unique health identifier for each individual, employer, health plan, and health care provider for use in the health care system and to specify the purposes for which the identifiers may be used. It also requires the Secretary to consider multiple locations and specialty classifications for health care providers in developing the standard health identifier for health care providers. We discussed other general aspects of the HIPAA statute in greater detail in the May 7, 1998, proposed rule (63 FR 25320).

D. Plan for Implementing Administrative Simplification Standards

On May 7, 1998, we proposed a standard unique health identifier for health care providers and requirements concerning its implementation (63 FR 25320). That proposed rule also set forth requirements that health plans, health care clearinghouses, and covered health care providers would have to meet concerning the use of the standard. On May 7, 1998, we also proposed standards for transactions and code sets (63 FR 25272). We published the final rule, entitled Health Insurance Reform: Standards for Electronic Transactions (the Transactions Rule), on August 17, 2000 (65 FR 50312). On May 31, 2002, in two separate proposed rules, we published proposed modifications to the Standards for Electronic Transactions. We published a final rule adopting modifications to the Transactions Rule on February 20, 2003 (68 FR 8381).

On November 3, 1999, we proposed standards for privacy of individually identifiable health information (64 FR 59918). We published the final rule, entitled Standards for Privacy of Individually Identifiable Health Information (the Privacy Rule), on December 28, 2000 (65 FR 82462). On March 27, 2002, we proposed modifications to the Privacy Rule. On August 14, 2002, we published modifications to the Privacy standards in a final rule, entitled "Standards for Privacy of Individually Identifiable Health Information" (the Privacy Rule Modifications) (67 FR 53182).

On June 16, 1998, we proposed the standard unique employer identifier (63 FR 32784). On May 31, 2002, we published the final rule, entitled "Standard Unique Employer Identifier" (67 FR 38009).

On August 12, 1998, we proposed standards for security and electronic signatures (63 FR 43242). On February 20, 2003, we published the final rule on security standards (the Security Rule) (68 FR 8334).

On April 17, 2003, we published an interim final rule adopting procedures for the investigation and imposition of civil money penalties and the conduct of hearings when the imposition of a penalty is challenged (68 FR 18895). The interim final rule is the first installment of a larger rule, known as the Enforcement Rule, the rest of which is to be proposed at a later date.

We will be proposing standards for the unique health plan identifier and claims attachments.

In the May 7, 1998, proposed rule for the standard unique health identifier for health care providers, we proposed to add a new part 142 to title 45 of the Code of Federal Regulations (CFR) for the administrative simplification standards and requirements. We have decided to codify the final rules in 45 CFR part 162 instead of part 142. The Transactions Rule (65 FR 50312) explains why we made this change and lists the subparts and sections comprising part 162. In this final rule, we reference the proposed text using part 142, and reference the final text using part 162.

In the Transactions Rule, we addressed (at 65 FR 50314) the comments that were made on issues that were common to the proposed rules on standards for electronic transactions, the standard employer identifier, the standards for security and electronic signatures, and the standard health care provider identifier. Those issues relate to applicability, definitions, general effective dates, new and revised standards, and the aggregate impact analysis. In that final rule, we set out the general requirements in part 160 subpart A and part 162 subpart A. We refer the reader to that rule for more information on all but our discussion of issues pertinent to the standard unique health identifier for health care providers and the definition of health care provider.

E. Employer Identifier Standard: Waiver of Proposed Rulemaking and Effective Date for Uses of Employer Identifier

As stated in section I.D., "Plan for Implementing Administrative Simplification Standards," of this preamble, we published the final rule that adopted the standard unique employer identifier on May 31, 2002 (67 FR 38009). The Employer Identifier was adopted as that standard effective July 30, 2002. We amend § 162.610 as explained below.

We ordinarily publish a correcting amendment of proposed rulemaking in the **Federal Register** and invite public comment on the correcting amendment before its provisions can take effect. We also ordinarily provide a delay of 30 days in the effective date of the final rule. We can waive notice and comment procedure and the 30-day delay in the effective date, however, if we find good cause that a notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and we incorporate a statement in the correcting amendment of this finding and the reasons supporting that finding.

We find that seeking public comment on and delaying the effective date of this correcting amendment would be contrary to the public interest. Section 1173(b)(2) of the Act requires that the standards regarding unique health care identifiers specify the purposes for which they may be used. Section 162.610 requires a covered entity to use the standard unique employer identifier—the employer identification number (EIN) assigned by the Internal Revenue Services (IRS), U.S. Department of the Treasury—in standard transactions that require an employer identifier. Unless § 162.610 is amended to permit use of the standard unique employer identifier for all other lawful purposes, the Act could be read to subject covered entities that use their EIN for other purposes to civil money penalties under section 1176 of the Act and criminal penalties under section 1177 of the Act, a result that we did not intend. The IRS requires any taxpayer assigned an EIN to use the EIN as its taxpayer identifying number. Statutes and regulations also authorize or require other Federal agencies, including the Departments of Agriculture, Commerce, Education, Housing and Urban Development, and Labor, to collect EINs in connection with administering various Federal programs and laws. Since some of these agencies may conduct transactions with covered entities or may be covered entities in their own right, failure to promptly publish the correcting amendment could cause conflict between § 162.610 and other statutory and regulatory directives, generating uncertainty for covered entities and potentially disrupting the administration of other Federal programs and laws. We believe that it is necessary to eliminate that uncertainty and potential disruption and to do so as soon as practicable by amending § 162.610 to include as permitted uses of the EIN all other lawful purposes. Therefore, we find good cause to waive the notice and comment procedure and the 30-day

delay in the effective date as being contrary to the public interest.

II. Provisions of the Regulations and Discussion of Public Comments

Within each section of this final rule, we set forth the proposed provision contained in the May 7, 1998, proposed rule, summarize and respond (if appropriate) to the comments we received on the proposed provision, and present the final provision.

It should be noted that the proposed rule contained multiple proposed "requirements." In this final rule, we replace the term "requirement" with the term "implementation specification," where appropriate. We do this to maintain consistency with the use of those terms as they appear in the statute and the other published HIPAA rules. Within the comment and response portion of this final rule, for purposes of continuity, however, we use the term "requirement" when we are referring specifically to matters from the proposed rule. In all other instances, we use the term "implementation specification."

In the May 7, 1998, proposed rule, we proposed a standard unique health identifier for health care providers. We listed the kinds of identifying information that would be collected about each health care provider in order to assign the identifier.

In addition to the requirement that health care providers use the standard, the May 7, 1998, proposed rule also proposed other requirements for health care providers:

- Each health care provider must obtain, by application if necessary, an NPI.
- Each health care provider must accept and transmit NPIs whenever required on all standard transactions it accepts or transmits electronically.
- Each health care provider must communicate to the National Provider System (NPS) any changes to the data elements in its record in the NPS within 60 days of the change.
- Each health care provider may receive and use only one NPI. An NPI is inactivated upon death or dissolution of the health care provider.

A. General Provisions

1. Applicability

The May 7, 1998, proposed rule for the standard unique health identifier for health care providers discussed the applicability of HIPAA to covered entities. The proposed rule provided that section 262 (Administrative Simplification) of HIPAA applies to health plans, health care clearinghouses, and health care providers when health care providers electronically transmit any of the transactions to which section 1173(a)(1) of the Act refers. Comments received with respect to Applicability are discussed in sections II. A. 2., "Definition of Health Care Provider," and II. A. 5., "Implementation Specifications for Health Care Providers, Health Plans, and Health Care Clearinghouses" of this preamble.

2. Definition of Health Care Provider

In the Transactions Rule, we summarized the comments we received on the definitions we proposed in the May 7, 1998, NPI proposed rule (at 63 FR 25324), with the exception of the definition of "health care provider." We codified all of the definitions in 45 CFR 160.103 and 45 CFR 162.103. Specifically, we codified the definition of "health care provider" at 45 CFR 160.103. We are responding in this preamble to the comments we received on the definition of "health care provider," as we believe that these comments present issues that are more relevant to the standard unique health identifier for health care providers. As appropriate, our responses refer to discussions and decisions that were published in the Privacy Rule (65 FR 82462). This final rule does not change the definition of "health care provider" at § 160.103. This final rule adds the definition of "covered health care provider" at § 162.402.

Proposed Provisions (§ 142.103)

In the May 7, 1998, proposed rule, we proposed to define "health care provider" as a provider of services as defined in section 1861(u) of the Act, a provider of medical or other health services as defined in section 1861(s) of the Act, and any other person who furnishes or bills and is paid for health care in the normal course of business (63 FR 25325). We based the proposed definition on section 1171(3) of the Act for the reasons we stated in the May 7, 1998, proposed rule.

Comments and Responses on the Definition of "Health Care Provider".

Comment: We received many comments concerning the kinds of entities that should receive NPIs. Some of these comments recommended that the definition of a "health care provider" be constructed narrowly to restrict the kinds of entities that would be eligible to receive NPIs; others recommended that the definition be constructed broadly. Comments did not reflect a consensus or majority view across all commenters or even within the two groups of commenters who recommended a narrow or a broad definition of "health care provider."

Commenters favoring a narrow definition of "health care provider" gave the following examples of entities to which NPIs should or should not be issued:

- Only to those licensed to furnish health care.
- Only to individuals and entities that furnish health care.
- Only to billing health care providers.
- Only to licensed health care providers that furnish care, bill, and are paid by third party payers for services.
- Not to physicians who have opted out of government medical programs.
- Not to groups, partnerships, or corporations.
- Not to entities that bill or are paid for health care services furnished by other health care providers. A billing or pay-to entity should be identified by its taxpayer identifying number, not by an NPI.
- Not to clearinghouses, administrative services only vendors, billing services, or health care provider service locations.

Commenters favoring a broad definition of "health care provider" gave the following examples of entities to which NPIs should be issued:

- Any health care provider that has a taxpayer identifying number.
- Any individual or organization, including Independent Practice Associations and clearinghouses, that ever has custody of or transmits a health care claim or encounter record.
- All health care provider groups.
- Each billing health care provider, health care provider billing location, pay-to provider, performing health care provider, health care provider service location, and health care provider specialty.
- Each incorporated individual and "doing business as" name of an organization.
- The lowest organizational level of an entity that needs to be identified.

Response: Although there was no consensus from commenters as to which entities should receive NPIs, several principles can be inferred.

Many commenters who favored a narrow definition of "health care provider" want to simplify the current situation for health care providers; that is, a health care provider may have many health care provider numbers assigned by health plans for different business functions. The health care provider numbers sometimes represent the actual health care provider that furnishes health care, but may also represent the health care provider's

service locations, corporate headquarters, specialties, pay-to arrangements, or contracts. Those who favored a narrow definition generally believed the NPI should represent only the health care provider that furnishes health care.

Commenters who favored a broad definition of "health care provider" recognized the many business functions and uses in health care transactions fulfilled by health care provider numbers today. These business functions will continue to need to be performed after the implementation of the NPI. In order for the NPI to replace the multiple, proprietary health care provider numbers assigned by health plans today, the NPI must be assigned so that the business functions can continue. Those who favored a broad definition believed that if the NPI is not able to identify the health care provider entities that must be identified in an electronic health care claim or equivalent encounter information transaction, health plans will be forced to continue to use their existing proprietary health care provider numbers and the NPI will add to, rather than replace or simplify, health care provider numbering systems currently in use.

The varying needs for health care provider numbers guided our decisions on which entities would be eligible to receive NPIs. Our general rule is that all health care providers, as we define that term in the regulations, will be eligible to receive NPIs. We discuss this in detail later in this section.

It is important to note that not all health care providers who are eligible to receive NPIs will necessarily be required to comply with the HIPAA regulations. This is because some health care providers are not covered entities under HIPAA. The fact that a health care provider obtains an NPI does not impose covered entity status on that health care provider. Only those entities that (1) meet the definition of health care provider at § 160.103, and (2) transmit health information in electronic form on their own behalf, or that use a business associate to transmit health information in electronic form on their behalf, in connection with a transaction for which the Secretary has adopted a standard (a covered transaction) are health care providers who are required to comply with the HIPAA regulations. These health care providers are covered health care providers and are considered "covered entities" under HIPAA. As noted above, we add a definition of "covered health care provider" at § 162.402.

The following discussion clarifies the eligibility of health care providers to be assigned NPIs and distinguishes between those that are covered entities under HIPAA and those that are not.

"Health care provider" is defined in the regulations at § 160.103 as follows "Health care provider means a provider of services as defined in section 1861(u) of the Act, 42 U.S.C. 1395X(u), a provider of medical or health services as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." Examples of health care providers included in this definition are: Physicians and other practitioners; hospitals and other institutional providers; suppliers of durable medical equipment, supplies related to health care, prosthetics, and orthotics; pharmacies (including on-line pharmacies) and pharmacists; and group practices. Additional examples are health maintenance organizations that may be considered health care providers as well as health plans if they also provide health care.

There are individuals and organizations that furnish atypical or nontraditional services that are indirectly health care-related, such as taxi, home and vehicle modifications, insect control, habilitation, and respite services. These types of services are discussed in the Transactions Rule at 65 FR 50315. As stated in that Rule, many of these services do not qualify as health care services because the services do not fall within our definition of "health care." An individual or organization must determine if it provides any services that fall within our definition of "health care" at § 160.103. If it does provide those services, it is considered a health care provider and would be eligible for an NPI. If it does not, and does not provide other services or supplies that bring it within the definition of "health care provider," it would not be a health care provider under HIPAA, and would not be eligible to receive an NPI.

The nonhealth care services of some atypical or nontraditional service providers are reimbursed by some health plans. Nevertheless, there is no requirement under HIPAA to use the standard transactions when submitting electronic claims for these types of services, because claims for these services are not claims for health care. (Health plans, however, are free to establish their own requirements for submitting claims in these circumstances, which means that a health plan could require atypical and nontraditional service providers to submit standard transactions. The health plans could not require these entities to obtain NPIs to use in those transactions, however, because those entities are not eligible to receive NPIs.)

There are other individuals and organizations that, in the normal course of business, bill or receive payment for health care that is furnished by health care providers. These individuals and organizations may include billing services, value-added networks, and repricers. While these entities bill for health care, we do not read the statutory definition of "health care provider" as encompassing them. Rather, they would usually be acting as agents of health care providers in performing the billing function, or as health care clearinghouses assuming that they perform the data translation function described in the definition of "health care clearinghouse" at § 160.103. The definition of "health care clearinghouse" specifically lists these entities as examples of health care clearinghouses. The health care industry does not consider these types of entities to be health care providers. Further, we do not believe that the Congress intended for them to be considered as such, as the statutory definition of "health care-provider" refers only to "other person furnishing health care services or supplies" and thus would exclude persons who only bill for, but do not furnish, health care services or supplies. Thus, this final rule does not include billing services and similar entities as health care providers. Therefore, because these kinds of entities are not health care providers, they will not be eligible for NPIs.

Comment: The Workgroup for Electronic Data Interchange (WEDI) commented that the NPI should be the only identifier for health care providers when the HIPAA transactions require provider identification. WEDI suggested that, to the extent provider-payer contracts require locations, location codes, and contract references, these should be handled outside of the NPS. To the extent numbers associated with providers (for example, Taxpayer Identifying Number (TIN) and Drug Enforcement Administration (DEA) number) are required for specific purposes other than provider identification, the HIPAA transactions should accommodate those numbers (and qualifiers) in the appropriate segments of the transactions.

WEDI recommended that:

- Health care providers who are individual human beings obtain one and only one NPI for life;
- Health care providers endeavor to have only one NPI per organization, but

that the final decision on how many NPIs are necessary for an organization health care provider be left to the health care provider; and

• At a minimum, and as the most critical criterion, the NPS data associated with any additional NPIs that an organization decides to obtain must not be identical to those associated with any other NPI in use by the organization.

Some commenters supported our proposal that, if a separate physical location of an organization health care provider, member of a chain, or subpart of an organization health care provider needs to be separately identified, it would be eligible to get a separate NPI. A few commenters stated that different physical locations or subparts of an organization health care provider should not get separate NPIs. One commenter recommended that the NPS issue separate NPIs for separate physical locations, members of a chain, or subparts of an organization health care provider only if these are separately licensed or certified. The commenter believes that the issuance of separate licenses and certifications justifies their recognition as separate health care providers. Another commenter recommended that the NPS issue separate NPIs for these entities if Medicare considers the entities to be separate health care providers. A number of large health plans consider each physical location of a supplier of health care-related supplies to be a separate health care provider in order to uniquely identify it on claims to enable accurate pricing and reimbursement.

Response: We agree in concept with the recommendations made by WEDI.

At the time we published the proposed rule and received public comments on it, the Secretary had not yet adopted standards for any of the HIPAA Administrative Simplification provisions. Since that time, and as noted in section I. D., "Plan for Implementing Administrative Simplification Standards" of this preamble, the Secretary has adopted a number of Administrative Simplification standards, including the Privacy and Security standards. The following discussion describes the assignment of NPIs to certain organization health care providers and the relationship, if any, of the assignment methodology to the standards and implementation specifications adopted in the Privacy and Security Rules.

Many health care providers that are organizations (such as hospitals and chains of suppliers of health care-related supplies, pharmacies, and others) are made up of components or separate physical locations. Many of these components or separate physical locations are separately certified or licensed by States as health care providers.

• Examples of hospital components include outpatient departments, surgical centers, psychiatric units, and laboratories. These components are often separately licensed or certified by States and may exist at physical locations other than that of the hospital of which they are a component. Many health plans consider these components to be health care providers in their own right. Many of these components bill independently of the hospital of which they are a component.

• Organization health care providers that are chains generally have a corporate headquarters and a number of separate physical locations. A durable medical equipment supplier chain, for example, has a corporate headquarters and separate physical locations at which durable medical equipment is dispensed to patients. The separate physical locations are generally separately licensed or certified by States. They often operate independently of each other and usually do their own billing. Many health plans consider each separate physical location to be a health care provider itself; and many of these health plans, including Medicare, reimburse for these items based on the geographic location where the items are dispensed to patients and not on the geographic location of the corporate headquarters.

An entity that meets certain Federal statutory implementation specifications and regulations is eligible to participate in the Medicare program. Our definition of "health care provider" at § 160.103 includes those eligible to participate in Medicare as described in Federal statute (that is, in § 1861(s) and § 1861(u) of the Social Security Act). These entities, according to Federal statute and regulations, must be issued their own identification numbers in order to bill and receive payments from Medicare. The Federal statutes and regulations similarly affect the Medicaid program.

Health care providers that are covered entities (see the definition at § 160.103) are required to comply with this final rule. Thus, while all health care providers (as defined in § 160.103) are eligible to be assigned NPIs and may, therefore, obtain NPIs, health care providers that are covered entities must obtain NPIs. As mentioned earlier in this section, a health care provider that is not a covered entity and which has been assigned an NPI does not become a covered entity as a result of NPI assignment.

We refer to the components and separate physical locations described in the bulleted examples above as "subparts" of organization health care providers.

We use the term "subpart" to avoid confusion with the term "health care component" in the Privacy and Security Rules. We discuss terms and concepts in the Privacy and Security Rules later in this section.

Section 1173(b)(1) of the Act provides that the Secretary "shall take into account multiple uses for identifiers and multiple locations and specialty classifications for health care providers." This language indicates that Congress realized that certain health care providers operate at multiple locations and/or provide multiple types of health care services, and intended that the identifier standard take these variations in circumstance into account. We accommodate this language by requiring covered health care providers to obtain NPIs for subparts of their organizations that would otherwise meet the tests for being a covered health care provider themselves if they were separate legal entities, and permitting health care providers to obtain NPIs for subparts that do not meet these tests but otherwise qualify for assignment of an NPI. For example, a subpart may qualify for assignment of an NPI based on such factors as the subpart having a location and licensure separate from the organization health care provider of which it is a subpart. Licensure is often indicative of specialty (Healthcare Provider Taxonomy) classification. Thus, the assignment scheme created by this final rule provides flexibility in addressing the varied circumstances of health care providers, as Congress intended.

A "subpart" described in this final rule may differ from a "health care component" described in the Privacy and Security Rules. Therefore, it is appropriate to discuss these concepts and their relationship, if any, to the assignment of NPIs as established by this final rule.

Standards and implementation specifications for the Privacy and Security standards fall under part 164—Security and Privacy, of 45 CFR, whereas the implementation specifications for the standard unique health identifier for health care providers (and for the other identifiers mandated by HIPAA) are within part 162—Administrative Implementation Specifications, of 45 CFR. The broad concepts of ownership, control, and structure of covered entities are relevant

to determining the scope of, and defining responsibility for, implementing the Privacy and Security standards; therefore, we addressed those concepts in those rules. On the other hand, the concepts of ownership, control, and structure are of no significant value or importance in determining the health care providers that may be eligible to obtain NPIs, which is why those concepts are not discussed in this final rule.

The term "hybrid entity" is defined in part 164, which is applicable to the Privacy and Security Rules, and may be a factor in determining responsibility for the implementation of the Privacy and Security standards and implementation specifications. It is defined in § 164.103 and is discussed in the Privacy Rule at 65 FR 82502. It is possible that an organization health care provider may be a hybrid entity and, as such, may designate health care components for purposes of implementing the Privacy and Security Rules. It is possible and, indeed, likely that subparts as described earlier in this preamble may be health care components of a hybrid entity. It is also possible that the subparts may not align precisely with the designated health care components. There is no necessary correlation between what is a subpart and what is a health care component, and there need not be because, as stated above, the nature and function of the Privacy and Security standards differ from those of the health care provider identifier standard. The level of assignment of NPIs must be adequate to enumerate entities that meet the definition of "health care provider" at § 160.103. It is, therefore, possible that a designated health care component may in essence be assigned multiple NPIs if the health care component is made up of multiple health care providers or subparts, as described earlier.

The term "organized health care arrangement" is discussed in the Security and Privacy Rules and is defined at § 160.103. It is possible that subparts that are also health care components may elect to come together to form an organized health care arrangement. Whether or not subparts participate in an organized health care arrangement for purposes of implementing the Privacy or Security standards has no effect on their eligibility to be assigned NPIs.

It must be kept in mind, with respect to the subparts as described in this preamble, that the organization health care provider is a legal entity and is the covered entity under HIPAA if it (or a subpart or component) transmits health information in electronic form (or uses a business associate to do so) in connection with a covered transaction. The subparts are simply parts of the legal entity. The legal entity—the covered entity—is ultimately responsible for complying with the HIPAA rules and for ensuring that its subparts and/or health care components are in compliance. The organization health care provider, of which the subpart is a part, is responsible for ensuring that the subpart complies with the implementation specifications in this final rule. The organization health care provider is responsible for determining if its subpart or subparts must be assigned NPIs, as discussed above in this section of the preamble. The organization health care provider is also responsible for applying for NPIs for its subparts or for instructing its subparts to apply for NPIs themselves. (That is, it is not necessary that an application for an NPI be made by the organization health care provider on behalf of its subpart.)

Comment: Some commenters expressed concern that the professional claim or equivalent encounter information transaction be able to accommodate address or location information associated with billing, pay-to, and furnishing health care providers.

Response: The ASC X12N 837 Health Care Claim: Professional, adopted in the Transactions Rule, accommodates addresses for all these entities.

Comment: Some commenters stated their desire for an identifier to represent each service address, for the purpose of reporting the location of service on a professional health care claim.

Response: We believe that the location of service can properly be reported by use of data elements in the standard professional health care claim or equivalent encounter information transaction. The address where service was furnished (if different from the billing or pay-to provider's address and if not at the patient's home) is accommodated in the X12N 837 Professional Claim in the Service Facility Location loop. For these reasons, we do not believe a health care provider identifier needs to be assigned to every address at which a service can be provided. If health plans need service location data in addition to the data that are accommodated in the standard health care claim transaction, they should notify the organization responsible for that transaction (*see* § 162.910 and § 162.1102).

Comment: Several commenters named specific kinds of practitioners or entities that should be eligible to receive NPIs. These commenters cited practitioners who write prescriptions, home health housekeepers, long-term care providers, providers of home health services, meals on wheels, and transportation.

Response: Entities that do not furnish health care, and do not meet the definition of health care provider, will not be eligible to receive NPIs. A title does not necessarily indicate that an entity does or does not furnish health care. Entities who are unsure as to whether they are health care providers should check the definition of "health care" in § 160.103 to determine whether the kinds of services they furnish are health care services.

Comment: Some commenters stated that billing services should not receive NPIs. None of these commenters gave a definition or criteria to distinguish billing services from entities that would be eligible to be assigned NPIs. Other commenters stated that these definitions and criteria would be difficult to apply.

Response: As stated earlier in this section, billing services do not meet our regulatory definition of health care provider and, therefore, will not be eligible for NPIs. Generally, the health care provider that furnished health care is the "Billing provider" on the X12N 837 transaction and would identify itself with an NPI. If a billing service needs to be identified as the "Billing provider," it would identify itself with either an Employer Identification Number (EIN) or a Social Security Number (SSN).

Comment: Several commenters noted that the term "medical care" in our descriptions of individual and organization health care providers should be replaced with the term "health care." They were concerned that one could construe "medical care" to mean only care that was physician-supplied or physician-authorized.

Response: We agree with the comment and have replaced the term "medical care" with "health care" in our discussion of individual and organization health care providers.

Comment: A majority of commenters stated that the NPS should not distinguish between organization health care providers and group health care providers. The NPS should collect the same data for both. A few other commenters suggested a definition for group, but did not suggest that different data should be collected for a group health care provider than for an organization health care provider.

Response: As described in the proposed rule (at 63 FR 25325), group health care providers are entities composed of one or more individuals (members), generally created to provide coverage of patients' needs in terms of office hours, professional backup and

support, or range of services resulting in specific billing or payment arrangements. Organization health care providers are health care providers who are not individual health care providers (that is, health care providers who are human beings). Examples of organization health care providers are hospitals, pharmacies, and nursing homes. For purposes of this rule, we consider group health care providers to be organization health care providers. There is additional information about these health care providers in section II.C.1.(d) of this preamble.

We agree with the majority of commenters that the NPS should collect the same data for group and organization health care providers. Because the same data are collected, there is no need for separate definitions of group and organization health care providers for NPI enumeration purposes.

Comment: Several commenters suggested that an NPI suffix or sub-identifier (sub-ID) be used to identify physical locations or subparts of a health care provider. Two commenters suggested that we explore the need for an electronic data interchange (EDI) identifier for transaction routing.

Response: We considered allowing each health care provider, if it so chose, to establish sub-IDs under its NPI. The health care provider might use the sub-IDs for different physical locations, subparts, EDI transaction routing, or other purposes. We decided not to establish sub-IDs because our decisions regarding which entities would be eligible to receive NPIs (including separate physical locations and subparts of certain kinds of organization health care providers) obviate the need for them. Sub-IDs may be useful as a later implementation feature that would support EDI routing or other purposes. We will consider an expansion at a later time to include them, if we determine that they would be beneficial.

Comment: Many commenters stated that all health care providers should be able to obtain NPIs, whether they conduct health care transactions electronically or on paper. Some commenters stated that health care providers that do not conduct any of the transactions named in HIPAA should be able to obtain NPIs.

Response: All health care providers—as we define that term—may obtain NPIs. Only covered health care providers are required to obtain and use NPIs in standard transactions.

Comment: Many commenters stated that NPIs should be mandatory for paper and fax transactions, as well as electronic.

Response: In the May 7, 1998, proposed rule, we did not propose to apply this standard to paper transactions. Therefore, we focus on standards for electronic transactions. Most of the paper forms currently in use today cannot accommodate all of the data content included in the standard transactions. This does not prevent health plans from requiring for paper transactions the same data, including identifiers, as are required by the HIPAA regulations for electronic transactions.

Final Provisions (§ 160.103)

As defined by section 1171(3) of the Act, a "health care provider" is a provider of services as defined in section 1861(u) of the Act, a provider of medical or other health services as defined in section 1861(s) of the Act, and any other person who furnishes health care services or supplies. Section 160.103 defines "health care provider" as the statute does and clarifies that the definition of a "health care provider" includes any other person or organization that furnishes, bills, or is paid for health care in the normal course of business.

Section 1173(b)(1) of the Act requires the Secretary to adopt standards providing for a standard unique health identifier for each health care provider, and to take into account multiple uses, locations, and specialty classifications for health care providers. All health care providers who meet our definition of "health care provider" at § 160.103, regardless of whether they conduct transactions electronically or on paper or conduct any covered transactions will be eligible to apply for health care provider identifiers.

We define "covered health care provider" at § 162.402. Subparts of organization health care providers, as described earlier in this section, may be assigned NPIs.

Registered nurses, dental hygienists, and technicians are examples of entities who furnish health care but who do not necessarily conduct covered transactions. They are eligible to receive NPIs because they are health care providers.

We define two categories of health care providers for enumeration purposes. A data element, the "Entity type code," in the NPS record for each health care provider will indicate the appropriate category.

- NPIs with an "Entity type code" of 1 will be issued to health care providers who are individual human beings. Examples of health care providers with an "Entity type code" of 1 are physicians, dentists, nurses, chiropractors, pharmacists, and physical therapists.
- NPIs with an "Entity type code" of 2 will be issued to health care providers other than individual human beings, that is, organizations. Examples of health care provider organizations with an "Entity type code" of 2 are: hospitals; home health agencies; clinics; nursing homes; residential treatment centers; laboratories; ambulance companies; group practices; health maintenance organizations; suppliers of durable medical equipment, supplies related to health care, prosthetics, and orthotics; and pharmacies.

Entities that participate in the Medicare program and many that participate in the Medicaid program are eligible for NPIs. (Note, however, our discussion of atypical and nontraditional service providers earlier in this section.) Many subparts of organization health care providers (as discussed earlier in this section) are eligible to be assigned NPIs, and an NPI must be obtained for, or by, them if they would be considered a covered health care provider if they were a separate legal entity. By definition, subparts are not themselves legal entities; the legal entity is the organization health care provider of which they are a subpart. Organization health care provider subparts—because they too are organizations—will be issued NPIs with "Entity type code" of 2.

We do not consider individuals who are health care providers (that is, they meet our definition of "health care provider" at § 160.103) and who are members or employees of an organization health care provider to be "subparts" of those organization health care providers, as described earlier in this section. Individuals who are health care providers are legal entities in their own right. The eligibility for an "Entity type code 1" NPI of an individual who is a health care provider and a member or an employee of an organization health care provider is not dependent on a decision by the organization health care provider as to whether or not an NPI should be obtained for, or by, that individual. The eligibility for an "Entity type code 1" NPI of a health care provider who is an individual is separate and apart from that individual's membership or employment by an organization health care provider. If such an individual is a covered health care provider, he or she is required to obtain an NPI. An example of the above discussion is a physician who is a member of a group practice. Both are health care providers and, therefore, both may apply for NPIs, but the physician would receive an

"Entity type code 1" NPI, while the group practice would receive an "Entity type code 2" NPI. If either is a covered health care provider, that covered health care provider must apply for an NPI.

"Entity type code" determinations will be made according to the following:

- An individual human being furnishes health care. The described individual is a health care provider and will be assigned an NPI with an "Entity type code" of 1.
- An organization furnishes health care. The described organization is a health care provider and will be assigned an NPI with an "Entity type code" of 2.
- An organization health care provider subpart, as described earlier in this section, is a health care provider and will be assigned an NPI with an "Entity type code" of 2.

Hereafter in this preamble, we include these subparts in our references to health care providers unless there is a reason to distinguish them.

An NPI will be used to identify the health care provider on a health care claim or equivalent encounter information transaction. If an organization health care provider consists of subparts that are identified with their own unique NPIs, a health plan may decide to enroll none, one, or a limited number of them (and to use only the NPI(s) of the one(s) it enrolls). A health plan may not require a health care provider or a subpart of an organization health care provider that has an NPI to obtain another NPI for any purpose. Links among the various NPI types may be made and maintained by health plans and other users of the NPS data, but will not be maintained in the NPS.

The data to be collected by the NPS for health care providers are described in section II. C. 2. of this preamble, "Data Elements and Data Dissemination." The NPS will capture data elements for health care providers with an "Entity type code" of 1 (individuals) that are different from those that it will capture for those with an "Entity type code" of 2 (organizations) because the data available to search for duplicates (for example, date and place of birth) are different. The NPS will ensure the uniqueness of the NPI by assigning only one NPI to a health care provider with a distinct string of data in the NPS. The NPS will contain the kinds of data necessary to adequately categorize each entity to which it assigns an NPI. An NPI will be a lasting identifier for the health care provider to which it has been assigned. For health care providers with an "Entity type code" of 1, the NPI will be a permanent identifier, assigned for life, unless circumstances justify deactivation, such as a health care provider who finds that his or her NPI has been used fraudulently by another entity. In that situation, the health provider can apply, and will be eligible, for a new NPI, and the previously assigned NPI will be deactivated. For health care providers with an "Entity type code" of 2, the NPI will also be considered permanent, except in certain situations such as when a health care provider does not wish to continue an association with a previously used NPI, or when a health care provider's NPI has been used fraudulently by another. In those situations, the health care provider that holds the NPI can apply, and be eligible for, a new NPI, and the previously assigned NPI will be deactivated. A new NPI will not be required for change of ownership, change from partnership to corporation, or change in the State where an organization health care provider is incorporated; indeed, ownership and incorporation information will not be contained in the NPS. A new NPI will not be required when there is a change in an organization health care provider's name, Employer Identification Number, address, Healthcare Provider Taxonomy classification, State of licensure, or State license number. Instead, the health care provider will supply that information to the NPS and the data in the NPS about these entities will be updated. After a corporate merger, the surviving organization may continue to use its NPI. A health care provider's NPI will not be deactivated if that health care provider is sanctioned or barred from one or more health plans. When an organization health care provider is disbanded, the organization health care provider's NPI will be deactivated. If a previously deactivated organization health care provider is later reactivated, its previous NPI will be reactivated.

3. NPI Standard

Proposed Provisions (§ 142.402(a))

The May 7, 1998, proposed rule (at 63 FR 25328) described our proposal for the standard health care provider identifier. We proposed the NPI standard as an 8-position alphanumeric identifier. It would include as the 8th position a numeric check digit to assist in identifying erroneous or invalid NPIs. The check digit would be a recognized International Standards Organization (ISO) standard. The check digit algorithm would be computed from an all-numeric base number. Therefore, any alpha characters that may be part of the NPI would be translated to a specific numeric before the calculation of the check digit. The NPI format would allow for the creation of approximately 20 billion unique identifiers. It would be an intelligence-free identifier. In the May 7, 1998 proposed rule, we also proposed the type of data included in the file containing identifying information for each health care provider.

In addition to the description of the NPI standard, this section of the May 7, 1998, proposed rule discussed several other points on which we received comments:

We noted that we proposed the 8-position alphanumeric format rather than a longer numeric-only format in order to keep the identifier as short as possible while providing for an identifier pool that would serve the industry's needs for a long time.

We listed selection criteria for the standard and discussed candidate identifiers, including the National Association of Boards of Pharmacy number, the Social Security Number, and the Employer Identification Number.

We noted that the USA Registration Committee approved the NPI as an International Standards Organization card issuer identifier in August 1996 for use on standard health identification cards.

Comments and Responses on the NPI Standard

Comment: Several commenters on the format of the NPI expressed general support for our proposal or specific support for an 8-position alphanumeric identifier. Very few of these commenters gave a reason for support of the 8-position alphanumeric format. A strong majority of commenters recommended instead that the NPI be a 10-position numeric identifier, because a 10-position identifier would yield an adequate pool of identifiers and would not exceed the length permitted for identifiers in the standard transactions proposed under HIPAA. A few other commenters recommended a 9-position numeric identifier. Several commenters who favored a numeric identifier stated that if additional capacity for NPIs were needed in the future, additional numeric digits should be added at that time. Commenters who preferred a numeric identifier were very specific in listing its advantages. They stated that a numeric identifier—

- Is more quickly and accurately keyed in data-entry applications;
- Is more easily used in telephone keypad applications;
- Does not require translation before application of the check digit algorithm,

and thus uses the full ability of the check digit algorithm to detect keying errors;

- Is compatible with ISO identification card standards for a card issuer identifier (discussed below), while an alphanumeric identifier is not; and
- Will require less change for systems that currently use a numeric identifier.

Response: We find the stated advantages of a 10-position numeric identifier convincing. We have revised proposed § 142.402 (now § 162.406(a)) to provide that the NPI will be a 10-position numeric identifier, with the 10th position being an ISO standard check digit. The use of a 10-digit numeric NPI and our initial assignment strategy will allow for 200 million unique NPIs. We estimate 200 million NPIs would last approximately 200 years, allowing for health care provider growth, as discussed later in the preamble of this final rule in section V.D., "Specific Impact of the NPI." If additional capacity for NPIs is needed in the future, additional numeric digits will be added to the identifier at that time. A modification to the NPI format would be accomplished through rulemaking. A 10-position numeric identifier is specified in § 162.406(a).

Comment: Some commenters asked that we clarify how the NPI would appear when used as a card issuer identifier on a standard health care identification card. Commenters also asked that we clarify any modification made to the check digit algorithm to allow the NPI to be used as a card issuer identifier.

Response: In December 1997, an American National Standard for a Uniform Healthcare Identification Card was approved by the National Committee for Information Technology Standards (NCITS), which is a standards-developing organization accredited by the American National Standards Institute. The specification for this standard, NCITS.284, is available from the American National Standards Institute, 11 West 42nd Street, New York, New York 10036. One identifier field on the standard health care identification card is the card issuer identifier. A card issuer identifier is an identifier for an entity that issues a health care identification card. In most cases, the entity issuing a health care identification card would be a health plan; in some cases, however, the entity could be a health care provider. We note that, under HIPAA, health care providers are neither required to issue health care identification cards, nor to use the NCITS.284 standard card. The NCITS.284 standard requires that the first five digits of the card issuer identifier be "80840," where the initial two digits, 80, signify health applications, the next three digits, 840, signify United States. The remainder of the card issuer identifier identifies the entity that issued the card. In August 1996, the USA Registration Committee, a standards-developing organization accredited by the American National Standards Institute, approved the NPI as an identifier for a card issuer for use on a standard health care identification card. If the NPI is used to identify the card issuer on a card that complies with NCITS.284, the card issuer identifier would consist of 15 positions as follows: "80840," signifying health applications in the United States, followed by the 10-position NPI (the 9-position identifier portion of the NPI, followed by the NPI check digit).

We note that the initial five digits "80840" would be required with the NPI only when the NPI is used as a card issuer identifier on a standard health care identification card. However, in order that any NPI could potentially be used as a component of the card issuer identifier on a standard health care identification card, the NPI check digit calculation must always be performed as though the NPI is preceded by "80840." This is easily accomplished by including a constant in the check digit calculation when the NPI is used without this prefix. The NPI check digit is calculated using the ISO standard Luhn check digit algorithm, a modulus 10 "double-add-double" algorithm. The specification for calculation of the NPI check digit will be made available on the CMS Web site (*http://www.cms.hhs.gov*). The specification will explain how to compute the check digit and how to verify an NPI using the check digit, both when the "80840" prefix is present and when it is not.

Comment: A strong majority of commenters supported our proposal that the NPI be intelligence free. A few commenters stated that an intelligence-free identifier would not meet their needs because their systems use the facility provider type, which is coded as part of the identifier in some current systems.

Response: If the NPI were to include intelligence, that is, coded information about the health care provider, as part of the identifier, a new NPI would have to be issued any time the coded information about the health care provider changed. This would undermine the lasting nature of the NPI. For this reason we agree with the large majority of commenters that the NPI not contain intelligence about the health care provider.

Comment: A small number of commenters stated that the Taxpayer Identifying Number (TIN) should be selected, or reconsidered, as the standard unique health identifier for health care providers.

Response: The TIN is the identifier under which the health care provider reports a United States tax return to the Internal Revenue Service (IRS). It can be an SSN, assigned by the Social Security Administration, or an IRS Individual Taxpayer Identification Number (ITIN), assigned by the IRS, or an EIN, assigned by the IRS. A large number of commenters on the "Data" section of the May 7, 1998, NPI proposed rule stated their opposition to dissemination of the SSN except in strictly controlled situations that fully comply with the Privacy Act. Use of the SSN or the TIN as the standard unique health identifier for health care providers would require the wide dissemination and use of the SSN or TIN in the HIPAA transactions under conditions that would not be protected by the Privacy Act. The majority of commenters did not support the use of the SSN as the standard unique health identifier for health care providers for individuals.

Comment: The National Council for Prescription Drug Programs requested that we make several clarifications regarding our reference to the National Association of Boards of Pharmacy (NABP) number, which we discussed as a candidate identifier in the May 7, 1998, proposed rule.

Response: As requested, we note that the NABP number has been renamed the National Council for Prescription Drug Programs (NCPDP) Provider Number. In 1997, the NCPDP and the NABP mutually severed the contract made in 1977. The NCPDP has full responsibility for maintenance of the pharmacy file. The NCPDP Provider Number is issued solely by NCPDP. All references to the NABP number should be changed instead to the NCPDP Provider Number.

Comment: A small number of commenters stated that the proposed NPI would not meet one or more of the selection criteria for standards or would not be consistent with the law because it would not reduce the administrative costs of providing and paying for health care. These kinds of comments cited the high costs of developing and operating a new system for health care provider enumeration.

Response: Elsewhere in this preamble, we discuss how the collection of health care provider data and the enumeration of health care providers can be satisfactorily accomplished with the NPI and how those associated costs can be kept to a minimum. We acknowledge

that organizations will incur costs in the move to a standard enumeration process. After the initial implementation, however, we believe that the costs will diminish significantly, and that long-term use of a standard identifier will be cost-effective.

Final Provisions (§ 162.406(a))

We are adopting the NPI format of an all-numeric identifier, 10 positions in length, with an ISO standard check-digit in the 10th position (§ 162.406(a)). The NPI will not contain intelligence about the health care provider. This format and our assignment strategy will allow for at least 200 million unique NPIs.

4. Effective Date and Compliance Dates

Proposed Provisions (§ 142.410)

The May 7, 1998, proposed rule proposed the compliance dates for the standard unique health identifier for health care providers.

The May 7, 1998, proposed rule proposed that:

- Each health plan that is not a small health plan must comply with the requirements of § 142.104 and § 142.404 by 24 months after the effective date of the final rule.
- Each small health plan must comply with the requirements of § 142.104 and § 142.404 by 36 months after the effective date of the final rule.
- Each health care clearinghouse and health care provider must begin using the NPI by 24 months after the effective date of the final rule.

Comments and Responses on Effective Date and Compliance Dates

Comment: An overwhelming number of commenters requested that there be an extended period of time between the publication of the NPI final rule and the date the implementation period for the NPI would begin. Commenters stated that their resources were fully committed to millennium issues and that those resources could not be used to address the numerous changes needed to implement the NPI until after the millennium work was satisfactorily completed. Some commenters asked that we publish the final rule on Standards for Electronic Transactions before any of the other rules.

Response: Work on the millennium is complete. Many commenters are undoubtedly expending resources at this time in implementing the HIPAA Privacy Rule (65 FR 82462 and 67 FR 53182), the Transactions Rule (65 FR 50312 and 68 FR 8381), the Security Rule (68 FR 8334) and the Employer Identifier Rule (67 FR 38009). The reader should note that we published the Transactions Rule (65 FR 50312) before any of the other HIPAA final rules. The National Provider System (NPS) will be a large, complex system. Its development cannot be finalized until publication of this final rule. The NPS must operate efficiently and be capable of performing many operations. It must undergo testing to ensure proper operation of all functions and must pass a variety of stress tests. To ensure adequate time for completion of system development and testing, we set the effective date of this final rule to be 16 months after publication in the **Federal Register**. Covered entities will need to be in compliance no later than 24 months after the effective date (36 months for small health plans). While the purpose of this extended effective date is to allow HHS sufficient time for NPS development and testing, it will also permit health care entities sufficient time to accommodate changes needed in order to implement the NPI.

Final Provisions (§ 162.404)

We set the effective date and compliance dates as follows:

a. *Effective date of this final rule.* The effective date of the NPI is May 23, 2005. The effective date of this final rule marks the beginning of the implementation period for the NPI.

b. *Compliance dates of the NPI.* We adopt the requirement that covered entities (except small health plans) must obtain an NPI and must use the NPI in standard transactions no later than May 23, 2007. Small health plans must do so no later than May 23, 2008.

If the Secretary adopts a modification to this standard, the compliance date of the modification would be no earlier than the 180th day following the adoption of the modification. The Secretary would determine the actual date, taking into account the time needed to comply due to the nature and extent of the modification. The Secretary would be able to extend the time for compliance with any modification by small health plans by rulemaking, if he determines that an extension is appropriate.

5. Implementation Specifications for Health Care Providers, Health Plans, and Health Care Clearinghouses

Proposed Provisions (§ 142.404, § 142.406, and § 142 408)

In section II. E., "Requirements," of the preamble of the May 7, 1998, proposed rule (63 FR 25330), we discussed the requirements that health plans, health care clearinghouses, and covered health care providers would have to meet in implementing the NPI. The proposed regulation text, in § 142.404, stated that health plans would be required to accept and transmit, directly or through a health care clearinghouse, the NPI on all standard transactions wherever required. The proposed regulation text, in § 142.406, stated that health care clearinghouses would be required to use the NPI wherever a standard electronic transaction requires it.

The preamble of the May 7, 1998, proposed rule (63 FR 25330) states: "In § 142.408, Requirements: Health care providers, we would require each health care provider that needs an NPI for HIPAA transactions to obtain, by application if necessary, an NPI * * *" Section 142.408(a) of the proposed regulation text states: "Each health care provider must obtain, by application if necessary, a national provider identifier." The text of the proposed rule states, in § 142.408(c): "Each health care provider must communicate any changes to the data elements in its file in the national provider system to an enumerator of national provider identifiers within 60 days of the change."

Comments and Responses on Requirements for Health Care Providers, Health Plans, and Health Care Clearinghouses

We believe that the Congress intended that each health care provider be eligible for an NPI and intended to authorize the Secretary to require covered health care providers to obtain one. HIPAA requires the adoption of a standard unique health identifier for health care providers and directs the Secretary to specify the purposes for which the identifier may be used. The statute sets forth the maximum amount of time by which all covered entities must comply with the standards, leaving discretion to the Secretary to designate compliance dates (within the limitations of the law). We proposed in the May 7, 1998, proposed rule, and require in this final rule, that covered entities must be in compliance with the standards no later than 2 years (3 years for small health plans) from the effective date of the regulation. Thus, as of the compliance date, a covered health care provider must have obtained and begun to use an NPI.

Comment: Some commenters recommended that all data about a health care provider in the NPS be required to be updated; others stated that only certain data elements should be required to be updated. Most indicated that data needed for unique identification should be kept current.

Response: In the proposed rule, the NPS was proposed to include many data elements that we have since decided not to include. (*See* section II. C. 2. of this preamble, "Data Elements and Data Dissemination.") We have decided that the NPS will consist entirely of data elements about a health care provider that are needed for administrative (communications) purposes and for the unique identification of the health care provider. We believe it is appropriate and necessary for the health care providers to notify the NPS of changes in their required NPS data, but, given limits on our statutory authority, we can require such notification only of covered health care providers.

Comment: We received many comments concerning the length of time a health care provider should be allowed before it must notify the NPS of changes to its NPS data. Most commenters thought that the 60-day period was too long and believed a 15-to-30-day period was more appropriate.

Response: The May 7, 1998, proposed rule at § 142.408(c) proposed 60 days to allow reasonable flexibility in the time required for a health care provider to complete a paper form (the NPI application/update form) containing the update(s) and forward it to the NPS. We will attempt to design the NPS to be responsive and easy to use. We will consider a design that will allow a health care provider (or possibly a health care provider's authorized representative (*see* section II. B. 2., "Health Care Provider Enumeration," of this preamble)) to communicate the health care provider's changes directly into the NPS over the Internet, using a secure Web-based transaction. A paper form (the NPI application/update form) will be developed for this same purpose and will be available from the NPS and from the CMS Web site (*http://www.cms.hhs.gov*) for use by health care providers. We realize that many health care providers may prefer to send electronic updates if the capability exists. According to the majority of commenters, health care providers should be required to communicate changes in their NPS data in far less than 60 days. We agree. Therefore, we adopt in this final rule a requirement that covered health care providers notify the NPS of changes in their required NPS data within 30 calendar days of the changes (§ 162.410(a)(4)).

Comment: Several commenters indicated that health plans will need to know about changes in health care provider information. Commenters did not believe it would be fair for health care providers to have to notify both the NPS and the health plans in which they are enrolled of changes.

Response: We agree that health plans will need to know of changes in the data associated with their enrolled health care providers. Most health plans collect more information about a health care provider than the NPS will collect. Therefore, we expect that health plans will still require health care providers to notify them of changes in this information. The NPS will have the capability to provide listings or reports of changes in NPS data in accordance with section II. C. 2. of this preamble, "Data Elements and Data Dissemination."

Comment: Several commenters stated that the NPS should be required to apply updates within a specified period of time after receipt of the updated information from a health care provider.

Response: We expect that the update process will be designed in a way that will allow the system to process updates within a reasonable timeframe (for example, 10 business days from receipt). The volume of updates at any given time may impact system performance. If changes are unable to be made (for example, the health care provider furnishing updates does not appear to match any health care provider in the NPS), the health care provider will receive a message that will indicate why the NPS is unable to update the record. The message will request that the problem be resolved and the information be resubmitted.

Comment: Several commenters asked if health plans should take any action to notify the NPS of changes to health care provider data if they become aware of these changes.

Response: Although health plans would not be required to provide information to the NPS to update health care provider data, we encourage health plans to instruct and remind their enrolled health care providers to notify the NPS of changes in their data.

Comment: There were numerous comments about penalties for non-use of the NPI:

- If NPIs could not be assigned to covered health care providers before the compliance date for those health care providers, and sufficiently ahead of that time to enable the health care providers to be capable of using the NPI in standard transactions, penalties should not be enforced for nonuse of the NPI.
- Sufficient time should elapse to ensure adequate experience in using the NPI before penalties are assessed.
- Financial penalties for noncompliance should not be assessed until 1 year after the NPI compliance dates.
- The method of enforcing compliance with the standard should be made public.
- The penalties for nonuse of a single standard and nonuse of multiple standards should be clarified.
- When noncompliance forces nonpayment, the entity expecting payment will resolve the issue.

Response: NPIs will be assigned to health care providers as quickly as possible and within the parameters of the performance criteria that are in effect. (*See* earlier comment and response for additional information.) HHS is preparing, and has issued in part, a separate regulation on enforcement of the HIPAA standards. This regulation is expected to address all but perhaps the last concern of these commenters. The regulation cannot place requirements on entities that are not covered entities, and the entities involved in the situation described in the last bullet may not be covered entities.

Comment: Many commenters suggested that (1) health care providers not be required to use the NPI within the first year after the effective date of its adoption, although willing trading partners could use the NPI by mutual agreement at any time after the effective date; and (2) health plans should give their health care providers at least 6 months' notice before requiring them to use the NPI.

Response: Upon the effective date of the adoption of this standard (which will be 16 months after the date it is published), health care providers may apply for NPIs. Covered entities (except for small health plans) must begin using the NPI in standard transactions no later than 24 months after the effective date. (Small health plans have 36 months to begin using NPIs.) These are statutory requirements that we have incorporated into this final rule. We believe these timeframes enable more than sufficient time for covered health care providers to become aware of their responsibilities under this final rule, to apply for and be assigned their NPIs, and to complete work needed to begin using their NPIs. Applying for an NPI up to 18 months after the effective date of the adoption of this standard will still give health care providers 6 months before the statutory compliance date arrives. We encourage health plans to give health care providers 6 months' notice before requiring them to use NPIs; however, we do not require that action by the health plans. How soon health care providers could use NPIs would depend on when they obtained the NPIs, and health plans have no direct control over that action.

We encourage all parties to work together to ensure a smooth transition.

Final Provisions (§ 162.410, § 162.412, § 162.414)

All health care providers are eligible for NPIs.

We require each covered health care provider to obtain an NPI from the NPS, by application if necessary, for itself and for its subparts, if appropriate, and to use its NPI in standard transactions. Covered health care providers must disclose their NPIs to other entities that need those health care providers' NPIs for use in standard transactions. Covered health care providers must communicate to the NPS any changes in their required data elements within 30 days of the change. If covered health care providers use business associates to conduct standard transactions on their behalf, they must require their business associates to use NPIs appropriately as required by the transactions the business associates conduct on its behalf.

Situations exist in which a standard transaction must identify a health care provider that is not a covered entity. An organization health care provider subpart may need to be identified in a standard transaction but the organization health care provider may not be required to obtain an NPI for the subpart. A noncovered health care provider may or may not have applied for and received an NPI. In the latter case, and in the case of the subpart described above, an NPI would not be available for use in the standard transaction. We encourage every health care provider to apply for an NPI, and encourage all health care providers to disclose their NPIs to any entity that needs that health care provider's NPI for use in a standard transaction. Obtaining NPIs and disclosing them to entities so they can be used by those entities in standard transactions will greatly enhance the efficiency of health care transactions throughout the health care industry. If subparts are assigned NPIs, the covered health care provider must ensure that the subpart's NPI is disclosed, when requested, to any entity that needs to use the subpart's NPI in a standard transaction.

Here are examples that illustrate the desirability for a health care provider that is not required to be enumerated to obtain and disclose an NPI:

(1) A pharmacy claim that is a standard transaction must include the identifier (which, as of the compliance date, would be the NPI) of the prescriber. Therefore, the pharmacy needs to know the NPI of the prescriber in order to submit the pharmacy claim. The prescriber may be a physician or other practitioner who does not conduct standard transactions. The prescriber is encouraged to obtain an NPI so it can be furnished to the pharmacy for the pharmacy to use on the standard pharmacy claim.

(2) A hospital claim is a standard transaction and it may need to identify an attending physician. The attending physician may be a physician who does not conduct standard transactions. The physician is encouraged to obtain an NPI so it can be furnished to the hospital for the hospital to use on the standard institutional claim.

In the examples above, the NPI of a health care provider that is not a covered entity is needed for inclusion in a standard transaction. The absence of NPIs when required in those claims by the implementation specifications may delay preparation or processing of those claims, or both. Therefore, we strongly encourage health care providers that need to be identified in standard transactions to obtain NPIs and make them available to entities that need to use them in those transactions.

Under § 162.410 (Implementation specifications: Health care providers), we require each covered health care provider to:

- Obtain from the NPS, by application if necessary, an NPI for itself and, if appropriate, for its subparts.
- Use the NPI it obtained from the NPS to identify itself in all standard transactions that it conducts where its health care provider identifier is required.
- Disclose its NPI, when requested, to any entity that needs the NPI to identify that health care provider in a standard transaction.
- Communicate to the NPS any changes to its required data elements in the NPS within 30 days of the change.
- If it uses one or more business associates to conduct standard transactions on its behalf, require its business associate(s) to use its NPI and the NPIs of other health care providers appropriately as required by the transactions the business associate(s) conducts on its behalf. (For example, a claim for a laboratory service will require the NPI of the laboratory and may also require the NPI of the referring physician. If a business associate prepares the laboratory claim, the business associate must use the laboratory's and the referring physician's NPIs. If the business associate does not already know the NPI of the referring physician, it may have to contact the referring physician to obtain his or her NPI.)
- If it has been assigned NPIs for one or more subparts, comply with the above requirements with respect to each of those NPIs.

Under § 162.412 (Implementation specifications: Health plans), we require health plans to: use the NPI of any health care provider (including subparts of organization health care providers) that has been assigned an NPI to identify that health care provider (or subpart) in all standard transactions where the health care provider's (or subpart's) identifier is required. Health plans may not require health care providers that have been assigned NPIs to obtain additional NPIs.

Under § 162.414 (Implementation specifications: Health care clearinghouses), we require health care clearinghouses to use the NPI of any health care provider (including subparts of organization health care providers) that has been assigned an NPI to identify that health care provider (or subpart) in all standard transactions where that health care provider's (or subpart's) identifier is required.

B. Implementation of the NPI

1. The National Provider System

Proposed Provisions (§ 142.402)

The May 7, 1998, proposed rule (at 63 FR 25331) described the National Provider System (NPS) as a central electronic enumerating system. The system would be a comprehensive, uniform system for identifying and uniquely enumerating health care providers at the national level. The Department of Health and Human Services (HHS) would exercise overall responsibility for oversight and management of the system.

Comments and Responses on the National Provider System

We did not receive comments specific to our description of the NPS. However, commenters were emphatic that the NPS be fully tested before it began assigning NPIs, and that the system ensure that the same NPI would not be issued to more than one health care provider. Commenters also suggested that an option be made available by which health care providers could apply for NPIs electronically in lieu of completing a paper application form. This comment is addressed in section II. B. 2. of this preamble, "Health Care Provider Enumeration."

Final Provisions (§ 162.408(a))

NPIs will be assigned to health care providers by the NPS, which will be a central electronic enumerating system operating under Federal direction. The

NPS will uniquely identify and enumerate health care providers at the national level. The NPS may enumerate subparts of organization health care providers.

The NPS will be designed to be easy to use. The design will employ the latest technological advances wherever feasible for capturing health care provider data and making information available to users. This is discussed in section II. C. 2. of this preamble, "Data Elements and Data Dissemination."

HHS will exercise overall responsibility for oversight and management of the NPS. The NPS will include a database that will store the identifying and administrative information about health care providers that are assigned NPIs. The data elements comprising the NPS are described and listed in section II. C. 2. of this preamble, "Data Elements and Data Dissemination."

Identifying and uniquely enumerating health care providers for purposes of the NPI is separate from the process that health plans follow in enrolling health care providers in their health programs. The NPS will assign NPIs to health care providers. However, the assignment of the NPI will not eliminate the process that health plans follow in receiving and verifying information from health care providers that apply to them for enrollment in their health programs.

Health care providers will submit applications for NPIs to HHS. As health care provider data are entered into the NPS from the application, the NPS will check the data for consistency, standardize addresses, and validate the Social Security Number (SSN) if the individual applying for an NPI provides it; the NPS will validate the date of birth only if the SSN is validated. (If a health care provider chooses not to furnish his or her SSN when applying for an NPI, the assignment of an NPI to that health care provider may be delayed and additional information may be requested from that health care provider in order to establish uniqueness.) If the NPS encounters problems in processing the application, appropriate messages will be communicated to the applicant. If problems are not encountered, the NPS will then search its database to determine whether the health care provider already has an NPI. If a health care provider has already been issued an NPI, an appropriate message will be communicated. If not, an NPI will be assigned. If the health care provider is similar (but not identical) to an already-enumerated health care provider, the situation will be investigated. Once an NPI is assigned, the health care provider will be notified of its NPI.

2. Health Care Provider Enumeration

In section III of the preamble of the May 7, 1998, NPI proposed rule, "Implementation of the NPI" (at 63 FR 25331), we asked for comments on the entity or entities that would be responsible for assigning NPIs to health care providers. We explained that the HIPAA legislation did not contain a specific funding mechanism for activities related to enumeration. We asked for comments on how the enumeration activity and the NPS itself could be funded, and how the costs of enumeration could be kept as low as practicable. We presented two options for the enumeration of health care providers: (1) All health care providers, except existing Medicare providers, would be enumerated by a single entity. Existing Medicare providers would automatically be enumerated and would not have to apply for NPIs; (2) Federal health plans and Medicaid would enumerate their enrolled health care providers, and a federally-directed registry would enumerate all remaining health care providers. We also presented a phased approach to enumeration and requested public comment on it. In the phased approach, we proposed that enumeration would occur in the following order: (1) Medicare providers; (2) Medicaid, other Federal providers, and health care providers that do not conduct business with Federal health plans or Medicaid but that do conduct electronically any of the transactions specified in HIPAA; and (3) all remaining health care providers. The May 7, 1998, proposed rule also stated that phase three would not begin until phases one and two were completed.

Comments and Responses on Provider Enumeration

Comment: Several commenters stated that it would cost more than our estimate of $50 to enumerate a health care provider; others believed our estimate of $50 to be reasonable. Some commenters pointed out that Federal and Medicaid health plans do not maintain all of the information about health care providers that would be required to assign NPIs; thus, if those health plans' prevalidated health care provider files were to be used to populate the NPS, costs might exceed $50 per health care provider in order to obtain the missing information needed to assign NPIs. Commenters also pointed out that the cost to enumerate an entity that furnishes atypical or nontraditional services would exceed $50.

Response: We respond to these issues as follows:

- We agree with the comment that there may be situations where information in addition to what is contained in existing health care provider files will be required in order to assign NPIs. For example, we have found that some Medicaid and Medicare provider files do not contain all of the information required to assign an NPI. Populating the NPS with existing files that lack certain required NPS data elements increases the cost of enumeration because additional resources would be needed to collect the missing information.
- Any inconsistencies or errors that are present in health care provider files that are considered to be used to populate the NPS would be imported into the NPS as part of that process. Resolving these inconsistencies and errors before loading these files will require resources and time. This will increase the cost of enumeration and possibly slow the process.
- Where the format or structure of a health care provider file being considered for use in populating the NPS differs from the format or structure of the NPS, additional costs will be incurred in attempting to conform that source file to the NPS.
- As discussed in section II. C. 2. of this preamble, "Data Elements and Data Dissemination," we are reducing the amount of health care provider information being captured by the NPS to only that which is required to uniquely identify and communicate with the health care provider. Some of the information that will not be collected is the kind that is costly to collect, such as membership in groups, certification and school information. Not collecting these health care provider data lowers the cost of enumeration.
- On applications for NPIs from individuals, the NPS will verify the SSN if it is furnished on the application.
- Problems in processing the applications will have to be resolved. This will increase the cost of enumeration.
- The NPS will be designed, wherever feasible, to take advantage of technologies that will make its operation efficient. This may include the use of the Internet to accept applications and updates from health care providers. While up-front costs will be higher for some designs, the more efficient the design and operation of the NPS, the lower the cost of enumeration and ongoing operations.

Medicare Part B carriers indicated in comments that it costs about $50 to enroll a health care provider in the Medicare program. This process involves reviewing and validating a

paper application containing far more information than will be collected and validated on the NPI application/update form. The NPS will verify the SSN only if it is furnished in applying for an NPI; the date of birth will be verified only if the SSN is furnished. The NPS will run various edits and consistency checks and will check for duplicate records to ensure that only one NPI is assigned to a health care provider and that the same NPI is not assigned to more than one health care provider. Enabling the receipt of Web-based applications and the limited validation will make the cost of enumerating a health care provider far less than enrolling a health care provider in a health plan. The majority of atypical and nontraditional service providers are not considered health care providers and, therefore, would not be eligible for NPIs. The use of modern technology to receive and process applications for NPIs makes it difficult if not impossible to attach a dollar value to the enumeration of a single provider. Implicit in enumeration are the costs of software, licenses, salaries, training, and overhead. We estimate that the combination of all of the above factors would reflect an average cost of enumerating a single health care provider to be closer to $10.

Comment: The majority of commenters favored enumeration option 1, where a single entity would enumerate all health care providers except existing Medicare providers (who would automatically be enumerated). (The May 7, 1998, proposed rule recommended enumeration option 2, which would have required Federal health plans and Medicaid to enumerate their enrolled health care providers, with a federally-directed registry enumerating all remaining health care providers.) The supporters of a single enumeration entity cited the following advantages of option 1: (1) It would be less costly than multiple enumeration entities; (2) it would ensure uniform operation of the enumeration process, reducing inconsistencies that could lead to duplicate assignment of NPIs; (3) it would be less confusing to health care providers, particularly those that participate in multiple health plans; (4) it would be a single point of contact with which to do business and seek help and information; and (5) it would ensure uniformity in resolving problems and would be more capable and efficient in responding to data integrity issues that may require investigation. Comments from Federal health plans and Medicaid State agencies (which were the proposed enumeration entities under option 2) stated that they preferred not to have a role as an enumerator. Some Federal health plans anticipated that too many health care providers would request that they handle their updates and changes. Medicaid State agencies indicated that they would require additional Federal funding to assume the responsibilities of enumeration.

Nonetheless, some commenters did support option 2. They stated that having Federal health plans and Medicaid State agencies enumerate their own health care providers had several advantages: (1) These entities already conduct a significant amount of enumeration activity in their health plan enrollment processes, which would bring a wealth of experience to the NPI enumeration process; (2) much of the information required to assign an NPI to a health care provider is already collected by these entities; (3) fraud detection would be enhanced because, as enumeration entities, they would have access to the data in the NPS; and (4) the initial cost of enumerating health care providers would be incremental to these entities, a major factor in making option 2 less costly than option 1.

Response: After analyzing all the comments and reviewing our computations as to the costs of enumeration under both options, we have determined that a single entity, under HHS direction, should handle the enumeration functions. We believe that enumeration by a single entity will be the most efficient option.

While supporters of option 2 cited several advantages, the reluctance of the Federal health plans and Medicaid State agencies to undertake enumeration functions was a major factor causing us to support a single entity. Selection of option 2 would have required those Federal health plans and Medicaid State agencies to perform functions they were not willing to perform. Another factor in our decision to choose option 1 was an oversight in our cost computations. While our narrative discussion of costs indicated that prevalidated Medicare provider files would populate the NPS under both options, Table 5 in the Impact Analysis portion of the May 7, 1998, proposed rule did not reflect those savings in the cost of option 1. If those savings had been reflected, the cost of option 1 would have been less. (Please see the next comment and response regarding Medicare provider files.) Costs for option 2 did not include the expenses that would be incurred by Federal health plans and Medicaid State agencies in resolving problems found in their health care provider records that would prevent some of those records from being loaded into the NPS for enumeration of the health care providers. This would have increased the cost of option 2. Had we applied both of these cost factors, both options would cost about the same.

The use of one entity, under HHS direction, to enumerate health care providers will ensure uniform operation of the NPS. Health care providers will have a single contact point for applications, updates, and questions. Problems will be resolved in a uniform manner. These factors make a single enumerator the more efficient option.

Comment: Several commenters cautioned against loading pre-existing health care provider files into the NPS. They indicated that any errors present in those files would be carried undetected into the NPS. Commenters cautioned that any data to be loaded into the NPS should be validated, accurate, and up to date.

Response: We agree with the commenters' recommendation that accurate, current data should be included in the NPS. After publication of the May 7, 1998 proposed rule, we reexamined the existing Medicare provider files in anticipation of using them to populate the NPS. Our reexamination revealed that some mandatory NPS data elements are not present in some of the Medicare files. In addition, data integrity problems have been identified, and reformatting some of the Medicare files to make them consistent with the structure of the NPS may be more difficult than first expected. It may require considerable time to update and reformat these files for NPS purposes.

It is important to note that we are undertaking steps to update our existing Medicare provider files for independent business reasons. If we find it is feasible to use updated, accurate Medicare provider files to populate the NPS, we will do so, and we will notify the affected Medicare providers that they will not have to apply for NPIs. The NPS will notify the affected providers of their NPIs.

Comment: Nearly all commenters recommended that the enumeration function and operation of the NPS be federally funded because a Federal statute mandates the adoption and use of a standard unique health identifier for health care providers. Many commenters stated that the costs cannot be borne directly by health care providers or indirectly by health care provider organizations and clearly stated that health care providers should receive NPIs at no cost. Some stated that if fees need to be assessed, they should come from the health plans, not the

health care providers, as the health plans will receive the most benefit from the use of the standard. There was some support for the collection of initial fees from health plans, health care clearinghouses, and other nonprovider entities to obtain data from the NPS; the fees would help offset the cost of maintaining the database. Another commenter recommended that the public sector and large health plans pay fees to a public-private sector trust organization. The fees would represent their proportion of the total health benefit dollars; the trust organization would administer various databases required by the HIPAA standards (not solely the NPS). One commenter suggested Federal funds be used initially, with the enumeration entity eventually becoming self-sufficient.

Response: HIPAA did not provide the authority to charge health care providers a user fee to obtain an NPI. Federal funds will support the enumeration process and the NPS, at least initially. After the NPI is implemented, HHS will investigate the use of other funding mechanisms. The data dissemination process is discussed in section II.C.2., "Data Elements and Data Dissemination," of this preamble.

Comment: Some commenters supported the phases of enumeration as described in the May 7, 1998, proposed rule. Many commenters supported assignment of NPIs to existing Medicare providers first for these reasons: (1) These health care providers are the majority of the health care providers that conduct standard transactions; (2) the NPS is being developed by HHS; and (3) Medicare provider information is already available in HHS in the Centers for Medicare & Medicaid Services (CMS).

Many commenters stated that health care providers that do not conduct the transactions specified in HIPAA should be enumerated at the same time as all other health care providers—all health care providers must be equally able to receive NPIs. Many of these commenters believed that costly dual systems would have to be maintained (one for health care providers with NPIs and one for those without) and confusion in the marketplace would be created if paper processors did not also receive NPIs within the same time frame as electronic processors.

Other commenters suggested that NPIs be issued on a first-come, first-served basis.

Some commenters suggested enumeration phases by health care provider type or by geographical region of the country.

Response: The NPS will be stress tested, but even successful passage of the stress test will not enable all health care providers to apply for and be assigned NPIs at the same time.

Covered health care providers are required to use NPIs where those identifiers are required in standard transactions. We expect that covered health care providers will be the first to apply for NPIs. We estimate that, on the effective date of the NPI, approximately 2.3 million health care providers will be ready to apply for NPIs. They may apply for NPIs beginning on the effective date, which is May 23, 2005. Covered health care providers must begin to use their NPIs in standard transactions no later than May 23, 2007.

We estimate that, on the effective date of the NPI, the number of health care providers that typically do not conduct standard transactions will be approximately 3.7 million. A few examples of these health care providers are registered nurses employed by hospitals or other facilities, X-ray and other technicians, and dental hygienists. These health care providers may apply for NPIs at any time after the effective date of this final rule. However, because there is no requirement for these health care providers to use NPIs, we do not expect them to apply for NPIs as soon as those that conduct standard transactions or those that must be identified in standard transactions.

It may be determined some time after publication of this final rule that "bulk enumeration" of some health care providers is feasible. Bulk enumeration is a term used to mean mass-enumeration of a large number of health care providers, all at one time, from a database or file that uniquely identifies them in a way consistent with the identification criteria in this final rule. Bulk enumeration would eliminate the need for those health care providers to apply for NPIs. For example, bulk enumeration might involve a specific classification of health care providers that comprises the membership of a large professional organization, or it could involve different classifications of health care providers that are employed by one large organization health care provider. In both of these examples, the health care providers to be enumerated may or may not be covered entities. This enumeration could occur at any time, if it is feasible. HHS, along with the other affected entities, and working within the requirements of the Privacy Act, will determine the feasibility of bulk enumeration. Any health care provider that would be enumerated in this way will be notified.

The NPS will process applications for NPIs as they are received.

It is true that some health plans may have to maintain—for internal purposes—dual health care provider numbers: the NPI and the number(s) issued to health care providers by the health plans themselves. Health plans impose this burden on themselves in accommodating their own internal operational needs. We expect that health plans may decide to use NPIs for additional purposes beyond those required in this final rule.

Comment: The majority of commenters made it clear that NPIs must be assigned and the NPS fully and successfully tested well before the compliance date.

Response: We agree. The NPS will have been fully tested before it begins to assign NPIs. The speed of assignment of NPIs will be dependent in part on the complete, correct, and timely submission of the NPI applications.

Comment: Several commenters stated that the application forms for NPIs should be retained indefinitely in a manner where the signatures or certification statements could be verified if necessary. Commenters stated that signatures or certification statements could be useful in prosecuting a health care provider that knowingly requested more than one NPI for itself.

Response: The NPI application forms will contain a statement whereby the signer attests to the accuracy of the information on the application. Paper applications will be maintained indefinitely for signature or certification statement verification and audit purposes. Applications completed electronically will be processed only if the person completing the application attested to the accuracy of the information by "checking" a designated box appearing in the on-line application. Those electronic applications that are successfully processed (that is, the health care provider is assigned an NPI) will be maintained indefinitely in a manner whereby certification statements can be verified if required.

Comment: Several commenters asked that the NPI application form be designed to accommodate updates to health care provider data.

Response: We believe this is a good suggestion, particularly because all of the information that will be required on the application for an NPI will have to be updated if changes occur. Therefore, we will attempt to design a form that can serve both application and update purposes.

Final Provisions

One entity will be given enumeration functions under the direction of HHS (option 1 as presented in the May 7, 1998, proposed rule) to enumerate all eligible health care providers who apply for NPIs. There are many advantages in using a single entity, which were discussed in the comment and response section above.

The enumeration function and the development and operation of the NPS will be federally funded, at least for the foreseeable future. Under this final rule, health care providers will not be charged a fee to be assigned NPIs or to update their NPS data.

If feasible, we will populate the NPS with Medicare provider files.

Health care providers will apply for NPIs, and covered health care providers must apply for NPIs.

We will attempt to design the NPI application form in order to also accommodate updates. The form will be available from the NPS and via the Internet (*http://www.cms.hhs.gov*).

We will attempt to design the NPS so that it can receive and accept NPI applications and updates on paper or over the Internet.

We expect that the use of modern technology to receive and process applications for NPIs and to apply updates to the NPS records of enumerated health care providers will greatly reduce our earlier estimates. In addition, the limited validation by the NPS of data reported by health care providers will further reduce NPS costs. We discuss the cost of operating the NPS in section V, "Regulatory Impact Analysis," of this preamble.

Before enumeration begins, the NPS will be fully tested. We will strive to ensure that the NPS functions properly and guards against assigning the same NPI to more than one health care provider, assigning more than one NPI to the same health care provider, and re-using NPIs (assigning to a health care provider an NPI that had at one time been issued to another).

Health care providers may apply for NPIs beginning on the effective date of this final rule.

At this time, we do not expect bulk enumeration of health care providers, except possibly of Medicare providers, as discussed earlier. HHS will explore the feasibility of other such enumerations. If considered feasible, the affected health care providers will be notified and will not have to apply for NPIs.

We will consider the feasibility of allowing health care providers to designate authorized representatives to handle their NPI applications and updates.

Applications for NPIs and updates will be retained by HHS indefinitely in a manner in which signatures on paper applications or certification statements on electronic applications can be verified if required.

We will make available as much information as possible about the implementation of the NPI on the CMS Web site (*http://www.cms.hhs.gov*).

The web site will include information about the availability and submission of the NPI application/update form.

3. Approved Uses of the NPI

The preamble of the May 7, 1998, proposed rule discussed approved uses of the NPI. We did not receive comments that objected to those uses.

By 24 months after the effective date of this final rule, covered health care providers, health plans (except for small health plans), and health care clearinghouses must use the NPI in standard transactions. Small health plans must do so within 36 months of the effective date. Covered health care providers must disclose their NPIs to other entities when these entities need to include those health care providers' NPIs in standard transactions. We encourage all other health care providers to do the same.

The NPI may also be used for any other lawful purpose requiring the unique identification of a health care provider. It may not be used in any activity otherwise prohibited by law.

Examples of permissible uses include, in addition to the above, the following:

- The NPI may be used as a cross-reference in health care provider fraud and abuse files and other program integrity files.
- The NPI may be used to identify health care providers for debt collection under the provisions of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, enacted on April 26, 1996) and the Balanced Budget Act of 1997 (Pub. L. 105–33, enacted on August 5, 1997).
- Health care providers may use their own NPIs to identify themselves in nonstandard health care transactions and on related correspondence.
- Health care providers may use other health care providers NPIs to identify those other health care providers in health care transactions and on related correspondence.
- Health plans may use NPIs in their internal health care provider files to process transactions and in communications with health care providers.
- Health plans may communicate NPIs to other health plans for coordination of benefits.
- Health care clearinghouses may use NPIs in their internal files to create and process standard transactions and in communications with health care providers and health plans.
- NPIs may be used to identify health care providers in patient medical records.
- NPIs may be used to identify health care providers that are health care card issuers on health care identification cards.

We encourage health care providers that are not required to comply with HIPAA regulations to use NPIs in the ways listed above.

4. System of Records Notice

A System of Records Notice (HHS/HCFA/OIS No. 09–70–0008) published in the **Federal Register** on July 28, 1998 (63 FR 40297), listed the ways in which data from the NPS that are protected by the Privacy Act may be used. Few comments were received on the System of Records Notice.

We are including a summary of the comments below:

Comment: One commenter believes that the data collected to assign NPIs to physicians should be kept to an absolute minimum. Data that are not required for enumeration or legitimate administrative purposes should not be collected. Data released beyond HHS must be released in accordance with the provisions of the Privacy Act, insofar as that Act applies to the data in question, and the Freedom of Information Act, as appropriate. Data in addition to those which are published in the Unique Physician Identification Number (UPIN) Directory should not be released. Most of the data collected to enumerate an individual should not be publicly available. Another commenter was concerned that removal of a health care provider's record from the NPS could result in the re-issuance of that health care provider's NPI to another health care provider. The NPI must remain unequivocally unique and the NPS must never re-issue a previously assigned NPI. Removal of a health care provider's records at some point after the health care provider's death is reasonable, as long as there are guarantees that the health care provider's NPI will never be used by another health care provider or re-issued to another health care provider.

Response: In section II. C. 2. of this preamble, "Data Elements and Data Dissemination," we describe the information that we expect will be collected and stored in the NPS. The

requirements described in the comments we received on the NPS System of Records Notice will be met in the design and operation of the NPS and in the enumeration functions.

5. Summary of Effects on Various Entities

Below is a summary of how the implementation of the NPI will affect health care providers, health plans, and health care clearinghouses.

a. Health Care Providers

At this time, bulk enumeration of health care providers is not expected to occur. If, however, it is determined to be feasible, we will populate the NPS with data from Medicare provider files. If bulk enumeration were to occur, the affected health care providers would be notified of their NPIs and would not have to apply for them. Otherwise, in order to be assigned NPIs, covered health care providers must apply for NPIs. (Health care providers that are not covered entities are encouraged to apply for NPIs.) After applying for NPIs, health care providers will be assigned and notified of their NPIs by the NPS. Health care providers will submit a paper application or, if feasible, will have the option of applying for NPIs via the Internet. The NPI application/update form and information about health care provider enumeration will be available from the CMS Web site (*http://www.cms.hhs.gov*).

Covered health care providers that have been assigned NPIs must furnish updates (changes) in their required NPS data or that of their subparts to the NPS within 30 days of the changes; they may use the NPI application/update form for this purpose. We recommend that health care providers notify the health plans in which they are enrolled of any changes at the same time they notify the NPS of these changes. (This recommendation does not preclude health plans from requiring notification of updates within a shorter time frame.)

We encourage health care providers who have been assigned NPIs but who are not covered entities also to notify the NPS of changes in their NPS data within 30 days of the changes.

Covered health care providers must use their NPIs to identify themselves and their subparts, if appropriate, on all standard transactions when their health care provider identifiers are required. We encourage all health care providers and subparts that have been assigned NPIs to do the same.

Covered health care providers must disclose their NPIs and those of their subparts to entities that need the NPIs to identify those health care providers in standard transactions. We encourage all health care providers and subparts that have been assigned NPIs to do the same.

Covered health care providers must require their business associates, if they use them to conduct standard transactions on their behalf, to use their NPIs and the NPIs of other health care providers and subparts appropriately as required by those transactions.

Covered health care providers that are organization health care providers with subparts as described earlier in this preamble must ensure that, when NPIs are assigned to subparts, either the covered health care provider or the subpart (1) uses the NPIs of the subparts on all standard transactions when their health care provider identifiers are required, (2) discloses their NPIs to entities that need the NPIs to identify those subpart(s) in standard transactions, (3) communicates changes in required data elements of the subparts to the NPS, and (4) requires business associates of the subparts, if they use them to conduct standard transactions on their behalf, to use their NPIs and the NPIs of other health care providers and subparts appropriately as required by the transactions that the business associates conduct on their behalf.

b. Health Plans

Health plans must use the NPI of any health care provider or subpart that has been assigned an NPI to identify that health care provider or subpart on all standard transactions when the NPI is required. All plans except small health plans have 24 months from the effective date of this final rule to implement the NPI; small health plans have 36 months. Health plans that need NPS data in order to create standard transactions will be able to obtain NPS data from the NPS. (*See* section II. C. 2. of this preamble, "Data Elements and Data Dissemination.") Use of data from the NPS in order to comply with HIPAA requirements is a routine use as published in the NPS System of Records Notice.

HIPAA does not prohibit a health plan from requiring its enrolled health care providers to obtain NPIs if those health care providers are eligible for NPIs as discussed earlier in this preamble.

c. Health care clearinghouses

Health care clearinghouses must use the NPI of any health care provider or subpart that has been assigned an NPI to identify that health care provider or subpart on all standard transactions when the NPI is required. As with health plans, health care clearinghouses will be able to obtain NPS data from the NPS.

C. Data

1. NPS Data Structures

Proposed Provisions (§ 142.402)

In section IV. B. of the preamble of the May 7, 1998, proposed rule, "Practice Addresses and Group/Organization Options," (63 FR 25336), we asked for public comment on some of the data structures that would be captured in the NPS for each health care provider.

Comments and Responses on NPS Data Structure Concepts

Below are the questions as posed in the May 7, 1998, proposed rule followed by a summary of the comments and our responses:

a. Should the NPS Capture Practice Addresses of Health Care Providers?

Comment:

Responding yes: Some commenters stated that they need to capture the multiple practice addresses of a health care provider for their business functions. They believe it would be best to do this once in the health care provider's NPS record, rather than in many local systems.

Responding no: A large majority of commenters stated that the NPS should not capture any practice addresses or should capture only one physical location address per NPI. Some of these commenters believed that each location where a health care provider practices needs to be identified, but they believed locations should receive separate identifiers, rather than be captured as multiple addresses in the health care provider's NPS record. Many other commenters noted that health care provider practice addresses change frequently and that address information will be burdensome and expensive to maintain and will be unlikely to be maintained accurately at the national level. They believe that, if needed, it should be collected and maintained in local systems.

Response: The NPS will capture the mailing address and one physical location address for each health care provider. Only one physical location address will be associated with each NPI. Practice addresses would be of limited use in the electronic matching of health care providers. The volatility of practice address information would make maintenance of the information burdensome and expensive. Collecting only one physical location address minimizes the burden of data collection and maintenance, while providing an

address where the health care provider can be contacted in situations when a mailing address is insufficient. For example, a mailing address containing a Post Office box number cannot be used for mail delivery by other than the United States Postal Service.

b. Should the NPS Assign a Location Code to Each Practice Address in a Health Care Provider's Record?

Comment:

Responding yes: A small number of commenters recommended that the NPS assign location codes. Most of these commenters were health plans that need to identify all the practice addresses of a health care provider. They want to use location codes as pointers to these addresses in a health care provider's NPS record.

Responding no: A large majority of commenters stated that the NPS should collect only one physical location address of each health care provider and should not assign location codes. If only one physical location address is collected, there is no need to assign location codes to distinguish multiple practice addresses. Respondents noted several technical weaknesses of the proposed location code. They stated that the format of the location code would allow for a lifetime maximum of 900 location codes per health care provider, and this number may not be adequate for health care providers with many locations. The location code would not uniquely identify an address; different health care providers practicing at the same address would have different location codes for that address, resulting in complexity, rather than simplification, for business offices that maintain data for large numbers of health care providers.

Response: The combination of the NPI assignment strategy described earlier in this final rule and the data elements contained in the standard claim and equivalent encounter information transaction eliminate the need for location codes. The NPS will not establish location codes.

c. Should the NPS Link the NPI of a Organization Health Care Provider That Is a Group Practice to the NPIs of the Individual Health Care Providers Who Are Members of the Group?

Comment:

Responding yes: Some commenters responded that they need to be able to associate organization health care providers who are group practices with the individual members of the group. They believe this association can most efficiently be maintained once in the NPS, rather than in many local systems.

Responding no: A large majority of commenters noted that health care provider membership in groups changes frequently and that this information will be burdensome and expensive to maintain and will be unlikely to be maintained accurately at the national level. Some health plans recognize contractual arrangements that may not correspond to groups. Commenters believe that, if needed, membership in groups should be collected and maintained in local systems.

Response: We agree that the NPS should not link the NPI of an organization health care provider that is a group practice to the NPIs of individual health care providers who are members of the group. The large number of members of some groups and the frequent moves of individuals among groups would make national maintenance of group membership burdensome and expensive. Contractual arrangements would be impractical to maintain nationally and would most likely differ from health plan to health plan. Most organizations that need to know group membership and contractual arrangements prefer to maintain this information locally, so that they can ensure its accuracy for their business purposes.

d. Should the NPS Collect the Same Data for Organization and Group Health Care Providers?

Comment:

Responding yes: A large majority of commenters stated that a distinction between organization and group health care providers would be artificial and would serve no purpose.

Responding no: Some commenters stated that organization and group health care providers should be distinguished in the NPS. None of these commenters suggested different data that should be collected for a group health care provider, as opposed to an organization health care provider. We believe that most of these comments reflect a recommendation that group health care providers receive NPIs rather than a recommendation that different data be collected for group health care providers, as opposed to organization health care providers.

Response: No commenter suggested that different data be collected for a group practice than for an organization health care provider and a strong majority of commenters stated that the same data should be collected. We agree that the NPS should collect the same data for group and organization health care providers. Groups will be enumerated as organization health care providers.

Comments and Responses on NPS Data Structure Alternatives

In the May 7, 1998, proposed rule, we presented two alternatives for the structure of health care provider data in the NPS.

Under "Alternative 1," the NPS would capture multiple practice addresses. It would assign a location code for each practice address of an individual or group health care provider. Organization and group health care provider records would have different associated data in the NPS. Group health care providers could have individuals (such as physicians) listed as members of the group, and the NPS would link the NPIs of group health care providers to the NPIs of the individuals that make up the group. Under "Alternative 2," the NPS would collect the mailing address and one physical location address for a health care provider. It would not assign location codes. It would not collect different data for organization and group health care providers. It would not link the NPI of an organization to the NPIs of individuals or any other health care providers.

Comment: A majority of respondents preferred Alternative 2.

Response: The comments on the four preceding questions and on the two alternatives indicated a strong preference for Alternative 2. We agree with commenters that Alternative 2 will provide the data needed to identify the health care provider at the national level. We agree that the NPS record will be based on the data described in Alternative 2.

Final Provisions

In the "Final Provisions" portion of section II. A. 2. of this preamble, "Definition of a Health Care Provider," we describe the entities that will be eligible to receive NPIs. The data structures discussed below apply to every entity that is assigned an NPI.

The mailing address and one practice address (physical location) will be collected by the NPS for each health care provider. One physical location address will be associated with each NPI.

Because only one physical location address will be collected per health care provider, location codes will not be necessary and, therefore, will not be established by the NPS.

Group practices often have many members, and individual health care providers often move from group to group. Maintenance of this information on a national level would be difficult and costly. Many health plans prefer to

collect and maintain this information themselves. Therefore, the NPS will not link the NPI of a group to the NPIs of individual health care providers who are members of that group.

The NPS will collect the same data from group health care providers as it will collect from organization health care providers.

Group practices will be considered organization health care providers and will be enumerated as organization health care providers.

We will design the NPS along the lines of Alternative 2 as presented in the May 7, 1998, proposed rule.

2. Data Elements and Data Dissemination

Proposed Provisions

In the preamble of the May 7, 1998, proposed rule, in section IV, "Data," we listed the data elements that we proposed to include in the NPS. We solicited comments on the inclusion and exclusion of those data elements and the inclusion of other data elements that the public believed appropriate. We asked how the NPS could be designed to make it useful, efficient, and low-cost.

In that same section, we also posed data questions and discussed options for NPS data structures. Section II.C.1. of this preamble, "NPS Data Structures," contains the comments and responses and decisions made regarding NPS data structures. As a result of those decisions, some data elements that were included in the list of proposed data elements published in the May 7, 1998, proposed rule will not, in fact, be included in the NPS database. Therefore, the information in section II.C.1. of the preamble should be kept in mind in reading this section.

In the preamble of the May 7, 1998, proposed rule, in section V., "Data Dissemination," we proposed two levels of dissemination of information from the NPS:

- (1) Level I—To the entity(ies) performing the enumeration functions. The(se) entity(ies) would have direct access to the NPS and to all the data elements in the NPS; and
- (2) Level II—To the general public. The general public would be able to request and receive selected data elements, excluding those that are protected by the Privacy Act. (Requests for Privacy Act-protected data and Freedom of Information Act (FOIA). requests would be handled in accordance with existing HHS policies.)

The May 7, 1998, proposed rule contained a table indicating the level of dissemination of the NPS data elements. We proposed that we would charge fees for data and data files, but that the fees would not exceed the costs of dissemination (63 FR 25338). We solicited comments on the information that should be available in paper and electronic formats and the frequency with which information should be made available.

Comments and Responses on Data Elements and Data Dissemination

Comment: An overwhelming number of commenters said that the NPS should contain only the data elements required to communicate with and uniquely identify and assign an NPI to a health care provider. They believed this information should be the kind that could effectively be maintained at the national level, leaving the more complex and volatile data to health plans to capture and maintain, as they currently do. Many commenters listed the specific data elements that they recommended we remove from the list presented in the May 7, 1998, proposed rule. The majority of commenters believe that, as a result of the removal of the data elements not needed for enumeration and communication, the NPS would be easier and less expensive to maintain and would operate more efficiently.

Response: To be valuable, the NPS must be accurate, up to date, and meet its intended purpose in the most feasible way. The NPS must collect information sufficient to uniquely identify a health care provider and assign it an NPI and must collect information sufficient to communicate with a health care provider. The data elements that we have retained are necessary to uniquely identify and communicate with a health care provider. Our decision to reduce the composition of the NPS to the data elements needed for unique identification and communication removes many of the data elements that were proposed to comprise the NPS in the May 7, 1998, proposed rule. The comments and responses that follow contain additional information and rationale concerning our decision to include or exclude certain data elements.

Comment: Some commenters said that collecting but not validating certification or school information would make that information meaningless. Most commenters did not believe the NPS should collect certification or school information in the first place because it would not be useful in uniquely identifying the individual applying for an NPI. They believe that collection and validation of this information should continue to be done by health plans in their health care provider enrollment processes. Most commenters supported the collection of credential designation(s) (for example, M.D., C.S.W., and R.N.), license number(s), and State(s), which issued the license(s) for individual health care providers whose taxonomy classifications require licenses.

Response: We agree with commenters that it would be costly to collect, validate, and maintain certification and school information. We do not believe the NPS should replicate unnecessarily the work carried out by health plans. We agree that health plans, which do this work now, should appropriately continue to do so. The NPS will capture an individual health care provider's license number (if appropriate), the State which issued the license (multiple occurrences of both data elements), and the credential designation(s). The credential designation(s) (called "Provider's credential designation" in the May 7, 1998, proposed rule) will be captured in the data element "Provider credential text," which will be a repeating field. This data element was renamed to make it compatible with X12N HIPAA data dictionary naming conventions and also to avoid giving the impression that the NPS will be validating the credentials. The license number and State in which it was issued will be useful to health plans in matching NPS records to their health care provider files. As a result of the decision not to collect certification and school information, the following data elements will not be included in the NPS:

- Provider certification code;
- Provider certification (certificate) number;
- School code;
- School name;
- School city, State, country;
- School graduation year.

Comment: Commenters did not see value in the NPS capturing "Provider's birth county name." They believe the State name and country (the latter required if the health care provider was not born in the United States) would be sufficient for identification purposes.

Response: We agree. The "Provider's birth county name" data element will be excluded from the NPS.

Comment: Some commenters suggested that the "Taxpayer Identifying Number" (TIN) be added to the NPS. They believed this was needed to match NPS records to health plans' health care provider files and that it could help in unique identification.

Response: We agree that the numbers used to report income taxes will be

useful in uniquely identifying health care providers.

According to the Internal Revenue Service (IRS), three numbers (known as "Taxpayer Identifying Numbers," or TINs) may be used (depending on circumstances) to report income taxes: (1) The Social Security Number (SSN), assigned by the Social Security Administration to individuals; (2) the IRS Individual Taxpayer Identification Number (ITIN), assigned by the IRS to individuals who are not eligible to receive Social Security Numbers; and (3) the Employer Identification Number (EIN), assigned by the IRS to organization health care providers (that is, health care providers that would not be assigned "Entity type code" 1 NPIs). For purposes of being assigned NPIs, health care providers will be asked voluntarily to supply their SSN or IRS ITIN (if they are individuals who would be assigned an "Entity type code" 1 NPI), or will be required to supply their EIN (if they are organizations that would be assigned "Entity type code" 2 NPIs).

Requesting the SSN from individual health care providers will dictate that we include on the NPI application/update form appropriate disclosure and Privacy Act statements.

Comment: Some commenters suggested that Medicare and Medicaid sanction information be added to the NPS. One commenter wanted to know where sanction data would be housed and who would maintain these data.

Response: The NPS will not contain sanction data or indicators that sanction data exist. Sanction data were not included in the data element list published in the May 7, 1998, proposed rule. While maintainers of sanction databases may incorporate the NPI into their databases to enable searches by NPI, the NPS will not house sanction information. The Web address for the Office of Inspector General sanctioned health care providers file is *http://exclusions.oig.hhs.gov/.*

Comment: Some commenters said that "License revoked indicator" and "License revoked date" should be included in the NPS.

Response: The NPS will not capture this or similar information. The uniqueness of the health care provider can be established without this information. This information would more appropriately be collected by health plans.

Comment: A number of data elements were suggested to be added to the NPS. These included "Owner of the provider," "Practice type control code" (office-based, hospital-based, Federal facility practice, and other), "Source of information for certification," "Provider type," and "Provider specialty code."

Response: The May 7, 1998, proposed rule did not propose that the NPS collect health care provider ownership information. This information is volatile and already resides on most health plans' health care provider enrollment files. Practice type control information is not required to uniquely identify or classify a health care provider for NPS purposes; therefore, it will not be included in the NPS. "Source of information for certification" will not be captured because, as explained earlier in this section, certification information will not be collected by the NPS. The definitions of "Provider type" and "Provider specialty code" may differ from one health plan to another; the NPS will capture the type(s), classification(s), and area(s) of specialization as described in the Healthcare Provider Taxonomy Code set. By capturing this information, we take into account the specialty classifications as required by HIPAA. The taxonomy can be viewed at this Web site: *http://www.wpc-edi.com/taxonomy/.*

Comment: A commenter suggested that a health care provider's "pay-to address" be added to the NPS. Another commenter stated that health plans will use the health care provider's mailing address as the pay-to address. Another commenter suggested that HHS consider electronic data interchange (EDI) addresses for inclusion in the NPS.

Response: In most situations, a health care provider's "pay-to address" is its mailing address. Therefore, we do not believe it is necessary to add a "pay-to address" to the NPS. Because EDI addresses are not standardized at this time, they will not be included in the NPS. The composition of the NPS will be revised if necessary in the future.

Comment: Several commenters suggested adding the name of the establishing enumerator or agent and the name and telephone number of the enumerator who made the last update to the NPS. They believe that this information would help ensure the accuracy of the database by preventing multiple enumerators from updating or attempting to update the same records.

Response: As discussed in section II. B. 2. of this preamble, "Health Care Provider Enumeration," there will be one entity, under HHS direction, that will be charged with enumeration functions. The decision to use a single enumerator renders the data elements proposed by these commenters unnecessary. The "Establishing enumerator/agent number" will not be included in the NPS.

Comment: One commenter suggested we add "Provider status" and "Date of deactivation" to the NPS.

Response: In section II. A. 2. of this preamble, "Definition of Health Care Provider," we describe the reasons why an NPI may be deactivated. We have added to the NPS two new data elements: "National Provider Identifier deactivation reason code" and "National Provider Identifier deactivation date." These data elements will capture the information suggested by this commenter. (It should be noted that "Provider's date of death" will be excluded as a data element from the NPS. Fact of death and resulting deactivation date will be captured in the two new data elements.) We have also added a data element called "National Provider Identifier reactivation date," which will capture the date that a health care provider's NPI is reactivated.

Comment: Several commenters suggested adding "Cross reference to replacement NPI." They thought it would be important to link former and current NPIs.

Response: In section II. A. 2. of this preamble, "Definition of Health Care Provider," we explain that an NPI is designed to last indefinitely. There may, however, be an unusual circumstance that would justify a health care provider's request to be issued a new, different NPI. In these situations, the NPS will link the new, or replacement, NPI to the previous NPI(s) of that same health care provider. (By "same health care provider," we mean an entity with exactly the same data elements, or string of NPS data.) We will add two new data elements to the NPS: "Replacement NPI" and "Previous NPI." Both will be repeating fields (see "Data Status" preceding the National Provider System Data Elements and Data Dissemination table). When a user retrieves the NPS record of a health care provider, either of those fields may contain data. (If neither field contains data, the health care provider has had only one—its original—NPI.) The user can then retrieve the related NPS record by requesting the record of the NPI appearing in the "Replacement NPI" or the "Previous NPI" field, whichever is appropriate.

Comment: One commenter suggested that "Effective from" and "Effective through" dates be added for telephone numbers and addresses.

Response: We expect that the NPS will be designed to associate dates with the information about a health care provider, thus creating a history of a health care provider's record. When changes are made to a health care provider's telephone number or address,

that health care provider's record will include the dates of those changes. "Effective from" and "Effective through" dates for telephone numbers and addresses may not hold true; there could be unexpected situations that could cause changes to occur sooner or later than reported. We believe it will be more accurate to include a date to reflect each time a change is made in this information.

Comment: A commenter suggested that the On-line Survey Certification and Reporting System (OSCAR) number be maintained after the initial load of Medicare providers, and that the NPS include a "Facility type" indicator for OSCAR providers.

Response: As explained earlier in section II. B. 2. of this preamble, "Health Care Provider Enumeration," we are evaluating the feasibility of populating the NPS with existing Medicare provider files. If this is done, the OSCAR number, which is a Medicare-assigned number, will be captured in the NPS automatically. Whether or not we populate the NPS with Medicare files, the NPI application/update form will collect health care provider identification numbers that are assigned by certain health plans (including Medicare) and other organizations. Health care providers that apply for NPIs will be able to furnish these numbers ("Other provider identifier") and to indicate the type of number being furnished (for example, OSCAR, UPIN, DEA, and Medicaid) ("Other provider identifier type code"), on the NPI application/update form. These will be optional and repeating NPS data elements. The NPS will capture as many "Other provider identifier" entries and the corresponding "Other provider identifier type code" entries as are reported on the NPI application/update form. The NPS will apply changes or updates to the "Other provider identifier" or "Other provider identifier type code" when health care providers notify the NPS of changes to this information.

The NPS will not require a "Facility type" indicator for health care providers with OSCAR numbers. It will collect the Healthcare Provider Taxonomy Code on the NPI application/update form.

Comment: Several commenters suggested the NPS retain the health care provider mailing and health care provider practice (provider location) phone number, facsimile number, and electronic mail address only during the initial assignment of NPIs, and then discontinue maintenance of this information.

Response: These data elements are needed for communication with the health care provider. HHS may need to communicate with a health care provider at any time during the implementation period or after. Therefore, these data elements will be maintained beyond the initial assignment of NPIs. In section II. A. 5. of this preamble, "Implementation specifications for Health Care Providers, Health Plans, and Health Care Clearinghouses," we are requiring health care providers who are covered entities to update their required NPS data, which includes the data elements noted in the comment above, whenever changes occur.

Comment: Many commenters suggested that several data elements be repeated; for example: "Provider's other name" and "Provider's other name type"; "Other provider number" and "Other provider number type"; "Provider license number" and "Provider license State"; "Provider classification"; the data elements associated with schools; and the data elements associated with credentials.

Response: The data element table appearing in the May 7, 1998, proposed rule did not indicate repeating fields. In the National Provider System Data Elements table at the end of this section, repeating fields are noted as such. The NPS will contain as many repeating fields as there is information for "Provider other last or other organization name" and "Provider other last or other organization name type code." As mentioned earlier, the NPS will also be able to accommodate multiples of other health care provider numbers in the data element "Other provider identifier" and types of other health care provider numbers in the data element "Other provider identifier type code." The NPS will accommodate multiple entries for "Provider license number" and "Provider license State." As explained earlier, the school information will be excluded from the NPS. "Provider credential text" (for example, M.D. and D.D.S.) will be a repeating field. These repeating fields are either optional or situational and will not be validated.

Comment: Many commenters asked that "Provider's race" be removed from the NPS. They did not believe it would be accurately reported. They stated that there are inconsistent definitions for "race"; they did not understand the purpose for collecting this information.

Response: We understand and appreciate the comments stating that the NPS should be capturing only what is needed for unique identification of and communication with a health care provider. While collection of race and ethnicity data could support a number of important research activities, this information is not needed to uniquely identify a health care provider; thus, we have concluded that the NPS is not the appropriate vehicle for collecting this information. Therefore, we will not collect these data elements even on an optional basis.

Comment: Several commenters suggested that a number of other data elements be excluded from the NPS: all user-requested data elements (these were denoted by a "U" in the data element list in the May 7, 1998, proposed rule), "Other provider number," "Other provider number type," "Organization type control code," "Provider certification code," "Provider certification (certificate) number," "Provider license number," "Provider license State," "School code," "School name," "School city, State, country," "School graduation year," "Provider classification," "Date of birth," all electronic mail addresses and fax numbers, "Date of death," "Provider sex," and "Resident/Intern code."

Response: We stated in the previous response that "Provider race code" (which was a user-requested data element in the list included in the May 7, 1998, proposed rule) will not be retained. We discussed all other data elements presented as user-requested data elements in the list in the May 7, 1998, proposed rule in previous comments and responses except for "Organization type control code" and "Resident/Intern code." These two latter data elements will be excluded; they are not needed for the unique identification of or communication with a health care provider.

Comment: Several commenters questioned the use of "optional" data elements, believing that "optional" information will rarely be furnished and, if it is furnished, may not be reliable and probably would not be kept current.

Response: Certain information about health care providers that is desirable to uniquely identify them in order to assign NPIs cannot be required to be furnished. "Situational" data elements should not be confused with "optional" data elements. "Situational" data elements are required if a certain situation, or condition, exists. "Optional" data elements do not have to be supplied at all. For example, "Provider other last or other organization name" is optional. A health care provider may choose not to report a former name or a professional name. We have attempted to make as

few data elements as possible "optional" in the NPS.

Comment: Several commenters suggested that data element names, qualifiers, and definitions be consistent with the X12N HIPAA data dictionary.

Response: The NPS data element names, qualifiers, and definitions, wherever possible, are mappable to those in the X12N HIPAA data dictionary and are compatible with X12N naming conventions. We believe the mapping capability and naming convention compatibility are essentially what the commenters wanted and believe we have satisfied their concerns.

Comment: Two commenters suggested that the Drug Enforcement Administration (DEA) number be collected from health care providers that have one.

Response: The DEA number is an example of an "Other provider identifier." The DEA number can be accommodated in this field in the NPS. We recognize that mapping between DEA numbers and NPIs is very important for the conversion of retail pharmacy files during NPI implementation. Therefore, we will collect the DEA number in the "Other provider identifier" field if it is reported on the NPI application/update form and will carry the fact that it is a DEA number by setting the "Other provider identifier type code" to indicate that.

Comment: Several commenters suggested that we publish a data model and record layout or both describing in detail the data elements, field lengths, format, repeating fields, and required and situational fields.

Response: The data element table in this preamble includes an indication of "required," "optional," or "situational" for each data element, and repeating data elements are noted as such. More detailed information, as requested in the comment, will be posted to the CMS Web site *(http://www.cms.hhs.gov)* when it becomes available during the NPS design.

Comment: Several commenters said an audit trail of NPI updates is needed for qualified users. This would indicate which enumerator updated which fields.

Response: The NPS will construct an audit trail. We expect that the audit trail would include the date a change was made, the old value, the new value, and the initiator of the change. As stated in section II. B. 2. of this preamble, "Health Care Provider Enumeration," there will not be multiple enumerators. The NPS will contain a date ("Last update date") that will indicate when a change was made to a health care provider's record. Extracts containing NPS changes will be made available in HHS-determined format and media to satisfy requests from approved users (see later discussion in this section of the data dissemination strategy).

Comment: Several Medicaid State agencies suggested that the Healthcare Provider Taxonomy Code set contain all health care provider types and specialties needed by Medicaid plans. Another commenter asked that the code set reflect services provided by pharmacists. Another stated that the code set did not contain a category for pain medicine. Several other commenters said the taxonomy code set is inconsistent.

Response: Until recently, this code set was maintained through an open process by the National Healthcare Provider Taxonomy Committee for use in Accredited Standards Committee X12N standard transactions. It is now maintained through an open process by the National Uniform Claim Committee. The Web site at which the code set is available is *http://www.wpc-edi.com/taxonomy/*. The web site contains information on how changes to the code set can be requested. (Note: Pharmacy service providers and physicians whose specialization is "Pain Medicine" are included in the code set.) Comment: Several commenters suggested that the NPS contain a feature whereby the Healthcare Provider Taxonomy Code set classifications will be available for selection when applying for an NPI.

Response: We will consider this comment in the design of the NPI application/update form.

Comment: Many commenters supported the creation of an industry-wide forum to determine the data element content, identify the mandatory and optional data elements, and determine the data dissemination requirements of the NPS. They recommended that WEDI foster such a group.

Response: WEDI is named in the Act as an external group with which the Secretary must consult in certain circumstances in standards development. To address these issues, WEDI formed several workgroups, which consisted of representatives from every aspect of the health care industry. Following the workgroups' meetings, WEDI supplied HHS with comments on NPS data, data dissemination, and other issues, supplementing the comments WEDI provided to HHS during the public comment period. We have considered these comments in developing this final rule.

Comment: Most commenters did not favor the two-level data dissemination approach presented in the May 7, 1998, proposed rule but favored instead a three-level approach:

- Commenters agreed that only the entity performing the enumeration functions and HHS should have access to the entire NPS.
- Commenters did not want Privacy Act restrictions violated but believe that our approach denied health plans and certain other health care industry entities information that they needed in order to process HIPAA transactions, while it gave the general public an excessive—and unnecessary—amount of information. They said that health plans and other health care industry entities required certain Privacy Act-protected data in order to accurately match their health care provider files with NPS data to effectively implement HIPAA requirements. Many suggested that health plans and health care clearinghouses be permitted to obtain copies of the database and periodic update files so that they can maintain files that are continually consistent with the NPS. Some commenters suggested an on-line query and response system be developed for health plans to verify a health care provider's NPI. Others wanted electronic transactions designed that could be sent to the NPS with a response returned. These transactions might request all available data, regional data, new records only, and updated records only. Some commenters suggested that health plans have batch and interactive access capabilities to the NPS, stating that health plans will require daily batch updates of new and changed records, particularly during the implementation period. Some suggested that changed records be available for electronic download daily and weekly, and monthly by CD ROM and diskette. Still others preferred that health care entities receive data through the Internet with secure identifiers.
- One commenter stated the NPS data should be used strictly for enumeration and that no NPS data should be made available to the public. This commenter recommended that the public and others obtain NPIs from the health care providers themselves, not from the NPS. Some commenters believe it inappropriate for the general public to look to the NPS as the source of any but the most general types of information about health care providers. Some commenters expressed concern that public release of too much information (particularly, full addresses) could subject health care providers to receipt of junk mail and other unsolicited materials.
- Commenters recommended that agreements be signed by anyone receiving NPS data to ensure the

information released would not be used for marketing or mailing list generation or sold or transferred to another entity.

• Several commenters stated that personally identifiable data about health care providers, contained in the NPS, should be available to researchers for clinical and financial outcomes analyses after appropriate agreements are signed.

• One commenter suggested read-only access to the NPS data for all users.

• Several commenters stated that the data dissemination policy should be consistent with the routine uses of NPS data as published in the NPS System of Records Notice (63 FR 40297).

• The three dissemination levels suggested by commenters were:

• Level 1—Available to HHS and the entity with which HHS contracts to perform the enumeration functions.

• Level 2—Available to health plans and certain other health care industry entities that require certain Privacy-Act protected data to match their health care provider files to NPS data.

• Level 3—Available to the general public.

Response: In order to keep costs low, we must make the NPS data dissemination strategy as efficient and uncomplicated as possible. The number of formats and access options will need to be limited.

We view the NPS as a health care provider identification and enumeration system, capturing the information required to perform those functions and disseminating information needed by health plans and other entities to effectively carry out the provisions of HIPAA. We agree with the majority of commenters who stated that health plans and certain other health care industry entities require NPS data, including some data that are protected by the Privacy Act, in order to effectively conduct HIPAA transactions. (Privacy Act-protected data are those that reveal or could reveal the identity of a specific individual when used alone or in combination with or linked to one or more data elements.)

Comment: Some commenters suggested that a health care provider be able to access its own NPS data through the Internet to ensure its accuracy and to facilitate updating the information.

Response: This comment will be considered in the design of the NPS; if it is determined to be feasible, this access will be made available.

Comment: Several commenters supported charging reasonable fees or subscription rates for web-based data access options; for example, HHS could charge an annual subscription fee for unlimited downloads and a different subscription fee for monthly downloads. Some commenters asked if on-line access charges would be based on time or on a per file access basis.

Some commenters believed that usage fees should not be limited to the cost of producing the data but should be linked to the costs and value of establishing and using the NPS.

Many commenters stated that the enumerator(s) should not have to pay for NPS data.

One commenter, who had suggested the enumerator be a public and private sector trust, suggested that dissemination fees be established and administered by the public and private sector trust.

Response: The design of the NPS will facilitate making information available in an efficient manner, which will involve the use of the Internet. We are reviewing the issue of charging fees, and intend to consider charging fees to the extent our authority permits.

Final Provisions (§ 162.408(b) and (f))

The NPS Data Elements Table lists the data elements that we expect to collect about a health care provider and which will be included in the National Provider System (NPS). The data element table is not intended to be used for data design purposes. During NPS design and development, the names and attributes of the data elements may be revised. We are including this listing to show readers the kind of information that we expect will be collected about health care providers or that will be NPS-generated (for example, the NPI) about health care providers. The table does not include systems maintenance or similar fields.

Description of the information contained in each column of this table:

Data Element Name: The name of the data element residing in the NPS.

Description: The definition of the data element and related information.

Data Status: The instruction for furnishing the information being requested in the data element. The abbreviations used in this column are as follows:

Required (R): Required for NPI assignment. NPS-generated (NG): Generated or assigned by the NPS. Optional (O): Not required for NPI assignment. Situational (S): If a certain condition exists, the data element is required. Otherwise, it is not required. Repeat (RPT): Indicates that the data element is a repeating field. A repeating field is one that can accommodate more than one separate entry. Each separate entry must meet the edits, if any, designated for that data element.

Data Condition: Describes the condition(s) under which a "Situational" data element must be furnished. NOTE: The abbreviation NA means "not applicable."

Entity Types: The "Entity type codes" to which the data element applies. See the description of the data element "Entity type code" in the table.

Use: The purpose for which the information is being collected or will be used.

I: The data element supports the unique identification of a health care provider.

A: The data element supports administrative implementation specifications.

Dissemination of data from the NPS is a complex process. It must be responsive to requests from covered entities for NPS information that they need in order to comply with HIPAA. We expect a high volume of such requests, primarily from health plans, once NPIs begin to be assigned. At the same time, the dissemination process must ensure compliance with the provisions of the Privacy Act, the Freedom of Information Act, the Electronic FOIA Amendments of 1996, and other applicable regulations and authorities, and must be consistent with the NPS System of Records Notice, which was published on July 28, 1998.

We expect to make routinely available, via the Internet and on paper, HHS-formatted data sets that will contain general identifying information, including the NPI, of enumerated organization health care providers and subparts of such health care providers (as described earlier in this preamble).

Because of complexities that are inherent in disseminating data from the NPS, it is necessary to eliminate from the NPS Data Elements Table the column that, in the proposed rule, indicated the data dissemination level. Our data dissemination strategy and the process by which it will be carried out will be described in detail at a later date and published in a notice in the **Federal Register.**

NPS DATA ELEMENTS

Data element name	Description	Data status	Data condition (situational status only)	Entity types	Use
National Provider Indentifier (NPI)	10-position all-numeric identification number assigned by the NPS to uniquely identify a health care provider.	NG	NA	1, 2	I
Entity type code (type of health care provider assigned an NPI).	Code describing the type of health care provider that is being assigned an NPI. Codes are 1 = (Person): individual human being who furnishes health care; 2 = (Non-person): entity other than an individual human being that furnishes health care (for example, hospital, SNF, hospital subunit, pharmacy, or HMO).	R	NA	1, 2	A
Replacement National Provider Identifier.	The most recent NPI issued by the NPS to this provider. Issuance of a Replacement NPI by the NPS would be an unusual circumstance in which the provider requested a new, different NPI for a valid reason. Issuance of a Replacement NPI is different from NPI deactivation and NPI reactivation.	NG S RPT	Required if provider has been issued a replacement NPI.	1, 2	I
Previous National Provider Identifier.	The NPI that had previously been issued to this provider.	NG S RPT	Required if provider previously had been issued a different NPI.	1, 2	I
Provider Social Security Number (SSN).	The SSN assigned by the Social Security Administration (SSA) to the individual being identified.	O	NA	1	I
Provider IRS Individual Taxpayer Identification Number (IRS ITIN).	The taxpayer identifying number assigned by the IRS (to individuals who are not eligible to be assigned SSNs) to the individual being identified.	O	NA	1	I
Provider Employer Identification Number (EIN).	The Employer Identification Number (EIN), assigned by the IRS, of the provider being identified.	S	Required if the provider has an EIN.	2	I
Provider last name or organization name.	The last name of the provider (if an individual) or the name of the organization provider. If the provider is an individual, this is the legal name. If the provider is an organization, this is the legal business name.	R	NA	1, 2	I
Provider first name	The first name of the provider, if the provider is an individual.	S	Required if the provider's NPI is Entity type code = 1.	1	I
Provider middle name	The middle name of the provider, if the provider is an individual.	S	Required if the provider's NPI is Entity type code = 1 and the provider has a middle name.	1	I
Provider other last or other organization name.	Other last name by which the provider being identified is or has been known (if an individual) or other name by which the organization provider is or has been known.	O RPT	NA	1, 2	I
Provider other last or other organization name type code.	Code identifying the type of other name. Codes are: 1 = former name; 2 = professional name; 3 = doing business as (d/b/a) name; 4 = former legal business name; 5 = other.	S RPT	Required if "Provider other last or other organization name" contains data. Codes 1–2 apply to individuals; codes 3–4 apply to organizations; code 5 applies to both.	1, 2	I
Provider other first name	Other first name by which the provider being identified is or has been known (if an individual). This may be the same as the "Provider first name" if the provider is or has been known by a different last name only.	S RPT	Required if "Provider other last or organization name" contains data and the provider's NPI is Entity type code = 1.	1	I
Provider other middle name	Other middle name by which the provider being identified is or has been known (if an individual). This may be the same as the "Provider middle name" if the provider is or has been known by a different last name only.	S RPT	Required if "Provider other last or organization name" contains data, the provider NPI is Entity type code = 1, and the provider has a middle name.	1	I
Provider name prefix text	The name prefix or salutation of the provider if the provider is an individual; for example, Mr., Mrs., or Corporal.	O	NA	1	I

NPS DATA ELEMENTS—Continued

Data element name	Description	Data status	Data condition (situational status only)	Entity types	Use
Provider name suffix text	The name suffix of the provider if the provider is an individual. The name suffix is a "generation-related" suffix, such as Jr., Sr., II, III, IV, or V.	O	NA	1	I
Provider credential text	The abbreviations for professional degrees or credentials used or held by the provider, if the provider is an individual. Examples are MD, DDS, CSW, CNA, AA, NP, RNA, or PSY. These credential designations will not be verified by NPS.	O	NA	1	I
Provider first line mailing address	The first line mailing address of the provider being identified. This data element may contain the same information as "Provider first line location address".	R	NA	1, 2	A
Provider second line mailing address.	The second line mailing address of the provider being identified. This data element may contain the same information as "Provider second line location address".	S	Required if it exists	1, 2	A
Provider mailing address State name.	The State or Province name in the mailing address of the provider being identified. This data element may contain the same information as "Provider location address State name".	S	Required if the address has no State code but contains a State or Province name.	1, 2	A
Provider mailing address postal code.	The postal ZIP or zone code in the mailing address of the provider being identified. NOTE: ZIP code plus 4-digit extension, if available. This data element may contain the same information as "Provider location address postal code".	S	Required if the address is inside the United States or has an associated postal code.	1, 2	A
Provider mailing address country code.	The country code in the mailing address of the provider being identified. This data element may contain the same information as "Provider location address country code".	S	Required if address is outside the United States.	1, 2	A
Provider mailing address telephone number.	The telephone number associated with mailing address of the provider being identified. This data element may contain the same information as "Provider location address telephone number".	S	Required if provider mailing address has a telephone.	1, 2	A
Provider mailing address fax number.	The fax number associated with the mailing address of the provider being identified. This data element may contain the same information as "Provider location address fax number".	O	NA	1, 2	A
Provider first line location address	The first line location address of the provider being identified. For providers with more than one physical location, this is the primary location. This address cannot include a Post Office box.	R	NA	1, 2	A
Provider second line location address.	The second line location address of the provider being identified. For providers with more than one physical location, this is the primary location. This address cannot include a Post Office box.	S	Required if it exists	1, 2	A
Provider location address city name.	The city name in the location address of the provider being identified.	R	NA	1, 2	A
Provider location address State code.	The State code in the location of the provider being identified.	S	Required if address is inside the United States or has an associated State code.	1, 2	A
Provider location address State name.	The State or Province name in the location address of the provider being identified.	S	Required if the address has no State code but contains a State or Province name.	1, 2	A
Provider location address postal code.	The postal ZIP or zone code in the location address of the provider being identified. NOTE: ZIP code plus 4-digit extension, if available.	S	Required if the address is inside the United States or has an associated postal code.	1, 2	A
Provider location address country code.	The country code in the location address of the provider being identified.	S	Required if address is outside the United States.	1, 2	A

NPS DATA ELEMENTS—Continued

Data element name	Description	Data status	Data condition (situational status only)	Entity types	Use
Provider location address telephone number.	The telephone number associated with the location address of the provider being identified.	R	NA	1, 2	A
Provider location address fax number.	The fax number associated with the location address of the provider being identified.	O	NA	1, 2	A
Provider taxonomy code	Code designating the provider type, classification, and specialization. Codes are from the Healthcare Provider Taxonomy code list. The NPS will associate these data with the license data for providers with Entity type code = 1.	R RPT	NA	1, 2	I
Other provider identifier	Additional number currently or formerly used as an identifier for the provider being identified. This data element will be captured from the NPI application/update form.	O RPT	NA	1, 2	I
Other provider identifier type code	Code indicating the type of identifier currently or formerly used by the provider being identified. The codes may reflect UPIN, NSC, OSCAR, DEA, Medicaid State or PIN identification numbers. This data element will be captured from the NPI application/update form.	O RPT	NA	1, 2	I
Provider enumeration date	The date the provider was assigned a unique identifier (assigned an NPI).	NG	NA	1, 2	A
Last update date	The date that a record was last updated or changed.	NG	NA	1, 2	A
NPI deactivation reason code	The reason that the provider's NPI was deactivated in the NPS. Codes are: 1 = death of entity type "1" provider; 2 = entity type "2" provider disbandment; 3 = fraud. 4 = other (for example, retirement).	S	Required if NPI has been deactivated.	1, 2	A
NPI deactivation date	The date that the provider's NPI was deactivated in the NPS.	S	Required if "NPI deactivation code" contains data.	1, 2	A
NPI reactivation date	The date that the provider's NPI was reactivated in the NPS.	NG	NA	1, 2	A
Provider birth date	The date of birth of the individual being identified.	S	Required if the provider's NPI is Entity type code = 1.	1	I
Provider birth State code	The code representing the State in which the individual being identified was born. X12N code lists and names will be used for this element.	S	Required if born in United States	1	I
Provider birth country code	The code representing the country in which the individual being identified was born.	S	Required if country is other than United States.	1	I
Provider gender code	The code designating the provider's gender if the provider is a person.	S	Required if the provider's NPI is Entity type code = 1.	1	I
Provider license number	The license number issued to the provider being identified. The NPS can accommodate multiple license numbers for multiple specialties and for multiple States. The NPS will associate this data element with "provider taxonomy code".	S RPT	Required for certain "Provider taxonomy codes.".	1, 2	I
Provider license number State code.	The code representing the State that issued the license to the provider being identified. This field can accommodate multiple States. It is associated with "provider license number.	S RPT	Required if "Provider license number" contains data.	1, 2	I
Authorized official last name	The last name of the person authorized to submit the NPI application or to change NPS data for a health care provider.	R		2	I
Authorized official first name	The first name of the authorized official	R		2	I
Authorized official middle name	The middle name of the authorized official	S	Required if the authorized official has a middle name.	2	I
Authorized official title or position	The title or position of the authorized official	S	Required if the authorized official has a title or position.	2	I
Authorized official telephone number.	The 10-position telephone number of the authorized official.	R		2	I
Contact person last name	The last name of the person to be contacted if there are questions about the NPI application or changes in NPS data.	R		1, 2	I

NPS DATA ELEMENTS—Continued

Data element name	Description	Data status	Data condition (situational status only)	Entity types	Use
Contact person first name	The first name of the contact person	R		1, 2	I
Contact person middle name	The middle name of the contact person	S	Required if the contact person has a middle name.	1, 2	I
Contact person name suffix text	The name suffix of the contact person (for example, Jr., Sr., II, III, IV, or V).	O	NA	1, 2	I
Contact person credential text	The abbreviations for professional degrees or credentials used or held by the contact person. Examples are M.D., R.N., or PhD.	O	NA	1, 2	I
Contact person title or position	The title or position of the contact person	S	Required if the contact person has a title or position.	1, 2	I
Contact person telephone number	The 10-position telephone number of the contact person.	R		1, 2	I
Contact person mailing address electronic mail identifier.	The electronic mail address associated with the mailing address of the contact person.	S	Required if the contact person has an electronic mail identifier associated with the mailing address of the contact person.	1, 2	I

D. New and Revised Standards

Comments and responses on new and revised standards can be found in the Transactions Rule (65 FR 50343). Generally, we may modify a standard after the standard has been in effect for at least a year, unless we determine a modification is necessary sooner in order to permit compliance with the standard. The Secretary may not require compliance with a modification until at least 180 days after the modification is adopted. We will consider requests for modifications to the standard unique health identifier for health care providers.

III. Summary of Revisions to Regulations Text

We added a definition for "Covered health care provider" at § 162.402. In addition to the changes discussed above, minor organizational or conforming changes were made to other sections of the regulations text.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), agencies are required to provide a 30-day notice in the **Federal Register** and solicit public comment on a collection of information requirement submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- Whether the information collection is necessary and useful to carry out the proper functions of the agency.
- The accuracy of the agency's estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

§ 162.410(a)(1) Through (a)(6) Implementation Specifications: Health Care Providers

A health care provider who is a covered entity must obtain, by application if necessary, an NPI from the NPS and must use the NPI it obtained to identify itself on all standard transactions where its provider identifier is required. A covered health care provider must ensure that its subpart(s), if assigned an NPI(s), does the same. A covered health care provider must disclose its NPI, when requested, to any entity that needs the NPI to identify that health care provider in a standard transaction. A covered health care provider must ensure that its subpart(s), if assigned an NPI(s), does the same. A covered health care provider that has been assigned an NPI must notify the NPS of any changes in its required data within 30 days of the change. A covered health care provider must ensure that its subpart(s), if assigned an NPI(s), does the same. A covered health care provider that uses one or more business associates to conduct standard transactions on its behalf must require its business associates to use its NPI and other NPIs appropriately on standard transactions that the business associate conducts on its behalf. A covered health care provider must ensure that its subpart(s), if assigned an NPI(s), and if the subpart(s) uses one or more business associates to conduct standard transactions, does the same.

§ 162.412 Implementation Specifications: Health Plans

A health plan must use the NPI of any health care provider or subpart in any standard transaction that requires the standard unique health identifier for health care providers. A health plan may not require a health care provider that has been assigned an NPI to obtain an additional NPI.

§ 162.414 Implementation Specifications: Health Care Clearinghouses

A health care clearinghouse must obtain and use the NPI of any health care provider or subpart in any standard transaction that requires the standard unique identifier for health care providers.

Applicability of the PRA to the Requirements

The emerging and increasing uses of health care EDI standards and transactions have raised the issue of the applicability of the PRA. The Office of Management and Budget (OMB) has determined that this regulatory requirement (which mandates that the private sector disclose information and do so in a particular format) constitutes an agency-sponsored third-party disclosure as defined under the PRA.

HIPAA requires the Secretary to adopt standards that have been developed, adopted, or modified by a standard setting organization, unless there is no such standard, or unless a different standard would substantially reduce administrative costs. OMB has concluded that the scope of its review under the PRA would include the review and approval of our decision to adopt or reject an established industry standard, based on the HIPAA criterion of whether a different standard would

substantially reduce administrative costs. For example, if OMB concluded under the PRA that a different standard would substantially reduce administrative costs as compared to an established industry standard, we would be required to reconsider our decision under the HIPAA standards. We would be required to make a new determination of whether it is appropriate to adopt an established industry standard or whether we should enter into negotiated rulemaking to develop an alternative standard (section 1172(c)(2)(A) of the Act).

The burden associated with the requirements of this final rule, which is subject to the PRA, is the initial one-time burden on health care providers who are covered entities to apply for an NPI and later, as necessary, to furnish updates, and on the covered entities identified above to modify their current processes to implement the NPI. However, the burden associated with the routine or ongoing use of the NPI is exempt from the PRA as defined in 5 CFR 1320.3(b)(2).

Based on the assumption that the burden associated with systems modifications that need to be made to implement the NPI may overlap with the systems modifications needed to implement other HIPAA standards, and the fact that the NPI will replace the use of multiple identifiers, resulting in a reduction of burden, commenters should take into consideration when drafting comments that: (1) One or more of these current identifiers may not be used; (2) systems modifications may be performed in an aggregate manner during the course of routine business; and/or (3) systems modifications may be made by contractors such as practice management vendors, in a single effort for a multitude of affected entities.

PRA Burden on Covered Health Care Providers

A health care provider that is a covered entity must obtain, by application if necessary, an NPI from the NPS. It must use its NPI to identify itself on all standard transactions that it conducts where its provider identifier is required. In addition, the covered health care provider must communicate to the NPS any changes to its required NPS data elements within 30 days of the change. To comply with these requirements, these health care providers will complete the NPI application/update form. This form serves two purposes: it enables a covered health care provider to apply for an NPI and to furnish updates to the NPS. Application for an NPI is considered to be a one-time action: an NPI is considered a permanent identifier for a health care provider. (*See* section II. A. 2., of this preamble, "Definition of Health Care Provider," for a discussion of the permanent nature of the NPI.) Most covered health care providers will not have to furnish updates in a given year; we estimate, based on information in the Medicare program, that approximately 12.6 percent of those health care providers will need to complete and submit the NPI application/update form in a given year. Below are our estimates for the annual burden hours associated with these requirements.

Applications for NPIs: Estimated Annualized Burden

Notes: (1) Existing health care providers that are covered entities would be able to apply for NPIs over a 2-year period. For the estimated annualized burden, we have divided the number of these health care providers by 2 to estimate the annual burden. (2) Applying for an NPI is a one-time burden on a health care provider. In future years, this burden would apply only to new health care providers that are covered entities. (3) The number of health care providers will increase by 1.56 percent annually. This is not a "net" percentage; it represents strictly the percentage of new health care providers coming into business annually. (4) We estimate it will take 20 minutes to complete the application/update form. (5) We estimate an hourly rate of $10.87, rounded to $11, for office staff to complete the application/update form.

New health care providers come into business every year. The first two years would have increases of 36,124 and 37,251 in new covered health care providers, respectively. The number of new covered health care providers is 1.56 percent of the number of existing health care providers in the previous year.

Updates of NPS Data: Estimated Annualized Burden

Notes: (1) We estimate that 12.6 percent of covered health care providers would need to furnish updates in a given year. The number of health care providers needing to update their data in any year is a percentage of the number of health care providers. (2) A health care provider that is a covered entity that does not have changes to its NPI data would not furnish updates and would, therefore, experience no burden. (3) We estimate it will take 10 minutes to complete the application/update form. (4) We estimate an hourly rate of $10.87, rounded to $11, for office staff to complete the application/update form.

In FY 2007, we estimate there will be 1,157,821 covered health care providers to be assigned NPIs. One could argue that no updates will need to be made in FY 2007 because no covered health care provider would have been enumerated prior to FY 2007. (*Note:* No health care provider is required to have an NPI before 2007.) However, for FY 2007, we have factored in updates by adding 12.6 percent of the 1,157,821 covered health care providers to represent—in a worst case scenario—a full year's worth of updates if the full 12.6 percent of the enumerated covered health care providers needed to provide updates within that same year.

Table 1 below shows the estimated annualized burden for the PRA.

TABLE 1.—PAPERWORK REDUCTION ACT ESTIMATED ANNUALIZED BURDEN. ESTIMATED ANNUALIZED BURDEN

Year	2007	2008	2009	2010	2011	Total
Cost (Burden Hours for Total Providers)	$5,419,027	$5,641,062	$183,050	$192,798	$204,079	$11,640,015
Cost (Update Hours)	$670,165	$719,050	$759,519	$800,337	$847,167	$3,796,237
Total Annualized Cost	$6,089,192	$6,360,111	$942,568	$993,135	$1,051,246	$15,436,252

If feasible, to further reduce burden and plan for compliance with the Government Paperwork Elimination Act, we are considering the acceptance of applications and updates electronically over the Internet. We explicitly solicit comment on how we might conduct this activity in the most efficient and effective manner, while ensuring the integrity, authenticity, privacy, and security of health care provider information.

As required by section 3504(h) of the Paperwork Reduction Act of 1995, we have submitted a copy of this document to the Office of Management and Budget (OMB) for its review of these information collection requirements. If you comment on these information collection and recordkeeping requirements, please e-mail comments to *Paperwork@ cms.hhs.gov* (Attn: CMS–0045–F) or mail copies directly to the following two addresses:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850, Attn: James Bossenmeyer, CMS–0045–F;

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, CMS–0045–F, CMS Desk Officer.

V. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (costs plus savings equal $100 million or more in any one year). We consider this final rule to be a major rule, as it will have an impact of over $100 million on the economy. This impact analysis shows a net savings of $526 million over a 5-year period.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, nonprofit organizations are considered small entities. Small government jurisdictions with a population of less than 50,000 are considered small entities. Individuals and States are not considered small entities. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having annual revenues of less than the threshold published in regulations by the Small Business Administration (SBA).

Effective October 1, 2000, the SBA no longer used the Standard Industrial Classification (SIC) System to categorize businesses and establish size standards, and began using industries defined by the new North American Industry Classification System (NAICS). The NAICS made several important changes to the Health Care industries listed in the SIC System: it revised terminology, established a separate category (Health Care and Social Assistance) under which many health care providers are located, and increased the number of Health Care industries to 30 NAICS industries from 19 Health Services SIC industries.

On November 17, 2000, the SBA published a final rule, which was effective on December 18, 2000, in which the SBA adopted new size standards, ranging from $5 million to $25 million, for 19 Health Care industries and retained the existing $5 million size standard for the remaining 11 Health Care industries. The revisions were made to more appropriately define the size of businesses in these industries that SBA believes should be eligible for Federal small business assistance programs.

On August 13, 2002, the SBA published a final rule that was effective on October 1, 2002. The final rule amended the existing SBA size standards by incorporating OMB's 2002 modifications to the NAICS into its table of small business size standards. The final rule did not affect industries that are considered covered entities by this final rule.

On September 6, 2002, the SBA published a final rule (effective October 1, 2002) that corrected the August 13, 2002, final rule. The final rule corrected errors in the August 13, 2002, final rule and contained a new table of size standards to clearly identify size standards by millions of dollars and by number of employees. Some of those revisions in size standards affected some of the entities that are considered covered entities under this final rule. For example, the SBA revisions increased the annual revenues for offices of physicians to $8.5 million (other practitioners' offices' revenues remained at $6 million) and increased the small business size standard for hospitals to $29 million in annual revenues.

The regulatory flexibility analysis for this final rule is linked to the aggregate regulatory flexibility analysis for all the Administrative Simplification standards that appeared in the Transactions Rule (65 FR 50312), published on August 17, 2000, which predated the SBA changes noted above. In addition, all HIPAA regulations published to date have used the SBA size standards that existed at the time of the publication of the Transactions Rule. Because the SBA size standard changes predate the effective date of this final rule, we are using the current SBA small business size standards for the regulatory flexibility analysis for this final rule. Although the SBA has raised the small business size standards, the revised size standards have no effect on the cost and benefit analysis for this final rule. The revised standards simply increase the number of health care providers that are classified as small businesses. Although the SBA revisions changed the size standard for health plans by increasing from $5 million to $6 million in annual revenues the small business size standard, this change has a minimal effect on this final rule. Because all HIPAA administrative simplification regulations permit small health plans an additional year in which to comply with the implementation specifications and requirements, a greater number of small health plans would have the additional year, due to the SBA size standard revisions.

While each standard may not have a significant impact on a substantial number of small businesses, the combined effects of all the standards are likely to have a significant effect on a substantial number of small businesses. However, this final rule will affect small businesses, such as small health care providers, health plans, and health care clearinghouses, in much the same way as it affects large businesses.

Small businesses that are covered entities must meet the provisions of this final rule and implement the standard unique health care provider identifier standard. The requirements placed on small health care providers, health care clearinghouses, and health plans would be consistent with the complexity of their operations. Small health plans have an additional year in which to comply. A more detailed analysis of the impact on small businesses is part of the impact analysis that we published on August 17, 2000 (65 FR 50312), for all the HIPAA standards.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to

the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. This final rule will have no more significant impact on small rural hospitals than it will have on other small health care providers.

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1532) requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This final rule establishes a Federal private sector mandate and is a significant regulatory action within the meaning of section 202 of UMRA. We have included the statements to address the anticipated effects of this final rule under section 202 of UMRA.

This standard applies to State and local governments in their roles as covered entities. Covered entities must implement the requirements in this final rule; thus, this final rule imposes unfunded mandates on them. Further discussion of this issue is found in the previously published impact analysis for all Administrative Simplification standards (65 FR 50312).

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. The proposed rule that proposed the NPI as the standard unique health identifier for health care providers was published prior to the signing of that Executive Order. We could not solicit comments on the effect of Executive Order 13132 on the adoption of the health care provider identifier standard.

This final rule will have a substantial effect on State and local governments to the extent that those entities are covered entities. As early as 1993, CMS (then the Health Care Financing Administration) led a workgroup whose goal was to develop a provider identification system for all health care providers. The system was intended to meet the needs of the Medicare and Medicaid programs, and eventually other programs. State Medicaid agencies in Alabama, California, Minnesota, Virginia and Maryland participated in this effort, along with representatives from the private sector and several other Federal agencies. The first task of the workgroup was to decide if an existing identifier could be used or if a new one needed to be developed. The workgroup developed criteria for a unique provider identifier, examined existing identifiers, and concluded that a new identifier needed to be developed. The workgroup developed the NPI, and we proposed the NPI as the standard unique health identifier for health care providers in the proposed rule.

States continue to hold memberships on the National Uniform Claim Committee and the National Uniform Billing Committee, and continue to be represented in the X12N and Health Level Seven standards development organization workgroups and committees. As a result, States have in the past, and continue to have, input into the development of new standards and the modification of existing standards.

As stated in the previously published impact analysis in 65 FR 50312, we do not have sufficient information to provide estimates of the impact of the administrative simplification standards on local governments.

In complying with the requirements of part C of title XI, the Secretary established interdepartmental implementation teams who consulted with appropriate State and Federal agencies and private organizations. These external groups included the NCVHS's Subcommittee on Standards and Security, the Workgroup for Electronic Data Interchange (WEDI), the National Uniform Claim Committee (NUCC), the National Uniform Billing Committee (NUBC), and the American Dental Association (ADA). The teams also received comments on the May 7, 1998, proposed regulation from a variety of organizations, including State Medicaid agencies and other Federal agencies.

We received comments from State agencies and from entities that conduct transactions with State agencies. Many of the comments referred to the costs to State and local governments of implementing the HIPAA standards. We believe that these costs will be offset by future savings (*see* the impact analysis of 65 FR 50350).

Other comments regarding States reflected the need for clarification as to when State agencies were subject to the standards.

B. Anticipated Effects

The Regulatory Flexibility Act of 1980 considers all 31 nonprofit Blue Cross-Blue Shield Health Plans to be small businesses. Additionally, 28 percent of HMOs are considered small businesses because of their nonprofit status. Doctors of osteopathy, dentistry, podiatry, as well as chiropractors, and solo and group physicians' offices with fewer than three physicians, are considered small businesses. Forty percent of group practices with three or more physicians and 100 percent of optometrist practices are considered small businesses. Seventy-two percent of all pharmacies, 88 percent of medical laboratories, 100 percent of dental laboratories, and 90 percent of durable medical equipment suppliers are assumed to be small businesses as well.

This analysis required that we use data and statistics about various entities that operate in the health data information industry.

We believe the best source for information about the health data information industry is *Faulkner & Gray's Health Data Directory*. This publication is the most comprehensive data directory of its kind that we could find. The information in this directory is gathered by Faulkner & Gray editors and researchers who called all of the more than 3,000 organizations that are listed in the book in order to elicit information about their operations. Some businesses are listed as more than one type of business entity because, in reporting the information, companies could list themselves to be as many as three different types of entities. For example, some businesses listed themselves as both practice management vendors and claims software vendors because their practice management software was "EDI enabled."

All the statistics referencing Faulkner & Gray's come from the 2000 edition of its *Health Data Directory*. It lists 78 claims clearinghouses, which, according to the *Health Data Directory* are entities that generally take electronic and paper health care claims data from health care providers and billing companies that prepare bills on a health care provider's behalf. The claims clearinghouse acts as a conduit for health plans; its activities may include batching claims and routing transactions to the appropriate health plan in a form that expedites payment.

Of the 78 claims clearinghouses listed in this publication, eight processed more than 20 million electronic transactions per month. Another 15 handled 2 million or more transactions per month and another 4 handled over a million electronic transactions per month. The remaining 39 entities listed in the data dictionary processed fewer than a million electronic transactions per month. Almost all of these entities have annual revenues of under $6 million and would therefore be considered small entities.

Software system vendors provide computer software applications support

to health care clearinghouses, billing companies, and health care providers. In particular, they work with health care providers' practice management and health information systems. These businesses provide integrated software applications for such services as accounts receivable management, electronic claims submission (patient billing), recordkeeping, patient charting, practice analysis, and patient scheduling. Some software vendors also provide applications that translate information on paper and information in electronic records having no standard formats into standard electronic formats that are acceptable to health plans.

Faulkner & Gray lists 78 physician practice management vendors and suppliers, 76 hospital information systems vendors and suppliers, 140 software vendors and suppliers for claims-related transactions, and 20 translation vendors (now known as Interface Engines/Integration Tools). We were unable to determine the number of these entities with revenues over $6 million, but we assume most of these businesses would be considered small entities.

The costs of implementing the NPI are primarily one-time or short-term costs related to conversion. These costs are characterized as follows: software conversion, cost of automation, training, implementation, and cost of documentation and implementation guides.

As stated earlier in this final rule, health care providers will not be charged for obtaining an NPI. Covered health care providers will have to apply for NPIs and will have to furnish updates to the NPS when their required data changes. (However, if health care providers are enumerated through the bulk enumeration process described earlier in this preamble, they will not have to apply for NPIs, and they will be notified of their NPIs. Those that are covered health care providers will have to furnish updates to the NPS when their required data changes and will have to ensure that their subparts, if assigned NPIs via bulk enumeration or otherwise, do the same. These burden estimates are discussed in section IV, "Collection of Information Requirements," of this preamble.) In addition, covered health care providers will have to bear the costs of converting to the NPI, as will health plans and health care clearinghouses. Health plans, health care clearinghouses, and covered health care providers are required to implement the NPI. Most of these entities meet the SBA's definition of small entities.

Health plans, health care clearinghouses, and health care providers who are covered entities must use NPIs in standard transactions and must make the necessary changes and conversions in order to do so. Conversion will require training for staff and will require changes to documentation, procedures, records, and software. Some covered health care providers that do not already do so may choose to use the services of software system vendors, billing companies, and/or health care clearinghouses to facilitate the transition to the NPI. While there may be up-front costs associated with some of the required changes, the fact that only one health care provider number (the NPI) will be used in standard transactions will simplify business, improve efficiency, and create savings. The format of the NPI (all numeric) will facilitate telephone keypad entry; the check-digit in the 10th position will detect keying and data entry errors; and the lack of intelligence built into the NPI will eliminate the need to issue a new health care provider number (and maintain records of such issuances) whenever changes occur that would impact that intelligence.

After being assigned NPIs, covered health care providers will have to furnish the NPS with updates to their required NPS data in the NPS within 30 days of the changes. It is very likely that the NPS data will duplicate some of the information that health care providers furnish to health plans when they enroll in health plans (although health plans traditionally collect far more information about a health care provider than the NPS will collect). Because health care providers must keep health plans apprised of updates to their data, the requirement that covered health care providers apprise the NPS of updates should not be a significant burden on those health care providers.

The extended effective date of the NPI should allow sufficient time for health plans, health care clearinghouses, and health care providers who are covered entities to implement the changes needed to accommodate the NPI.

Lastly, HIPAA gives small health plans an extra year (36 months instead of 24 months from the effective date) in which to implement the NPI.

The May 7, 1998, proposed rule for the National Provider Identifier (NPI) contained a cost-benefit analysis based on the aggregate impact of all the HIPAA administrative simplification standards for electronic data interchange (EDI). The Comment/Response section related to the proposed aggregate analysis, and a final aggregate impact analysis, are contained in the Transactions Rule at 65 FR 50345. We address the specific impact of the NPI in section V.D. of this preamble, "Specific Impact of the NPI."

C. Alternatives Considered

Guiding Principles for Standard Selection

As explained in the May 7, 1998, proposed rule (at 63 FR 25323), the implementation teams charged with designating standards under the statute defined, with significant input from the health care industry, a set of common criteria for evaluating potential standards. These criteria are based on direct specifications in HIPAA, the purpose of the law, and principles that support the regulatory philosophy set forth in Executive Order 12866 of September 30, 1993, and the Paperwork Reduction Act of 1995. These criteria also support and are consistent with the principles of the Paperwork Reduction Act of 1995. In order to be designated as a standard, a proposed standard should:

- Improve the efficiency and effectiveness of the health care system by leading to cost reductions for or improvements in benefits from electronic HIPAA health care transactions. This principle supports the regulatory goals of cost-effectiveness and avoidance of burden.
- Meet the needs of the health data standards user community, particularly health care providers, health plans, and health care clearinghouses. This principle supports the regulatory goal of cost-effectiveness.
- Be consistent and uniform with the other HIPAA standards—their data element definitions and codes and their privacy and security implementation specifications—and, secondarily, with other private and public sector health data standards. This principle supports the regulatory goals of consistency and avoidance of incompatibility, and it establishes a performance objective for the standard.
- Have low additional development and implementation costs relative to the benefits of using the standard. This principle supports the regulatory goals of cost-effectiveness and avoidance of burden.
- Be supported by an ANSI-accredited standards developing organization or other private or public organization that will ensure continuity and efficient updating of the standard over time. This principle supports the regulatory goal of predictability.
- Have timely development, testing, implementation, and updating procedures to achieve administrative

simplification benefits faster. This principle establishes a performance objective for the standard.

- Be technologically independent of the computer platforms and transmission protocols used in HIPAA health transactions, except when they are explicitly part of the standard. This principle establishes a performance objective for the standard and supports the regulatory goal of flexibility.
- Be precise and unambiguous, but as simple as possible. This principle supports the regulatory goals of predictability and simplicity.
- Keep data collection and paperwork burdens on users as low as is feasible. This principle supports the regulatory goals of cost-effectiveness and avoidance of duplication and burden.
- Incorporate flexibility to adapt more easily to changes in the health care infrastructure (such as new services, organizations, and health care provider types) and information technology. This principle supports the regulatory goals of flexibility and encouragement of innovation.

We assessed the various candidates for a health care provider identifier against the principles listed above, with the overall goal of achieving the maximum benefit for the least cost. We found that the NPI met all the principles and that no other candidate identifier met all the principles, or even those principles supporting the regulatory goal of cost-effectiveness. We received comments suggesting that we consider or reconsider the Taxpayer Identifying Number or the Social Security Number for individual health care providers and the Employer Identification Number for organizations as the standard unique health identifier for health care providers. We responded to these comments in section II. A. 3. of this preamble, "NPI Standard."

One possible alternative in the development of the identifier was to allow intelligence to be included in it. We rejected this alternative on qualitative grounds because it meant that individuals might get more than one identifier in their lifetimes. Cost considerations also contributed to our decision.

If intelligence were built into the identifier, the operating cost of the enumeration system would rise for several reasons. First, additional information would need to be collected and verified so that the intelligence in the identifier would be accurate. Secondly, new identifiers for individuals and organizations would need to be assigned because the embedded intelligence would change.

The cost to health plans would also increase. First, their systems might need to be adapted to use the intelligence in the identifier. Secondly, they would have to keep track of the more frequent changes in identifiers, and revise their processes accordingly.

An intelligent identifier would also be more expensive for health care providers. They would have to reapply for identifiers if the information in the intelligence changed. Additionally, they would have to revise their systems to change their identifiers every time they changed.

These quantitative reasons support our choice not to include intelligence in the identifier.

Need to Convert

Because there is no standard health care provider identifier in widespread use throughout the industry, adopting any of the candidate identifiers would require covered entities to convert to the new standard. In the case of the NPI, covered entities will have to convert because this identifier is not in use presently. As we pointed out in the May 7, 1998, proposed rule in our analysis of the candidates, even the identifiers that are in use are not used for all purposes or for all health care provider classifications. The selection of the NPI does not impose a greater burden on the industry than the nonselected candidates, and presents significant advantages in terms of cost-effectiveness, universality, uniqueness, and flexibility.

Complexity of Conversion

Some existing health care provider identifier systems assign multiple identifiers to a single health care provider in order to distinguish the multiple identities the health care provider has in the system. For example, in these systems, the health care provider may have a different identifier to represent each contract or provider agreement, practice location, and specialty or health care provider classification. Since the NPI is a unique identifier for a health care provider, it will not distinguish these multiple identities. Systems that need to distinguish these identities will need to use data other than the NPI to do so. The change to using other data will add complexity to the conversion to the NPI (or to any other standard health care provider identifier), but it is necessary in order to achieve the goal of unique identification of the health care provider.

The complexity of the conversion will also be significantly affected by the degree to which health plans' processing systems currently rely on intelligent identifiers. For example, a health plan may route claims to different processing routines based on the type of health care provider by keying on a health care provider type code included in the identifier. Converting from one unintelligent identifier to another is less complex than modifying software logic to obtain needed information from other data elements. However, the use of an unintelligent identifier is required in order to meet the guiding principle of ensuring flexibility.

Specific technology limitations of existing systems could affect the complexity of conversion. For example, some existing health care provider data systems use a telephone keypad to enter data. Data entry of alpha characters is inconvenient in these systems.

Comments were strong in suggesting that the NPI be an all-numeric identifier, be 10 positions in length, and include a check-digit in the 10th position. (*See* section II. A. 3. of this preamble, "NPI Standard," for a full description of comments on the characteristics of the identifier.) As stated in that section, in response to comments, we changed the format of the NPI to an all-numeric number, 10 positions in length, with a check-digit in the 10th position. There will be no intelligence about the health care provider in the number. This format satisfies the comments for easier data entry and the need for a number that will be short enough to fit into most existing data formats.

The selection of the NPI does not impose a greater burden on the industry than the nonselected candidates.

D. Specific Impact of the National Provider Identifier

In the May 7, 1998, proposed rule (at 63 FR 25349), we included a section that related to the specific impact of the health care provider identifier. That section of the proposed rule also indicated the Federal, State, and private costs associated with the enumeration options set out in the proposed rule.

Proposed Provisions

The May 7, 1998, proposed rule for the National Provider Identifier (NPI) contained a cost-benefit analysis based on the aggregate impact of all the HIPAA administrative simplification standards for electronic data interchange (EDI). The response to comments on the proposed aggregate analysis is contained in the Transactions Rule (at 65 FR 50345). The Transactions Rule also includes an updated impact analysis (at 65 FR 50350).

One section of the impact analysis that was published in the May 7, 1998, proposed rule for the NPI (at 63 FR 25351) contained a discussion of the costs of enumerating health care providers under each of the two enumeration options that were described in the proposed rule. Table 5, entitled "Enumeration Costs: Federal, State, and Private," was included in this part of the impact analysis in the proposed rule. This table compared the costs for each of the two proposed enumeration options. Below we respond to the comments received about that part of the impact analysis.

Comments and Responses on the Specific Impact of the National Provider Identifier

Comment: One commenter stated that the pharmacy industry will not see huge gains in the standardization of the NPI for prescriber and pharmacy because de facto standard identifiers exist for these two provider types.

Response: We agree that the pharmacy industry may not realize the benefits from standardization of health care provider numbers as quickly as other segments of the health care industry because the pharmacy industry already uses numbers to identify health care providers and pharmacies. However, once NPIs are assigned to health care providers and once the entire health care industry begins to use the NPI, we believe the pharmacy industry will see the benefits of replacing its de facto standards with the national standard. The Drug Enforcement Administration (DEA) number was established by the DEA to identify those who prescribe or store controlled substances. It is the pharmacy industry's de facto identifier for prescribers. In developing the NPI, we considered several existing identifiers as candidates for the national health care provider identifier. One of those considered was the DEA number. However, the use of the DEA number as a national health care provider identifier does not fit the scope for which the DEA number was established. In addition, the DEA number is not available to all health care providers and, as a result, would not be appropriate as the national health care provider identifier. The National Council for Prescription Drug Programs (NCPDP) provider number, formerly called the National Association of Boards of Pharmacy (NABP) number, is the pharmacy industry's de facto identifier for pharmacies. This number was also considered a candidate for the national health care provider identifier, but did not meet two of the criteria deemed necessary for a standard identifier: it would not yield a sufficient number of identifiers and it contained intelligence.

Comment: Several commenters suggested revisions to our definitions of "HIPAA-transaction health care provider" and "non-HIPAA-transaction health care provider." They found the terms confusing.

Response: We agree and do not use those terms in this final rule.

Comment: One commenter asked that we insert the word "costs" after "start-up" and "outyear" in Table 5 headings and definitions.

Response: This comment is not applicable, as we do not include Table 5 in this final rule. We refer the reader to the discussion under "Final Provisions" in this section.

Comment: One commenter stated that we did not factor in atypical service providers that are exclusive to the Medicaid program.

Response: The Medicaid program's atypical and nontraditional service providers were included in Table 5 in the May 7, 1998, proposed rule. However, as explained in section II. A. 2, "Definition of Health Care Provider" in this preamble, most of them do not meet our definition of health care provider. Therefore, they are not included in our analyses in this final rule.

Comment: Several commenters stated the estimate that 5 percent of health care providers participating in Federal health plans and Medicaid would have updates each year is conservative and that the number is more like 12 to 15 percent. Another commenter believes it to be even higher.

Response: We have not seen documentation that would convince us our estimate was incorrect at the time the May 7, 1998, proposed rule was published. In the proposed rule, we estimated that 5 percent of the health care providers who are covered entities that conduct business with Federal health plans or Medicaid would require updates each year, and that 15 percent of the remaining health care providers that are covered entities (those that do business only with private insurers) would require updates each year. In general, health plans (including Federal health plans and Medicaid) collect more information from their enrolled health care providers than the NPS will collect when a health care provider applies for an NPI. Thus, there is more information subject to change for health care providers that are enrolled in a health plan. This fact could explain why health plans sometimes have a greater percentage of updates than what we estimated for NPI purposes in the proposed rule, and could have been the basis on which the comment was made. The proposed rule did not include calculations for updates for health care providers who are not covered entities; we would expect that percentage would not exceed 15 percent. We computed the weighted average of the percentages of health care providers that would require updates that were used in the proposed rule (using 15 percent for these health care providers). We have concluded that approximately 12.6 percent of all existing health care providers will have updates each year.

Comment: Several commenters said that erroneous assumptions were used in stating that the costs to Federal health plans (including Medicare) and Medicaid would be zero for enumerating their own health care providers. The costs would be substantial.

Response: We acknowledge that there would have been costs to Medicaid State agencies and to Federal health plans in manipulating and reformatting their health care provider files and transferring them to CMS for loading into the NPS. There would also have been ongoing costs to Medicaid State agencies and other Federal health plans to obtain NPIs for their health care providers under option 2. In manipulating and reformatting the files, problems could be discovered in some of the health care provider records that would require investigation and resolution. The costs of investigating and resolving these problems were not recognized earlier and, therefore, were not considered in the May 7, 1998, proposed rule.

Comment: One commenter stated that the costs for option 1 as shown in Table 5 did not reflect the savings that would have accrued by preloading Medicare provider files into the NPS.

Response: While the narrative portion of the impact analysis did mention that Medicare provider files would be preloaded into the NPS under both options 1 and 2, the commenter is correct in that this was not reflected in Table 5 for option 1. However, as stated earlier in this preamble, Medicare provider files will be loaded into the NPS only if it is feasible to do so.

Final Provisions

We stated in the May 7, 1998, proposed rule that we cannot determine the specific economic impact of the NPI (and individually, each HIPAA administrative simplification standard may not have a significant impact). The overall impact analysis (65 FR 50355) made it clear that, collectively, all the standards will have a significant impact of over $100 million on the economy.

The implementation costs and benefits of the NPI were factored into that overall impact analysis.

However, that impact analysis used certain assumptions that have not been realized. For example, it was assumed that all of the HIPAA standards would be issued and effective at about the same time, so that covered entities would be making their system changes at one time. For various reasons, standards have been issued and effective over a much longer period of time than expected. For example, the transaction and code set standards were published in 2000 and must be implemented by October 2003. Security standards are to be implemented by April 2005, and the NPI must be used by 2007.

Because the compliance dates cover such an extended period of time, we will estimate part of the overall cost and savings for health plans and health care providers that can be attributed to the NPI. We continue to use the impact analysis previously referenced as the set of total costs and savings.

Because the standards for transactions and codes sets, the employer identifier, and security have already been published, we assume that covered entities have already made significant system investments. Because they were aware that the NPI was an upcoming standard, they may have also made some accommodations in their systems to be able to use the NPI when it is assigned. The NPI has already been identified as a future identifier in the implementation specifications for the transaction standards.

There will still be costs and savings related to the implementation of the NPI by health plans and health care providers. These will, however, be small in comparison to those for transaction standards and security. The NPI affects only a small part of the system and business processes for any covered entity.

We estimate that the NPI would entail 10 percent of the costs and 5 percent of the savings for health plans. Health plans would need to make some system changes from their current identifiers to the NPI. They would save in not having to maintain a system of identifiers that exist today. We would estimate that for health care providers, the NPI would represent 5 percent of the costs and 10 percent of the savings. Health care providers need only to substitute the NPI for their current identifier(s). They reap greater savings by not having to keep track of separate identifiers for each health plan and possibly for each location, address, or contractual arrangement. (However, as noted earlier in this preamble, health plans may require health care providers to use identifiers other than the NPI for uses other than standard transactions.)

Looking at the overall impact analysis, while 2007 is the initial year for using the NPI, it would be the analogous to the first year of the overall impact analysis, in which most of the costs are incurred. Using the figures from above, we make the following estimates for 2007:

TABLE 2.—COSTS OF IMPLEMENTING THE NPI IN 2007

[In millions of dollars, rounded to the nearest million]

Health Plans:	
2002 Cost from Impact Analysis ...	−146
2002 Savings ...	24
2007 Net for NPI for Health Plans	−122
Health Care Providers:	
2002 Cost from Impact Analysis ...	−79
2002 Savings ...	61
2007 Net for NPI for Health Care Providers ...	−18

Note: The figures in Table 2 have been adjusted to reflect dollars expressed for 2007.

We perform the same calculations for the next 4 years. This yields the following results:

TABLE 3.—COSTS OF IMPLEMENTING THE NPI, 2007–2011

[In millions of dollars, rounded to the nearest million]

Year	2007	2008	2009	2010	2011	Total
Health Plan Costs	146	146	134	0	0	426
Health Plan Savings	24	49	73	91	103	341
Provider Costs	73	73	67	0	0	213
NPI Application and Update Costs	6	6	1	1	1	15
Provider Savings	61	122	183	219	256	840
Net Savings	−140	−55	54	309	358	526
NPS Costs	91	9	9	9	9	128

Note: The figures in Table 3 have been adjusted to reflect dollars expressed for each year.

All costs of NPS development and operation (which include the costs of enumerating health care providers and maintaining their information in the NPS, and the costs of disseminating NPS data to the health care industry and others, as appropriate) are Federal costs. As mentioned earlier in this preamble, HHS will contract for system development and for the enumeration, update, and data dissemination activities. We estimate the following costs for operations of the National Provider System (NPS), keeping in mind that the NPS will enumerate both covered and noncovered health care providers, and that health care providers are not being charged for obtaining NPIs.

E. Affected Entities

Health Care Providers

Health care providers and subparts, as appropriate, will apply for NPIs. Health care providers that are covered entities must begin to use NPIs in standard transactions no later than 24 months after the effective date of this regulation; and they must ensure that their subparts, if assigned NPIs, do the same. Covered health care providers that need to be identified on standard transactions must disclose their NPIs, upon request, to entities that are required to use those health care providers' NPIs on standard transactions. Covered health care providers must ensure that their subparts, if assigned NPIs, do the same. Any negative impact on health care providers generally would be related to the initial implementation period. They would incur implementation costs for converting systems, especially those that generate electronic claims, from current health care provider identifiers to the NPI. Some health care providers would incur those costs directly and others would incur them in the form of fee increases from billing associates and health care clearinghouses.

Covered health care providers will have to use their NPIs on standard claims transactions and any other standard transactions that they conduct; they will have to ensure that their

subparts, if assigned NPIs, do the same. They will also have to obtain and use the NPIs of other health care providers if those NPIs are needed on those transactions. If covered health care providers' subparts are assigned NPIs, the covered health care providers must ensure that their subparts do the same. This will be a more significant implementation workload for larger organization health care providers, such as hospitals, that will have to capture the NPIs for each health care provider practicing in the hospital if those health care providers need to be identified on hospital claims. However, these health care providers are accustomed to maintaining these types of data. Some health care providers will need access to the NPIs of other health care providers in order to identify those health care providers on standard transactions. In this regard, we encourage all health care providers to obtain NPIs and, when requested, to disclose their NPIs to covered entities that need them for inclusion on health care transactions. Some health care providers, particularly ones that do not do business with large health plans, may be resistant to obtaining NPIs and providing data about themselves to a national database.

Claims processing and timely payments to health care providers could possibly be affected as health plans transition to the NPI. We encourage health plans to conduct outreach efforts in order to minimize disruptions in claims processing and timely payment.

Covered health care providers are required to also furnish updates to their required NPS data within 30 days of the changes. Covered health care providers must ensure that their subparts, if assigned NPIs, do the same. (We encourage other health care providers to do the same.) The vast majority of health plans issue identifiers to the health care providers with which they conduct business in order to facilitate the electronic processing of claims and other transactions. The information that health care providers must supply in order to receive an NPI is significantly less than the information most health plans require from a health care provider in order to enroll in a health plan. We will attempt to make the processes of obtaining NPIs and updating NPS data as easy as possible for health care providers, reducing duplication of effort wherever possible and making the processes as automated as possible. Neither the statute nor this final rule requires charging health care providers (or their subparts) to receive NPIs.

After the compliance date, health care providers will no longer have to keep track of and use different identifiers with different health plans when conducting standard transactions. This should simplify health care provider billing systems and processes and reduce administrative expenses. A standard identifier should facilitate and simplify coordination of benefits, resulting in faster, more accurate payments.

Health Plans

HIPAA does not prohibit health plans from requiring their enrolled health care providers to obtain NPIs.

Health plans will have to modify their systems to use the NPI. This conversion will have a one-time cost impact on Federal, State, and private health plans and is likely to be more costly for health plans with complex systems that rely on intelligent provider numbers. Disruption of claims processing and payment delays could result. However, health plans will be able to schedule their implementation of the NPI and other standards in a manner that best fits their needs, as long as they meet the deadlines specified in this and the other final rules that implement the administrative simplification provisions. Upon the NPI compliance dates, health plans' coordination of benefits activities should be greatly simplified because all health plans will use a unique standard health care provider identifier for each health care provider. In addition, utilization review and other payment safeguard activities will be facilitated, since health care providers would use only one identifier and could be easily tracked over time and across geographic areas. Health plans currently assign their own identification numbers to health care providers as part of their enrollment procedures, and this practice would no longer be necessary. Existing enumeration systems maintained by Federal health programs could be phased out, and savings would result. Health care clearinghouses will face impacts (both positive and negative) similar to those experienced by health plans. However, implementation will likely be more complex, because health care clearinghouses deal with many health care providers and health plans. Health care providers that are not covered entities that do not wish to apply for NPIs will necessitate the need for health care clearinghouses to accommodate health care provider identifiers in addition to the NPI.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 45 CFR Part 162

Administrative practice and procedure, Electronic transactions, Health facilities, Health insurance, Hospitals, Incorporation by reference, Medicare, Medicaid, Reporting and recordkeeping reports.

■ For the reasons set forth in the preamble, 45 CFR subchapter C part 162 is amended as follows:

PART 162—ADMINISTRATIVE REQUIREMENTS

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

Authority: Secs. 1171 through 1179 of the Social Security Act (42 U.S.C. 1320d–1320d–8), as added by sec. 262 of Pub. L. 104–191, 110 Stat. 2021–2031, and sec. 264 of Pub. L. 104–191, 110 Stat. 2033–2034 (42 U.S.C. 1320d–2 (note)).

■ 2. A new subpart D is added to read as follows:

Subpart D—Standard Unique Health Identifier for Health Care Providers

Sec.

Subpart D—Standard Unique Health Identifier for Health Care Providers

§ 162.402 Definitions.

Covered health care provider means a health care provider that meets the definition at paragraph (3) of the definition of "covered entity" at § 160.103 of this subchapter.

§ 162.404 Compliance dates of the implementation of the standard unique health identifier for health care providers.

(a) *Health care providers.* A covered health care provider must comply with the implementation specifications in § 162.410 no later than May 23, 2007.

(b) *Health plans.* A health plan must comply with the implementation specifications in § 162.412 no later than one of the following dates:

(1) A health plan that is not a small health plan—May 23, 2007.

(2) A small health plan—May 23, 2008.

(c) *Health care clearinghouses.* A health care clearinghouse must comply with the implementation specifications in § 162.414 no later than May 23, 2007.

§ 162.406 Standard unique health identifier for health care providers.

(a) *Standard.* The standard unique health identifier for health care providers is the National Provider Identifier (NPI). The NPI is a 10-position numeric identifier, with a check digit in the 10th position, and no intelligence about the health care provider in the number.

(b) *Required and permitted uses for the NPI.*

(1) The NPI must be used as stated in § 162.410, § 162.412, and § 162.414.

(2) The NPI may be used for any other lawful purpose.

§ 162.408 National Provider System.

National Provider System. The National Provider System (NPS) shall do the following:

(a) Assign a single, unique NPI to a health care provider, provided that—

(1) The NPS may assign an NPI to a subpart of a health care provider in accordance with paragraph (g); and

(2) The Secretary has sufficient information to permit the assignment to be made.

(b) Collect and maintain information about each health care provider that has been assigned an NPI and perform tasks necessary to update that information.

(c) If appropriate, deactivate an NPI upon receipt of appropriate information concerning the dissolution of the health care provider that is an organization, the death of the health care provider who is an individual, or other circumstances justifying deactivation.

(d) If appropriate, reactivate a deactivated NPI upon receipt of appropriate information.

(e) Not assign a deactivated NPI to any other health care provider.

(f) Disseminate NPS information upon approved requests.

(g) Assign an NPI to a subpart of a health care provider on request if the identifying data for the subpart are unique.

§ 162.410 Implementation specifications: Health care providers.

(a) A covered entity that is a covered health care provider must:

(1) Obtain, by application if necessary, an NPI from the National Provider System (NPS) for itself or for any subpart of the covered entity that would be a covered health care provider if it were a separate legal entity. A covered entity may obtain an NPI for any other subpart that qualifies for the assignment of an NPI.

(2) Use the NPI it obtained from the NPS to identify itself on all standard transactions that it conducts where its health care provider identifier is required.

(3) Disclose its NPI, when requested, to any entity that needs the NPI to identify that covered health care provider in a standard transaction.

(4) Communicate to the NPS any changes in its required data elements in the NPS within 30 days of the change.

(5) If it uses one or more business associates to conduct standard transactions on its behalf, require its business associate(s) to use its NPI and other NPIs appropriately as required by the transactions that the business associate(s) conducts on its behalf.

(6) If it has been assigned NPIs for one or more subparts, comply with the requirements of paragraphs (a)(2) through (a)(5) of this section with respect to each of those NPIs.

(b) A health care provider that is not a covered entity may obtain, by application if necessary, an NPI from the NPS.

§ 162.412 Implementation specifications: Health plans.

(a) A health plan must use the NPI of any health care provider (or subpart(s), if applicable) that has been assigned an NPI to identify that health care provider on all standard transactions where that health care provider's identifier is required.

(b) A health plan may not require a health care provider that has been assigned an NPI to obtain an additional NPI.

§ 162.414 Implementation specifications: Health care clearinghouses.

A health care clearinghouse must use the NPI of any health care provider (or subpart(s), if applicable) that has been assigned an NPI to identify that health care provider on all standard transactions where that health care provider's identifier is required.

Subpart F—Standard Unique Employer Identifier

■ 3. In § 162.610, paragraph (c) is added to read as follows:

§ 162.610 Implementation specifications for covered entities.

* * * * *

(c) Required and permitted uses for the Employer Identifier.

(1) The Employer Identifier must be used as stated in § 162.610(b).

(2) The Employer Identifier may be used for any other lawful purpose.

Authority: Secs. 1171 through 1179 of the Social Security Act (42 U.S.C. 1320d—1320d-8), as added by sec. 262 of Pub. L. 104–191, 110 Stat. 2021–2031, and sec. 264 of Pub. L. 104–191, 110 Stat. 2033–2034 (42 U.S.C. 1320d-2 (note)).

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program.)

Dated: October 16, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–1149 Filed 1–22–04; 8:45 am]

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Federal Register

Friday,
January 23, 2004

Part III

Securities and Exchange Commission

17 CFR Part 270
Investment Company Governance; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC–26323; File No. S7–03–04]

RIN 3235–AJ05

Investment Company Governance

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing amendments to rules under the Investment Company Act of 1940 to require registered investment companies ("funds") to adopt certain governance practices. The proposed amendments, which apply to funds relying on certain exemptive rules, are designed to enhance the independence and effectiveness of fund boards and to improve their ability to protect the interests of the funds and fund shareholders they serve.

DATES: Comments must be received on or before March 10, 2004.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by one method only. Comments in paper format should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments in electronic format should be submitted to the following E-mail address: *rule-comments@sec.gov*. All comments should refer to File No. S7–03–04; if E-mail is used, this file number should be included on the subject line. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (*http://www.sec.gov.*) [1]

FOR FURTHER INFORMATION CONTACT: Catherine E. Marshall, Attorney, Office of Investment Adviser Regulation, (202) 942–0719; C. Hunter Jones, Assistant Director, Office of Regulatory Policy, (202) 942–0690, Division of Investment Management, Securities and Exchange Commission, 450 Fifth St. NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to: rules 0–1(a) [17 CFR 270.0–1(a)]; 10f–3(c)(11) [17 CFR 270.10f–3(c)(11)]; 12b–1(c) [17 CFR 270.12b–1(c)]; 15a–4(b)(2)(vii) [17 CFR 270.15a–4(b)(2)(vii)]; 17a–7(f) [17 CFR 270.17a–7(f)]; 17a–8(a)(4) [17 CFR 270.17a–8(a)(4)]; 17d–1(d)(7)(v) [17 CFR 270.17d–1(d)(7)(v)]; 17e–1(c) [17 CFR 270.17e–1(c)]; 17g–1(j)(3) [17 CFR 270.17g–1(j)(3)]; 18f–3(e) [17 CFR 270.18f–3(e)]; 23c–3(b)(8) [17 CFR 270.23c–3(b)(8)]; and 31a–2 [17 CFR 270.31a–2] under the Investment Company Act of 1940 [15 U.S.C. 80a] (the "Investment Company Act" or the "Act").[2]

Table of Contents

I. Background

Investment companies typically are formed as corporations or business trusts under state law and, like other business organizations, must be operated for the benefit of their shareholders. Under the Investment Company Act, each fund must have a board of directors, which is elected by shareholders to represent their interests. Fund boards are fully empowered with authority to manage all of the fund's affairs, although most delegate management responsibility to the fund adviser over whom they retain oversight responsibility.

In 2001, we recognized the need to improve governance standards and adopted rules to improve the effectiveness of the independent directors [3] and their ability to deal with fund managers.[4] These rules, which apply to funds relying on certain of our exemptive rules, require that boards have a majority of independent directors, that independent directors select and nominate independent directors, and that independent directors, when they hire counsel, hire only counsel that does not have substantial ties to fund managers.[5] The rules required funds to make modest improvements to their governance practices.

Recent events, however, suggest we need to revisit the governance of funds. We and state regulators have brought a number of enforcement actions involving late trading, inappropriate market timing activities and misuse of nonpublic information about fund portfolios.[6] These enforcement actions reflect a serious breakdown in management controls in more than just a few mutual fund complexes. In each case, the fund was used for the benefit of fund insiders rather than fund shareholders. In this respect, the enforcement cases bear a striking similarity to the abuses that led to the enactment of the Investment Company Act.[7]

The Investment Company Act relies heavily on fund boards of directors to manage conflicts of interest that the

[1] We do not edit personal, identifying information, such as names or E-mail addresses, from electronic submissions. Submit only information you wish to make publicly available.

[2] Unless otherwise noted, all references to statutory sections are to the Investment Company Act of 1940.

[3] We refer to directors who are not "interested persons" of the fund as "independent directors" or "disinterested directors." The term "interested person" is defined in section 2(a)(19) [15 U.S.C. 80a–2(a)(19)] of the Investment Company Act.

[4] Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816 (Jan. 2, 2001) [66 FR 3734 (Jan. 16, 2001)] ("2001 Adopting Release").

[5] See, e.g., rule 12b–1(c) [17 CFR 270.12b–1(c)].

[6] See, *e.g.*, In the Matter of Alliance Capital Management, L.P., Investment Company Act Release No. 26312 (Dec. 18, 2003) ("Alliance Capital Management") (finding that an investment adviser violated its fiduciary duty to the fund by failing to disclose agreements, and making special accommodations, to permit select investors to engage in market timing transactions in exchange for the maintenance of "sticky assets," and finding that the investment adviser divulged material nonpublic information about portfolio holdings); In the Matter of Putnam Investment Management, Investment Company Act Release No. 26232 (Nov. 13, 2003) ("Putnam Investment Management") (finding that an investment adviser failed to disclose potentially self-dealing transactions in shares of funds managed by several of its employees, failed to have procedures reasonably designed to prevent misuse of material nonpublic information, and failed to reasonably supervise the employees who committed violations); In the Matter of Connelly, Investment Company Act Release No. 26209 (Oct. 16, 2003) (finding that a former executive of an investment adviser to a fund complex approved agreements that permitted select investors to engage in market timing transactions in certain funds in the complex, in exchange for the maintenance of sticky assets); In the Matter of Markovitz, Investment Company Act Release No. 26201 (Oct. 2, 2003) (finding that a former hedge fund trader violated the federal securities laws and defrauded investors by engaging in late trading of mutual fund shares).

[7] See Sen. Rep. No. 76–1775, at 6 (1940) ("[C]ontrol of [investment companies] offers manifold opportunities for exploitation by the unscrupulous managements of some companies. [Investment company] assets can and have been easily misappropriated and diverted by such types of managements, and have been employed to foster their personal interests rather than the interests of the public security holders."). *See also* section 1(b)(2) [15 U.S.C. 80a–1(b)(2)] (finding that the interests of investors are adversely affected when funds are organized, operated and managed in the interest of fund insiders).

fund adviser inevitably has with the fund. The effectiveness of a fund board and the influence of its independent directors depend on both the quality of the directors and the governance practices they adopt. Our concern is that in many fund groups, including some of the fund complexes that have been the subject of our enforcement cases, the fund adviser exerts a dominant influence over the board. Because of its monopoly over information about the fund and its frequent ability to control the board's agenda, the adviser is in a position to attempt to impede directors from exercising their oversight role. In some cases, boards may have simply abdicated their responsibilities, or failed to ask the tough questions of advisers;[8] in other cases, boards may have lacked the information or organizational structure necessary to play their proper role.[9]

Management-dominated boards may be less likely to effectively undertake the many important responsibilities assigned to them.[10] The breakdown in fund management and compliance controls evidenced by our enforcement cases raises troubling questions about the ability of many fund boards, as presently constituted, to effectively oversee the management of funds.[11] The failure of a board to play its proper role can result, in addition to serious compliance breakdowns, in excessive fees and brokerage commissions, less than forthright disclosure, mispricing of securities, and inferior investment performance.

We believe that a fund board must be "an independent force in [fund] affairs rather than a passive affiliate of management."[12] Its independent directors must bring to the boardroom "a high degree of rigor and skeptical objectivity to the evaluation of [fund] management and its plans and proposals," particularly when evaluating conflicts of interest.[13] To empower independent directors to better serve as an effective check on fund management, we are proposing to require funds to adopt better governance practices. Publicly traded companies now are required by exchange listing standards to have similar practices in place.[14] Many have been adopted voluntarily by some fund complexes.[15]

II. Discussion

The Commission is proposing to amend ten of our exemptive rules to require any fund that relies on any of them to adopt certain fund governance standards, which we discuss below, in addition to those adopted by the Commission in 2001. Each of these rules, which we have listed in the margin below,[16] (i) exempts funds or their affiliated persons from a provision of the Act, and (ii) has as a condition the approval or oversight of independent directors. For convenience, we will refer to these rules as the "Exemptive Rules." The Exemptive Rules typically relieve funds from statutory prohibitions that preclude certain types of transactions or arrangements that would involve serious conflicts of interest. We are also proposing to require that funds retain, for our examination, copies of written materials that the board considers when approving the fund's advisory contract.

In proposing these rules, we recognize that there is a tension between the role

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[8] *See, e.g.*, In the Matter of Hammes, Investment Company Act Release No. 26290 (Dec. 11, 2003) (directors of Heartland Funds negligently failed to adequately monitor the liquidity of the Funds and to take adequate steps to address the Funds' pricing deficiencies, and failed to inquire beyond the self-serving answers and misrepresentations they received from the advisers regarding the board's concerns). One Commissioner believed that the Heartland Funds directors' conduct was reckless or knowing. *See* In the Matter of Hammes, Investment Company Act Release No. 26290A (Jan. 7, 2004). (Commissioner Roel C. Campos dissenting as to the Commission's acceptance of the Heartland Funds directors' settlement offer, on the basis that it charged only negligence or non-scienter based fraud and because imposition of a cease-and-desist order was insufficient to address the conduct).

[9] In order to get fund boards the information they need to oversee fund compliance, we recently adopted rules requiring appointment of a chief compliance officer reporting directly to the fund board. New rule 38a–1 will require fund boards (including independent directors) to (i) approve the compliance policies and procedures of the fund and its service providers; (ii) designate, and approve the compensation of, the compliance officer; (iii) approve the removal of the chief compliance officer; and (iv) review the compliance officer's annual report and meet separately with the compliance officer. Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] ("Compliance Adopting Release").

[10] The Investment Company Act places specific responsibilities on fund boards and the independent directors, including evaluating and approving a fund's advisory contract (sections 15(a) and 15(c) [15 U.S.C. 80a–15(a) and 80a–15(c)]), approving the fund's principal underwriting contract (sections 15(b) and 15(c) [15 U.S.C. 80a–15(b) and 80a–15(c)]), selecting the fund's independent accountant (section 32(a)(1) [15 U.S.C. 80a–31(a)(1)]), and valuing certain securities held by the fund (section 2(a)(41) [15 U.S.C. 80a–2(a)(41)]). In addition, state law generally places responsibility on directors to oversee all operations of a fund. *See* Jean Gleason Stromberg, *Governance of Investment Companies*, *in* The Investment Company Regulation Deskbook §§ 4.1–2 (Amy L. Goodman ed., 1997). Many of our exemptive rules rely heavily on independent directors to approve transactions and review practices involving conflicts of interest that otherwise would be prohibited by the Act.

[11] In some cases, fund boards appear to have been deceived, misled or not informed as to the existence of serious compliance lapses. Our new compliance rule, which requires each fund to designate a chief compliance officer who reports directly to the board of directors, should get boards the information they need about compliance matters. *See* Compliance Adopting Release, *supra* note 9.

[12] Division of Corporation Finance, Securities and Exchange Commission, *Staff Report on Corporate Accountability* (Sept. 4, 1980) (printed for the use of Senate Committee on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess.) at F2.

[13] Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 Geo. L.J. 797, 798 (2001). "[T]here are industries where the case for independence is compelling. The best example here is the mutual fund industry, where conflicts of interests are commonplace and traditional checks on managerial overreaching, such as vigorous shareholder voting and hostile tender offers do not exist." *Id.* at 814.

[14] We recently approved amendments to the corporate governance listing standards of the New York Stock Exchange ("NYSE") and NASD. Although many closed-end funds are listed on the NYSE, several of the corporate governance listing standards recently adopted are not applicable to closed-end funds. *See* Securities Exchange Act Release No. 48745 (Nov. 4, 2003) [68 FR 64154 (Nov. 12, 2003)]. We also approved proposed changes to the corporate governance standards of the NYSE itself. *See* Securities Exchange Act Release No. 48764 (Nov. 7, 2003) [68 FR 64380 (Nov. 13, 2003)].

[15] *See* Investment Company Institute, *Report of the Advisory Group on Best Practices for Fund Directors: Enhancing A Culture of Independence and Effectiveness* (June 24, 1999) ("ICI Advisory Group Report"); Richard M. Phillips, *Mutual Fund Independent Directors: A Model for Corporate America?*, *in* Investment Company Institute Perspective, Aug. 2003, at 1, 3 (stating that a significant portion of mutual funds have followed all or most of the recommendations in the ICI Advisory Group Report).

[16] The rules proposed to be amended are:

Rule 10f–3 (permitting funds to purchase securities in a primary offering when an affiliated broker-dealer is a member of the underwriting syndicate);

Rule 12b–1 (permitting use of fund assets to pay distribution expenses);

Rule 15a–4(b)(2) (permitting fund boards to approve interim advisory contracts without shareholder approval where the adviser or a controlling person receives a benefit in connection with the assignment of the prior contract);

Rule 17a–7 (permitting securities transactions between a fund and another client of the fund investment adviser);

Rule 17a–8 (permitting mergers between certain affiliated funds);

Rule 17d–1(d)(7) (permitting funds and their affiliates to purchase joint liability insurance policies);

Rule 17e–1 (specifying conditions under which funds may pay commissions to affiliated brokers in connection with the sale of securities on an exchange);

Rule 17g–1(j) (permitting funds to maintain joint insured bonds);

Rule 18f–3 (permitting funds to issue multiple classes of voting stock); and

Rule 23c–3 (permitting the operation of interval funds by enabling closed-end funds to repurchase their shares from investors).

Last October we proposed a new exemptive rule, rule 15a–5, that would also be conditioned on meeting the fund governance standards that are currently included in these ten exemptive rules. *See* Exemption from Shareholder Approval for Certain Subadvisory Contracts, Investment Company Act Release No. 26230 (Oct. 23, 2003) [68 FR 61720 (Oct. 29, 2003)]. If we adopt the fund governance standards proposed in the current Release, we also intend to adopt those standards as a condition of rule 15a–5.

of the board and that of the investment adviser, and that our rules need to strike the proper balance between management and oversight. Funds meet the investment needs and fulfill the expectations of their shareholders because of the efforts and skill of their investment advisers. Investors do not generally invest in a fund because of the skill or reputation of its board of directors. Nonetheless, the ultimate responsibility for the fund lies with its board of directors, whose oversight is critical because of the unique set of conflicts the investment adviser has with the fund. We ask commenters to address whether our proposals strike the proper balance.

A. Board Composition

We propose to require that any fund relying on any of the Exemptive Rules [17] have a board of directors whose independent directors constitute at least seventy-five percent of the board.[18] The Investment Company Act currently requires that at least forty percent of the board be independent,[19] and our 2001 amendments to the Exemptive Rules require that a majority of the board be independent.[20] These 2001 amendments largely codified current mutual fund practices at the time we adopted them.[21]

When we proposed the 2001 amendments, we considered requiring that independent directors comprise a supermajority of the fund boards, and observed that such a requirement "could change the dynamics of board decision making in favor of the interests of investors."[22] Commenters supporting a supermajority independence requirement asserted that a greater proportion of independent directors would help to strengthen the hand of independent directors when dealing with fund management, and would help assure that independent directors maintain control of the board in the event of the illness or absence of other independent directors.[23]

We request comment on the proposed seventy-five percent requirement. Is any change from the current requirement necessary? Should the requirement be higher? Should it be lower? Should it be phrased in terms other than a fraction or percentage, *e.g.*, that all directors, or all directors but one, must be independent? We also request comment on the appropriate period of time over which, if we adopt the new requirement, it should be phased in.[24] Would eighteen months be sufficient? [25]

B. Independent Chairman of the Board

We propose to require that the chairman of the fund board be an independent director.[26] The Investment Company Act and state law are silent on who will fill this important role on fund boards. Today, a director who is also an officer of the fund's investment adviser serves as chairman of most, but not all, fund boards. In many cases, he (or she) also is the chief executive officer of the adviser. This practice may contribute to the adviser's ability to dominate the actions of the board of directors.

The chairman of a fund board can largely control the board's agenda, which may include matters not welcomed by the adviser. The board is required to consider some matters annually in connection with the renewal of the advisory contract, but other matters the board considers at its discretion, such as termination of service providers, including the adviser.[27] Perhaps more important, the chairman of the board can have a substantial influence on the fund boardroom's culture. The boardroom culture can foster (or suppress) the type of meaningful dialogue between fund management and independent directors that is critical for healthy fund governance. It can support (or diminish) the role of the independent directors in the continuous, active engagement of fund management necessary for them to fulfill their duties.

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[17] As discussed above, our proposal would apply only to funds that rely on one or more of the Exemptive Rules. Because almost all funds either rely or anticipate someday relying on at least one of the Exemptive Rules, we expect they would apply to most funds. For convenience, the remainder of this Release assumes that they will apply to all funds registered with the Commission.

[18] We note that section 15(f)(1) of the Act, which provides a safe harbor for the sale of an advisory business, requires that directors who are independent of the adviser constitute at least 75 percent of a fund board for at least three years following the assignment of the advisory contract. 15 U.S.C. 80a–15(f)(1). *See also* Alliance Capital Management, *supra* note 6 (Dec. 18, 2003) (including voluntary undertaking to have independent directors constitute at least 75 percent of board); Putnam Investment Management, *supra* note 6 (same).

[19] *See* section 10(a) of the Act [15 U.S.C. 80a–10(a)].

[20] *See, e.g.*, rule 10f–3(b)(11)(i) [17 CFR 270.10f–3(b)(11)(i)].

[21] Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24082 (Oct. 14, 1999) [64 FR 59826 (Nov. 3, 1999)] ("1999 Proposing Release") at n. 39 and accompany text ("Today, most, but not all, mutual funds have boards with at least a simple majority of independent directors.").

[22] *See* 1999 Proposing Release, *supra* note 21, at text following n. 44. Some economic studies of funds find that boards with a higher proportion of independent directors are more effective. *See, e.g.*, Peter Tufano and Matthew Sevick, *Board Structure and Fee-Setting in the U.S. Mutual Fund Industry*, 46 J. Fin. Econ. 321, 350 (1997) ("Tufano and Sevick") ("We find that funds whose boards have a larger fraction of independent directors tend to charge investors lower fees."); *Mutual Funds: Who's Looking Out for Investors?: Hearings Before the Committee on Financial Services, Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises on the Committee on Financial Services*, 108th Cong., 1st Sess. (2003) (prepared testimony of Eric W. Zitzewitz, Assistant Professor of Economics, Stanford Graduate School of Business) (*http://financialservices.house.gov/media/pdf/110603ez.pdf*) ("My research suggests that boards with more independent directors perform better in limiting arbitrage; earlier research has shown that these boards negotiate lower expense ratios on behalf of their investors."); Diane Del Guercio, Larry Y. Dann and M. Megan Partch, *Governance of Boards of Directors in Closed-End Investment Companies*, 69 J. Fin. Econ. 111, 148 (2003) ("[W]e find reasonably strong evidence of an association between [closed-end fund] board decisions in shareholders' interests and greater nominal independence. Funds with more nominally independent boards have lower expense ratios * * *."). However, we note that the authors of these studies concede that fewer independent directors may be a symptom rather than the cause of ineffective governance and that studies of operating companies have failed to find a correlation between the proportion of independent directors and performance. *See* Tufano and Sevick, *supra*, at 353 ("[W]e must be very cautious about attributing causality to empirical results of this type."); Sanjai Bhagat and Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 Bus. Law. 921, 922 (1999) ("studies of overall firm performance have found no convincing evidence that firms with majority-independent boards perform better than firms without such boards").

[23] *See, e.g.*, Letter from W. Allen Reed, Chair, Financial Executives Institute Committee on Investment of Employee Benefit Assets (Jan. 24, 2000) (expressing support for two-thirds majority requirement by noting that "the more independent a board is, the less likely it will be to have conflicts and, therefore, in a better position to serve the needs of the fund's shareholders"); Letter from C. Meyrick Payne, Senior Partner, Management Practice Inc. (Nov. 3, 1999) ("independent directors are markedly more powerful with a 67% majority than they would be with only a 51% majority"); Letter from Gerald C. McDonough, Independent Trustee, Fidelity Funds (on behalf of the Independent Trustees) (Jan. 28, 2000) ("A two-thirds super majority of independent directors is necessary to maintain an adequate cushion above a bare majority requirement in order to assure that independent directors control the corporate machinery at all times."); Letter from Peter W. Gavian, Independent Trustee, Calvert Group (Jan. 5, 2000), (welcoming "a supermajority requirement, perhaps even the 100% standard that has apparently proven quite successful with bank funds."). These letters are available in the public comment file on that rulemaking, File No. S7–23–99. In addition, the ICI Advisory Group Report recommends that independent directors constitute at least two-thirds of the fund board. The ICI's Board of Governors endorsed these best practices in 1999. ICI Advisory Group Report, *supra* note 15.

[24] Proposed rule 0–1(a)(7) would include the requirement that currently appears in the Exemptive Rules, that the fund's independent directors must select and nominate other independent directors. *See* proposed rule 0–1(a)(7)(i).

[25] *See* 2001 Adopting Release, *supra* note 4, at Section III.B (permitting funds 18 months to comply with fund governance amendments to Exemptive Rules).

[26] *See* proposed rule 0–1(a)(7)(iii).

[27] Under section 15(a)(3) of the Act [15 U.S.C. 80a–15(a)(3)], the advisory contract must permit the fund board to terminate the advisory contract on no more than 60 days' notice.

A boardroom culture conducive to decisions favoring the long-term interest of fund shareholders may be more likely to prevail when the board chairman does not have the conflicts of interest inherent in his role as an executive of the fund adviser.[28] Moreover, a fund board may be more effective when negotiating with the fund adviser over matters such as the advisory fee if it were not at the same time led by an executive of the adviser with whom it is negotiating.[29] If such negotiation leads to lower advisory and other fees, shareholders would stand to benefit substantially.[30]

We request comment on this proposed amendment. Would it strike the correct balance between management of the fund and the proper role of independent directors? Could it improve the boardroom culture we discussed above? Would it reduce the ability of the fund adviser to dominate the board? Or, as some have asserted, would an independent board chairman actually weaken fund governance because an independent director could not effectively lead the board through a discussion of a detailed and, in some respects, complex agenda?[31] Comment is specifically requested on this point from members of those fund boards currently chaired by independent directors.

Are there alternatives that would serve the same or similar purposes? For example, should we instead require independent directors to appoint a "lead director," who would chair separate meetings of the independent directors, act as their spokesperson and interact with their independent legal counsel?[32] Should the chairman of all board committees, or certain board committees, also be required to be an independent director? Should we require instead that the chairman—whether or not independent—be elected annually by both a majority of the board as a whole *and* by a majority of the independent directors? Is a requirement mandating an independent chairman necessary if the Commission adopts a supermajority requirement, as discussed in Section II.A, *supra*, since a majority may empower the independent directors to select the appropriate person to serve as chairman, whether or not independent? Similarly, is a requirement mandating an independent chairman even necessary under current standards that generally mandate a majority of independent directors?

C. Annual Self-Assessment

We also propose to require fund directors to perform an evaluation, at least once annually, of the effectiveness of the board and its committees.[33] The self-assessment process can improve fund performance by strengthening directors' understanding of their role and fostering better communications and greater cohesiveness.[34] It gives directors an opportunity to step back and review their own performance, so that they can best consider any changes in their governance practices.[35]

The self-evaluation should focus on both substantive and procedural aspects of the board's operations. Our proposed rule would leave for the directors to decide those aspects of board operations they should address in their evaluation, except for two procedural matters. First, we propose to require the directors to consider the effectiveness of the board's committee structure. Fund boards, like corporate boards, often designate board committees to which they delegate certain functions and activities.[36] The proposed requirement is designed to focus the board's attention on the need to create, consolidate or revise the various board committees, such as the audit, nominating or pricing committees. The requirement also is designed to facilitate a critical assessment of the current board committees.[37]

Second, we would have the directors carefully evaluate whether they have taken on the responsibility for overseeing too many funds.[38] Directors often serve on a large number of fund boards within a fund complex.[39] This

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[28] *See* Ira M. Millstein and Paul W. MacAvoy, *Proposals for Reform of Corporate Governance*, in The Recurrent Crisis in Corporate Governance 95, 119 (2003) ("Millstein and MacAvoy") ("The first important initiative is for the [corporate] board * * * to develop an identified independent leadership, by separating the roles of chairman of the board and CEO and appointing an independent director as chairman. Independent leadership is critical to positioning the board as an objective body distinct from management. * * * The board cannot function without leadership separate from the management it is supposed to monitor. On behalf of the shareholders, the board must be enabled to obtain the information necessary to monitor * * * the performance of management. * * *").

[29] We recognize that neither the Investment Company Act nor any state law (of which we are aware) requires a fund to appoint a chairman of the board. The proposed rule would apply to any person designated as chairman of the fund board of directors, or who otherwise presides over board meetings and has substantially the same responsibilities as a chairman of a board of directors. *See* proposed rule 0–1(a)(7)(iii).

[30] In some of our recent settled enforcement cases against fund advisers, the funds have undertaken voluntarily to have an independent director chair the fund board. *See* Alliance Capital Management, *supra* note 6; Putnam Investment Management, *supra* note 6. We note that the National Association of Corporate Directors ("NACD") recommends an independent director be designated chairman of the board. *See, e.g.*, National Association of Corporate Directors, *Recommendations from the National Association of Corporate Directors Concerning Reforms in the Aftermath of the Enron Bankruptcy* (May 3, 2002) (*http://www.nacdonline.org/nacd/enron_recommendations.asp*) ("NACD Recommendations") (recommendations include: designation of an independent director as chairman or lead director; regular and formal evaluation of the performance of the board as a whole; and periodic executive sessions for independent directors).

[31] *Hearings on H.R. 2420, the Mutual Funds Integrity and Fee Transparency Act of 2003, Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the Committee on Financial Services*, 108th Cong., 1st Sess. ("Executive Summary") (2003) (prepared testimony of Paul G. Haaga, Vice President, Capital Research and Management Company, and Chairman, Investment Company Institute) (*http://financialservices.house.gov/media/pdf/061803ph.pdf*) ("It is neither necessary nor appropriate to require mutual funds to have an independent chairman of the board. In many cases, a person needs to be intimately familiar with the operations of a company in order to be an effective chairman, and a management representative is often in the best position to do this.").

Similar criticisms also have been raised of proposals to split the roles of the chairman and the chief executive officer of operating companies. *See, e.g.*, The Conference Board, *The Commission on Public Trust and Private Enterprise: Findings and Recommendations 2003* ("Conference Board Recommendations") at 1, 35 (dissenting opinion of John H. Biggs) (*http://www.conference-board.org/knowledge/governCommission.cfm*) ("If [organization of the board meeting] is done in a perfunctory way, say the day before the meeting, it is probably irrelevant. However, to do this competently, [the chairman] would have to devote substantial extra time to understanding the company's operations, discussing with the CEO and others in senior management the issues currently confronting the company, and probably "rehearsing" the meeting to be sure those issues can be discussed adequately.").

[32] *See* ICI Advisory Group Report, *supra* note 15, at 25 (recommending as a best practice that the independent directors of a fund appoint a lead independent director).

[33] *See* proposed rule 0–1(a)(7)(iv). The ICI, NACD, Business Roundtable, and Conference Board all recommend that boards evaluate their performance and effectiveness. *See* ICI Advisory Group Report, *supra* note 15, at 29; NACD Recommendations, *supra* note 30; The Business Roundtable, *Principles of Corporate Governance* (May 2002), at 28–29 (*http://www.businessroundtable.org/pdf/704.pdf*) ("Business Roundtable Principles"); Conference Board Recommendations, *supra* note 31, at 31.

[34] See Katherine McG. Sullivan and Holly J. Gregory, *Creating a Board Self-Evaluation Methodology*, The Metropolitan Corporate Counsel, Mar. 1996, at 1, 12.

[35] *See* ICI Advisory Group Report, *supra* note 15, at 29–31 (recommending periodic self-evaluation by fund board).

[36] *See* American Bar Assoc., *Fund Director's Guidebook*, 59 Bus. L. 201, 212–17 (2003).

[37] We would expect that the minutes of the board of directors would reflect the substance of the matters discussed during the board's annual self-assessment.

[38] *See* proposed rule 0–1(a)(7)(iv).

[39] *See, e.g.*, Tufano and Sevick, *supra* note 22, at 333–334 (for the 50 largest funds sampled, the average number of boards on which a director serves is 16, with the highest being 151); Raj Varma, *An Empirical Examination of Sponsor Influence Over the Board of Directors*, 38 Fin. Rev. 55 (2003)

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practice has over the years generated some criticism that directors are unable to pay adequate attention to their obligations to each fund.[40] Others, however, strongly support the practice as a necessary recognition that many issues facing a particular fund in a fund group are common to all of the funds, and argue that it may actually give directors greater leverage when dealing with the common adviser.[41] It would be difficult to determine the optimum number of funds that a particular director or group of directors can serve, which should depend upon a number of factors.[42] We are, however, sufficiently concerned that we are proposing to ask directors to evaluate each year this aspect of their service on fund boards.

We request comment on our proposed self-evaluation requirement. Should we require boards to make written reports of their self-assessment? We also request comment on whether we should ask directors to evaluate their committee structures and the number of boards on which they serve. Should we require that boards form committees to address certain matters? Should we restrict the number of fund boards on which a director serves? If so, what should be the maximum number of fund directorships any individual should hold? Alternatively, should boards be required to adopt policies on the number of other boards that directors may serve? Should service on non-fund boards factor into any limitation? Should we require that boards also consider how frequently they meet, in light of the number of funds that they oversee?

D. Separate Sessions

We propose that independent directors be required to meet at least once quarterly in a separate session at which no interested persons of the fund are present.[43] Such meetings, which we understand are held by many fund boards, would afford independent directors the opportunity for a frank and candid discussion among themselves regarding the management of the fund, including its strengths and weaknesses. Regularly required sessions would prevent any "negative inferences from attaching to the calling of such executive sessions."[44] The requirement is also designed to help strengthen the collegiality and cohesiveness of the independent directors. We request comment on this proposed amendment. Should separate sessions be held more or less frequently than quarterly?

E. Independent Director Staff

We are proposing that any fund relying on any Exemptive Rule explicitly authorize the independent directors to hire employees and others to help the independent directors fulfill their fiduciary duties.[45] Use of staff and experts may be important to help independent directors deal with matters that are beyond the level of their expertise, or help give them an understanding of better practices among mutual funds.[46]

We request comment on this proposed amendment. If independent directors receive this explicit authority, are they likely to hire their own staff? Should the rule *require* independent directors to hire their own staff?[47] If so, should such a requirement be limited to funds with a certain minimum amount of assets under management? Should the staff be employed by the fund rather than the fund adviser? Should we also require that committees of the board be explicitly authorized to hire their own staff or experts?[48]

We also request comment on whether we ought to *require* that independent directors have an independent legal counsel. In 2001, we began to require that independent directors, if they retain counsel, retain "independent legal counsel," *i.e.*, counsel who the independent directors determine at least annually is free of significant conflicts

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(for the closed-end funds sampled, the average number of board seats held by independent directors for a given sponsor is 32.4, with the highest being 99).

[40] *See, e.g., Mutual Funds: Trading Practices and Abuses That Harm Investors: Hearings Before the Subcomm. on Financial Management, the Budget, and Internationol Security of the Senate Governmentol Affairs Committee*, 108th Cong., 1st Sess. (2003) (statement of Senator Susan M. Collins) (webcast: *http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=124*) ("There are, in fact, plenty of fund family directors who serve on the boards for 80 or even 90 different funds, which seems too many to me. The chairman of Bank of America's Nations Fund sits on the boards of 85 funds. The chairman at Janus sits on 113 fund boards. Now, I realize that many of the funds have similar structures and approaches so there may be some economies of scale, if you will. But it's hard for me to see how anyone, any one director could effectively monitor the activities of so many different entities."); Tufano and Sevick, *supra* note 22, at 329 ("The potential for conflicts of interest may be compounded when the independent directors serve on multiple boards for a single fund sponsor. * * * By seeking to protect the current and future stream of compensation from existing and new board membership, an independent director's interests could become more closely aligned with the fund sponsor than with the shareholders of the fund, leading to less vigilant oversight and higher fees."); Varma, *supra* note 39 ("a more important factor that can weaken director independence is multiple board service for the sponsor"); Geoffrey Smith, *Mutual Funds: Investors Are Still in the Dark*, Bus. Wk., Apr. 29, 2002, at 90 ("the independent directors are often on the boards of so many of the funds in the same family that it's hard to distinguish them from full-time employees"); Anna Robaton, et al., *Is There a Cushier Port-Time Job? Board Stiffs: Pay Swell for Fund Directors*, Investment News, Feb. 22, 1999, at 1 (quoting Barry Barbash, "What troubles me more is the number of fund boards on which a director serves.").

[41] *See* ICI Advisory Group Report, *supra* note 15, at 28 ("[S]ervice on multiple boards can provide the independent directors of those boards with an opportunity to obtain better familiarity with the many aspects of fund operations that are complex-wide in nature. It also can give the independent directors greater access to the fund's adviser and greater influence with the adviser than they would have if there were a separate board for each fund in the complex.").

[42] Funds must disclose to shareholders in their statements of additional information and proxy statements the number of fund boards on which each director serves. Form N–1A (Item 13(a)(1)) [17 CFR 274.11A] (requiring disclosure of the number of portfolios in the fund complex overseen by each director); Schedule 14A, Item 7 [17 CFR 240.14a–101 (Item 7); 17 CFR 229.401 (Item 401)(a)] (requiring disclosure of all positions and offices held by each director).

[43] *See* proposed rule 0–1(a)(7)(v). Under the compliance rule that we recently adopted, the fund's chief compliance officer and the independent directors must meet separately at least once a year. *See* rule 38a–1(a)(4)(iv), to be codified at 17 CFR 270.38a–1(a)(4)(iv). NYSE and NASD listing standards require that independent directors meet without management, and the ICI, NACD, Conference Board, and Business Roundtable also recommend that independent directors meet without the presence of management. *See* Securities Exchange Act Release No. 48745 (Nov. 4, 2003) [68 FR 64154 (Nov. 12, 2003)]; ICI Advisory Group Report, *supra* note 15, at 24; NACD Recommendations, *supra* note 30; Conference Board Recommendations, *supra* note 31, at 41, and Business Roundtable Principles, *supra* note 33, at 26 ("Independent directors should have the opportunity to meet outside the presence of the CEO and any other management directors.").

[44] Report of the New York Stock Exchange Corporate Accountability and Listing Standards Committee (June 6, 2002) at 8 (recommending that independent directors meet at regularly scheduled sessions without management).

[45] *See* proposed rule 0–1(a)(7)(vi).

[46] *See* Millstein and MacAvoy, *supra* note 28, at 115, 116 (recommending that "[b]oards should feel free, without the consent of management, to retain such consultants and advisers as they deem necessary to carry out their responsibilities * * *. In order to monitor management effectively—and sufficiently, in light of emerging legal responsibilities—directors must know more, and understand more, about how the company functions."). *See also* ICI Advisory Group Report, *supra* note 15, at 20.

[47] *See* Alliance Capital Management, *supra* note 6 (voluntarily undertaking to hire compliance staff and to give notice and invitations to independent staff of directors to attend and participate in meetings of Internal Compliance Controls Committee); Putnam Investment Management, *supra* note 6 (voluntarily undertaking to designate independent administrative staff of the trustees to assist the board in monitoring compliance with federal securities laws, fiduciary duties and the funds' codes of ethics; to review compliance reports; and to attend meetings of the Internal Compliance Controls Committee).

[48] *See, e.g.*, Exchange Act rule 10A–3(b)(4) and (5) [17 CFR 240.10A–3(b)(4) and (5)] (rules of securities exchanges and associations must provide that a listed company's audit committee must have authority to engage independent legal counsel and other advisers as it determines are necessary to carry out its duties, and that the company must provide for appropriate funding for the audit committee as determined by the committee).

of interest that might affect their legal advice.[49] At that time, we did not require that independent directors retain independent legal counsel. We noted, however, that the likely result of our rule amendments would be that many fund directors would seek independent legal counsel. We also cited with approval an American Bar Association Report stating that "[t]he complexities of the Investment Company Act, the nature of the separate responsibilities of independent directors and the inherent conflicts of interest between a mutual fund and its managers effectively require that independent directors seek the advice of counsel in understanding and discharging their special responsibilities." [50] Should we take the next step and require independent legal counsel?

F. Recordkeeping for Approval of Advisory Contracts

Finally, we propose to amend rule 31a–2, the fund recordkeeping rule, to require that funds retain copies of the written materials that directors consider in approving an advisory contract under section 15 of the Investment Company Act. Section 15 requires that fund directors, including a majority of independent directors, approve the fund's advisory contract each year.[51] It also requires that the directors first obtain from the adviser the information reasonably necessary to evaluate the contract.[52]

The information request requirement in section 15 provides fund directors, including independent directors, a tool for obtaining the information they need to represent shareholder interests.[53] Careful consideration of the information enables them to better negotiate the amount of the advisory fee.[54] Conversely, the failure of a board to acquire information sufficient to scrutinize the advisory fee and other fund expenses can suggest an inability or lack of interest on the part of the board in negotiating on behalf of the fund. In this regard, the Mutual Fund Directors Forum, an independent organization that advises fund directors, is preparing best practices recommendations for directors on the types of information that they should request and consider when reviewing advisory contracts.[55]

As part of our examinations of funds, our staff has reviewed the materials that directors considered in approving the advisory contract, if the materials were available. Our examiners have found that the nature and quality of these materials vary widely among funds. Some fund boards have failed to request the materials they need to make an informed assessment of the advisory contract. In one case, we brought an enforcement action against directors who neglected to request and evaluate sufficient information under section 15(c).[56]

Our compliance examiners also have reported that often they are unable to determine whether the requirements of section 15 of the Act were met, in part because the funds did not retain the materials that the board considered in approving the advisory contract. We propose to address this problem by amending our recordkeeping rules.[57] Funds would retain the materials on which the board relied in approving the advisory contract, for at least six years, the first two years in an easily accessible place.[58]

We request comment on the proposed amendment to our fund recordkeeping rule. Are there any reasons why a fund would not be able to keep some or all of the required documents? Are there additional documents that funds should maintain that are relevant to the directors' consideration of the advisory contract? Should we require that funds maintain the records for a period shorter or longer than six years? We also specifically request comment, as required by section 31(a)(2) of the Investment Company Act [15 U.S.C. 80a–30(a)(2)], that commenters address whether there are feasible alternatives to the proposed amendment that would minimize the recordkeeping burdens, the necessity of these records in facilitating the examinations carried out by our staff, the costs of maintaining the required records, and any effects that the proposed recordkeeping requirements would have on the nature of firms' internal compliance policies and procedures.

III. General Request for Comments

The Commission requests comment on the rule amendments proposed in this Release, suggestions for additional provisions or changes to existing rules, and comments on other matters that might have an effect on the proposals in this Release. We note that comments that are of greatest assistance are those that are accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

Certain provisions of the proposals contain "collection of information" requirements within the meaning of the

[49] *See* 2001 Adopting Release, *supra* note 4, at nn. 34–56 and accompanying text.

[50] American Bar Association, *Report of the Tosk Force on Independent Director Counsel, Subcommittee of Investment Companies ond Investment Advisers, Committee on Federol Regulotion of Securities, Section of Business Law: Counsel to the Independent Directors of Registered Investment Companies* at 3 (Sept. 8, 2000). *See olso* 2001 Adopting Release, *supra* note 4, at n. 35.

[51] The directors must approve the advisory contract initially, and annually thereafter if it continues in effect for more than two years. 15 U.S.C. 80a–15(a) and (c). The Act also requires that shareholders approve the contract, and prohibits the assignment of the contract to other advisers. 15 U.S.C. 80a–15(a) and (b). The advisory contract must be very specific about the amount of the adviser's fee, and the adviser has a fiduciary duty with respect to that fee. 15 U.S.C. 80a–15(a)(1), 80a–35(b).

[52] 15 U.S.C. 80a–15(c). This requirement was added to the Investment Company Act in 1970, to ensure that directors would have adequate information upon which to base their decision about the advisory contract generally and the advisory fee in particular. *See* Securities and Exchange Commission, Analysis of S. 1659 (*in* Staff of Senate Comm. on Banking and Currency, 90th Cong., 1st Sess., Investment Company Act Amendments of 1969 9 (Comm. Print 1967)). *See olso* S. Rep. No. 90–1351, at 6 (1968).

[53] This provision was intended to "facilitate well-informed directorial consideration of the matters relating to advisory fees" and ensure that "the attention of the directors will be fixed on their responsibilities." *See* Securities and Exchange Commission, Analysis of S. 1659 (*in* Staff of Senate Comm. on Banking and Currency, 90th Cong., 1st Sess., Comparative Print Showing Changes in Existing Law 9 (Comm. Print 1967)); S. Rep. No. 91–184, at 7 (1969).

[54] *See* S. Rep. No. 90–1351, at 14 (1968) ("[T]he directors would be handicapped in determining the reasonableness of compensation for advisory services if they [for example] could not determine what portion of the total compensation was paid for that service and if they did not have relevant information."). *See also Gortenberg* v. *Merrill Lynch Asset Management, Inc.*, 694 F.2d. 923, 930 (2d Cir. 1982) ("[T]he expertise of the independent trustees of a fund, whether they are fully informed about all facts bearing on the adviser-manager's service and fee, and the extent of care and conscientiousness with which they perform their duties are important factors to be considered in deciding whether they and the adviser-manager are guilty of a breach of fiduciary duty in violation of § 36(b)").

[55] Chairman Donaldson recently requested that the Mutual Fund Directors Forum develop best practices recommendations to guide directors in areas where director oversight and decision making is critical for investors, including information requested to approve the advisory contract. *See* Letter from William H. Donaldson, Chairman, Securities and Exchange Commission, to David S. Ruder, Chairman, Mutual Fund Directors Forum (Nov. 17, 2003). The Mutual Fund Directors Forum is a non-profit organization for independent directors "dedicated to improving mutual fund governance by promoting the development of concerned and well-informed independent directors." Mutual Fund Directors Forum Web Site, *www.mfdf.com*.

[56] *See* Heart of America Investment Services, Investment Company Act Release No. 11975 (Oct. 6, 1981) (settling an administrative proceeding that arose in part because of the failure of the fund's independent directors to "request and evaluate" the proper information in connection with their approval of advisory contracts).

[57] *See* proposed rule 31a–2(a)(6).

[58] *Id.*

Paperwork Reduction Act. We are submitting these proposals to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. "Collection of information" requirements would apply to funds because the proposed amendments would require them to maintain records. The proposed amendments to rule 31a–2 would require funds to retain copies of the written materials that boards consider in approving advisory contracts under section 15(c) of the Investment Company Act. Funds would have to retain these materials for at least six years, the first two years in an easily accessible place for our examiners. The information would not be kept confidential. The title for the collection of information associated with the proposed amendments is "Rule 31a–2, 'Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.'" An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The approved collection of information associated with rule 31a–2, which would be revised by the proposed amendments, displays control number 3235–0179.

Our staff estimates that each fund would spend a total of 0.5 hours annually and a total of $9.46 for clerical time to comply with this proposal, and that all funds would spend a total of 2,562 hours annually and a total of $48,473.04 annually to comply with this proposal.[59] Pursuant to 44 U.S.C. 3506(c)(2)(B), we solicit comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

[59] We estimate that 5,124 funds would incur costs under this proposal. To calculate these costs, our staff used $18.92 per hour as the average cost of clerical time.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer of the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–03–04. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this Release; therefore a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–03–04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services.

V. Cost-Benefit Analysis

We are sensitive to the costs and benefits imposed by our rules. As discussed in section II above, we are proposing to require that funds relying on any of the Exemptive Rules adopt certain governance practices that are designed to enhance the independence and effectiveness of fund boards. We also are proposing to require that funds maintain materials considered by a fund board when approving an advisory contract.

A. Benefits

We believe that funds and fund shareholders are likely to benefit from the proposals, which are designed to strengthen the role of independent directors so that fund boards can more effectively manage conflicts of interest, monitor service providers, and protect the interests of fund shareholders. The proposed amendments are designed to enhance the independence and effectiveness of independent directors, who are charged with overseeing the fund's activities and transactions under the Exemptive Rules. Boards that meet these conditions should be more effective at exerting an independent influence over fund management. Their independent directors should be more likely to have their primary loyalty to the fund's shareholders rather than the adviser.

A board of directors whose independent directors constitute at least seventy-five percent of the board may help strengthen the hand of the independent directors when dealing with fund management, and may help assure that independent directors maintain control of the board in the event of the illness or absence of other independent directors. Requiring fund boards to be chaired by an independent director should provide similar benefits. The chairman of a fund board can have a substantial influence on the fund boardroom's culture, which can foster (or suppress) meaningful dialogue between fund management and independent directors and can support (or diminish) the role of the independent directors in fund management. We expect that the opportunity for frank and candid discussions among independent directors will increase their effectiveness.

Requiring funds to explicitly authorize the independent directors to hire employees should help independent directors fulfill their fiduciary duties. Use of staff and experts may be particularly important to help independent directors address complex matters or provide an understanding of the practices of other mutual funds. This requirement should provide substantial benefits to shareholders by helping to ensure that independent directors are better able to fulfill their role of representing shareholder interests.

Finally, the proposed annual self-assessment of the effectiveness of the board and its committees is intended to improve fund performance by strengthening directors' understanding of their role and fostering better communications and greater cohesiveness. Moreover, the self-assessment could help identify potential weaknesses and deficiencies.

The proposed recordkeeping amendment is designed to improve the documentation of a fund board's basis for approving an advisory contract, which would assist our examination staff in determining whether fund directors are fulfilling their fiduciary duties when approving advisory contracts. The proposed amendment to rule 31a–2 would underscore the importance of the information requests that precede the directors' consideration of the advisory contract. Further, it may encourage independent directors to request more information, and this information may enable them to obtain more favorable terms in advisory contracts. These amendments would benefit both shareholders and the Commission by enabling the Commission's staff to monitor the

independent directors' determination of whether their counsel is independent.

The proposed amendments seek to promote strong fund boards that effectively perform their oversight role. By increasing the independence of fund boards, the amendments are designed to improve the quality of the oversight of the process for the benefit of fund investors. Vigilant and informed oversight by a strong, effective and independent fund board may help to prevent problems such as late trading and market timing. These benefits may increase investor confidence in fund management. While these benefits are not easily quantifiable in terms of dollars, we believe they are real, and that the proposed amendments will strengthen the hand of independent directors to the advantage of shareholders.

B. Costs

The proposals would impose additional costs on funds that rely on an Exemptive Rule by requiring them to satisfy the fund governance standards in proposed rule 0–1(a)(7).[60] The proposals would require that independent directors constitute at least seventy-five percent of the fund board. Our staff estimates that nearly sixty percent of all funds currently meet this requirement.[61] Therefore, this proposal would impose costs on funds that do not already meet this standard. A fund could comply with this requirement in one of three ways: (i) Decrease the size of its board and allow some inside directors to resign; (ii) maintain the current size of its board and replace some inside directors with independent directors; or (iii) increase the size of its board and elect new independent directors. If a fund were to hold a shareholder election, it would incur costs to prepare proxy statements and hold the shareholder meeting. A fund also would incur costs of finding qualified candidates and compensating those new independent directors.[62] We have no reliable basis for determining the costs associated with electing independent directors, however, because we have no reliable basis for determining how funds would choose to satisfy this requirement.[63] We request comment on the manner in which funds would likely choose to satisfy a seventy-five percent independence requirement.

The proposals also would require: (i) An independent director to be chairman of the board; (ii) directors to perform an evaluation of the board and its committees, at least once annually; (iii) independent directors to meet in an executive session at which no interested person of the fund is present, at least once quarterly; and (iv) independent directors to be given specific authority to hire employees. We are not aware of any out-of-pocket costs that would result from the first three items because these requirements could be performed at a regularly scheduled board meeting. We are not aware of any costs associated with the fourth item because boards typically have this authority under state law, and the rule would not require them to hire employees. We request comment on the costs of the first three items above, and on whether boards would choose to hire employees.

The proposal that funds retain copies of materials considered by the board in approving advisory contracts would result in increased recordkeeping costs. Our staff anticipates that the cost increases will be limited, however, because many if not most funds already maintain the documents that the proposed amendment would require them to keep.[64] Even for firms that do not already maintain such records, our staff anticipates that the costs of the proposed amendment will be limited.[65] This recordkeeping proposal merely requires the retention of documents already prepared. Further, as with other records, funds would be able to maintain the required records electronically.[66] For purposes of the Paperwork Reduction Act, our staff estimates that each fund would spend a total of 0.5 hours annually and a total of $9.46 for clerical time to comply with this proposal, and that all fund would spend a total of 2,562 hours annually and a total of $48,473.04 annually to comply with this proposal.[67] We request comment on the number of funds that already retain these materials, and on the costs of retaining such materials. We also request comment on whether directors, as a result of the proposed amendment, are likely to request more written materials from investment advisers.

C. Request for Comments

We request comment on the potential costs and benefits of the proposals. We encourage commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits. For purposes of the Small Business Regulatory Enforcement Act of 1996,[68] we also request information regarding the potential impact of the proposals on the U.S. economy on an annual basis. Commenters are requested to provide data to support their views.

VI. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis ("IRFA") has been prepared in accordance with 5 U.S.C. 603. It relates to the proposed amendments to the Commission's rules relating to independent directors of investment companies.

A. Reasons for the Proposed Action

As described more fully in Section I of this Release, the reasons for the proposed amendments are that the Investment Company Act relies heavily on fund boards of directors to manage conflicts of interest that the fund adviser inevitably has with the fund, and the breakdown in fund management and compliance controls evidenced by our enforcement cases raises troubling questions about the ability of many fund boards, as presently constituted, to effectively oversee the management of funds.

B. Objectives of the Proposed Action

As described more fully in Section II of this Release, the objectives of the proposed amendments, which would apply to funds relying on any of the

[60] Funds that do not rely on any Exemptive Rules, however, will not be subject to enhanced fund governance standards in rule 0–1(a)(7) and would not incur costs associated with the proposed amendments. Our staff estimates for purposes of this cost-benefit analysis that approximately 4,610 funds (90 percent of all 5,124 registered investment companies) rely on at least one Exemptive Rule.

[61] *See also Hearing on H.R. 2420, the Mutual Fund Integrity and Fee Transparency Act of 2003, Before the Subcomm. on Capital Markets, Insurance and Government-Sponsored Enterprises of the Committee on Financial Services*, 108th Congress (2003) (prepared testimony of Paul G. Haaga, Executive Vice President, Capital Research and Management Company, and Chairman, Investment Company Institute (*http://financialservices.house.gov/media/pdf/061803ph.pdf*) ("It is the Institute's understanding that most fund boards * * * currently have a super-majority of independent directors.").

[62] Under some circumstances a vacancy on the board may be filled by the board of directors. *See* section 16(a) of the Investment Company Act [15 U.S.C. 80a–16(a)].

[63] With respect to the requirements related to independent selection and nomination of other independent directors and independent legal counsel, this proposal incorporates the current requirements of the Exemptive Rules, and therefore funds would not bear new costs related to those provisions.

[64] Of course, if this proposal causes independent directors to request more information from the adviser, the fund's cost of recordkeeping may also increase.

[65] For purposes of the Paperwork Reduction Act, our staff estimates that each fund would spend approximately 0.5 hours annually maintaining records of documents reviewed by fund boards when approving advisory contracts. *See supra* Section IV.

[66] See rule 31a–2(f) under the Act [17 CFR 270.31a–2(f)].

[67] *See infra* Section IV of this Release.

[68] Pub. L. No. 104–121, Title III, 110 Stat. 857 (1996).

Exemptive Rules, are to enhance the independence and effectiveness of fund boards and to improve their ability to protect the interests of the funds and fund shareholders they serve.

C. Legal Basis

The proposed amendment to rule 0–1 and proposed amendments to the Exemptive Rules are proposed pursuant to the authority set forth in sections 6(c), 10(f), 12(b), 17(d), 17(g), 23(c), and 38(a) of the Investment Company Act. The proposed amendment to rule 31a–2 is proposed pursuant to the authority set forth in sections 12(b) and 31(a).[69]

D. Small Entities Subject to the Proposed Rule and Amendments

A small business or small organization (collectively, "small entity") for purposes of the Regulatory Flexibility Act is a fund that, together with other funds in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[70] Of approximately 5,124 registered investment companies, approximately 204 are small entities.[71] As discussed above, the proposed amendments would require funds relying on an Exemptive Rule to comply with proposed rule 0–1(a)(7) and all funds to retain records under proposed rule 31a–2. Whether these proposed amendments to the Exemptive Rules would affect small entities would depend on whether the small entities rely on an Exemptive Rule.[72] Under proposed rule 31a–2, all small entities would be required to maintain records of materials consulted by a fund board when approving an advisory contract. We request comment on the effects and costs of these proposed amendments on small entities.

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposals do not introduce any new mandatory reporting requirements. The proposals contain mandatory recordkeeping requirements. Any fund, regardless of size, would be required to maintain records of written materials that directors consider to approve an advisory contract. The proposed amendments also would introduce new compliance requirements for any fund that relies on an Exemptive Rule. Any fund that relies on an Exemptive Rule would be required to satisfy the fund governance standards in proposed rule 0–1(a)(7), including having: (i) A board of directors whose independent directors constitute seventy-five percent of the board; (ii) an independent director be chairman of the board; (iii) directors perform an evaluation of the board and its committees, at least once annually; (iv) independent directors meet in an executive session at which no interested person of the fund is present, at least once quarterly; and (v) independent directors be given specific authority to hire employees and others for the independent directors.

F. Duplicative, Overlapping, or Conflicting Federal Rules

We have not identified any federal rules that duplicate, overlap, or conflict with the proposed amendments.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. Alternatives in this category would include: (i) Establishing different compliance or reporting standards that take into account the resources available to small entities; (ii) clarifying, consolidating, or simplifying the compliance requirements under the rule for small entities; (iii) using performance rather than design standards; and (iv) exempting small entities from coverage of the rule, or any part of the rule.

With respect to the establishment of special compliance requirements or timetables under the proposals for small entities, we do not presently think this is feasible or necessary. The proposals arise from enforcement actions and settlements that underscore the need to strengthen the role of independent directors so that fund boards can more effectively manage conflicts of interest, monitor service providers, and protect the interests of fund shareholders. Excepting small entities from the proposed amendments could disadvantage fund shareholders of small entities and compromise the effectiveness of the proposed amendments. Nevertheless, we request comment whether it is feasible or necessary for small entities to have special requirements or timetables for compliance with the proposed amendments. Should any of the proposed amendments be altered or reduced in order to ease the regulatory burden on small entities, without sacrificing the effectiveness of the proposed amendments?

With respect to (i) further clarifying, consolidating or simplifying the compliance requirements of the proposed amendments, (ii) using performance rather than design standards, and (iii) exempting small entities from coverage of the rule or any part of the rule, we believe such changes are impracticable. Small entities are as vulnerable to the problems uncovered in recent enforcement actions and settlements as large entities; shareholders of small entities are equally in need of more independent fund boards. We believe that specific measures must be undertaken by all funds, regardless of size, to increase the independence of boards to provide better oversight of service providers and compliance matters, to better manage conflicts of interest and to better protect fund shareholders. Exempting small entities from coverage of the rule or any part of the rule could compromise the effectiveness of the proposed amendments.

H. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this IRFA. Comment is specifically requested on the number of small entities that would be affected by the proposed amendments, and the likely impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in connection with the adoption of the proposed rule and amendments, and reflected in the Final Regulatory Flexibility Analysis.

Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments also may be submitted electronically to the following E-mail address: *rule-comment@sec.gov*. All comment letters should refer to File No. S7–03–04; this file number should be included on the subject line if E-mail is used.[73]

VII. Efficiency, Competition and Capital Formation

Section 2(c) of the Investment Company Act requires the Commission,

[69] *See infra* Statutory Authority Section of this Release.

[70] 17 CFR 270.0–10.

[71] Some or all of these entities may contain multiple series or portfolios. If a registered investment company is a small entity, the portfolios or series it contains are also small entities.

[72] As discussed above, our staff estimates that approximately 4,610 funds (90 percent of all 5,124 registered investment companies) rely on at least one Exemptive Rule. If 90 percent of all small entities rely on at least one Exemptive Rule, then approximately 184 funds that are small entities would rely on at least one Exemptive Rule and would therefore be affected by the proposed amendments to the Exemptive Rules.

[73] Comments on the IRFA will be placed in the same public file that contains comments on the proposed amendments themselves.

when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. The proposal to require that funds adopt certain governance practices if they rely on any of the Exemptive Rules is designed to enhance the independence and effectiveness of fund boards. The proposal to require that funds maintain materials considered by a fund board when approving an advisory contract is designed to improve the documentation of a fund board's basis for approving an advisory contract, which would assist our examinations staff in determining whether fund directors are fulfilling their fiduciary duties when approving advisory contracts. We do not anticipate that these proposals will have a significant effect on efficiency, competition and capital formation with regard to funds because the costs associated with the proposals are minimal and many funds have already adopted some of the proposed practices. To the extent that these proposals do affect competition and capital formation, we believe that the effect will be positive because the proposals would likely reduce the risk of securities law violations such as late trading in mutual funds and market timing violations, and thus increase investor confidence in mutual funds.

We request comments on whether the proposed rule amendments, if adopted, would promote efficiency, competition, and capital formation. Will the proposed amendments or their resulting costs materially affect the efficiency, competition, and capital formation of funds? Comments will be considered by the Commission in satisfying its responsibilities under section 2(c) of the Investment Company Act. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Statutory Authority

We are proposing amendments to rule 0–1(a) and the Exemptive Rules pursuant to the authority set forth in sections 6(c), 10(f), 12(b), 17(d), 17(g), 23(c), and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–10(f), 80a–12(b), 80a–17(d), 80a–17(g), 80a–23(c), and 80a–37(a)]. We are proposing amendments to rule 31a–2 under the Investment Company Act pursuant to the authority set forth in sections 12(b) and 31(a) [80a–12(b) and 80a–31(a)].

Text of Proposed Rules

List of Subjects in 17 CFR 270

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The general authority citation for Part 270 is amended by adding the following citation to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, 80a–39, unless otherwise noted.

* * * * *

Section 270.0–1(a)(7) is also issued under 15 U.S.C. 80a–10(e);

* * * * *

2. Section 270.0–1 is amended by adding paragraph (a)(7) to read as follows:

§ 270.0–1 Definition of terms used in this part.

(a) * * *

(7) *Fund governance standards.* The board of directors of an investment company ("fund") satisfies the *fund governance standards* if:

(i) At least seventy-five percent of the directors of the fund are not interested persons of the fund ("disinterested directors"), and those directors select and nominate any other disinterested director of the fund;

(ii) Any person who acts as legal counsel for the disinterested directors of the fund is an independent legal counsel as defined in paragraph (a)(6) of this section;

(iii) A disinterested director serves as chairman of the board of directors of the fund, or otherwise presides over meetings of the board of directors and has substantially the same responsibilities as would a chairman of a board of directors;

(iv) The board of directors evaluates at least once annually the performance of the board of directors and the committees of the board of directors, which evaluation must include a consideration of the effectiveness of the committee structure of the fund board and the number of funds on whose boards each director serves;

(v) The disinterested directors meet at least once quarterly in a session at which no directors who are interested persons of the fund are present; and

(vi) The disinterested directors have been authorized to hire employees and to retain advisers and experts necessary to carry out their duties.

* * * * *

3. Section 270.10f–3 is amended by revising paragraph (c)(11) to read as follows:

§ 270.10f–3 Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate.

* * * * *

(c) * * *

(11) *Board composition.* The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

4. Section 270.12b–1 is amended by revising paragraph (c) to read as follows:

§ 270.12b–1 Distribution of shares by registered open-end management investment company.

* * * * *

(c) A registered open-end management investment company may rely on the provisions of paragraph (b) of this section only if its board of directors satisfies the fund governance standards as defined in § 270.0–1(a)(7);

* * * * *

5. Section 270.15a–4 is amended by revising paragraph (b)(2)(vii) to read as follows:

§ 270.15a–4 Temporary exemption for certain investment advisers.

* * * * *

(b) * * *

(2) * * *

(vii) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

6. Section 270.17a–7 is amended by revising paragraph (f) to read as follows:

§ 270.17a–7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.

* * * * *

(f) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

7. Section 270.17a–8 is amended by revising paragraph (a)(4) to read as follows:

§ 270.17a–8 Mergers of affiliated companies.

* * * * *

(a) * * *

(4) *Board composition.* The board of directors of the Merging Company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

8. Section 270.17d–1 is amended by revising paragraph (d)(7)(v) to read as follows:

§ 270.17d–1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans.

* * * * *

(d) * * *

(7) * * *

(v) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

9. Section 270.17e–1 is amended by revising paragraph (c) to read as follows:

§ 270.17e–1 Brokerage transactions on a securities exchange.

* * * * *

(c) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7); and

* * * * *

10. Section 270.17g–1 is amended by revising paragraph (j)(3) to read as follows:

§ 270.17g–1 Bonding of officers and employees of registered management investment companies.

* * * * *

(j) * * *

(3) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

11. Section 270.18f–3 is amended by revising paragraph (e) to read as follows:

§ 270.18f–3 Multiple class companies.

* * * * *

(e) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

12. Section 270.23c–3 is amended by revising paragraph (b)(8) to read as follows:

§ 270.23c–3 Repurchase offers by closed-end companies.

* * * * *

(b) * * *

(8) The board of directors of the investment company satisfies the fund governance standards defined in § 270.0–1(a)(7).

* * * * *

13. Section 270.31a–2 is amended by:

a. Removing the word "and" at the end of paragraph (a)(4);

b. Removing the period at the end of paragraph (a)(5) and adding "; and"; and

c. Adding paragraph (a)(6) to read as follows:

§ 270.31a–2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.

(a) * * *

(6) Preserve for a period not less than six years, the first two years in an easily accessible place, any documents or other written information considered by the directors of the investment company pursuant to section 15(c) of the Act (15 U.S.C. § 80a–15(c)) in approving the terms or renewal of a contract or agreement between the company and an investment adviser.

* * * * *

By the Commission.

Dated: January 15, 2004.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–1323 Filed 1–22–04; 8:45 am]

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Pennsylvania; published 11-24-03
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
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Kentucky and Tennessee; published 12-19-03
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West Virginia; published 12-19-03

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Drawbridge operations:
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Major repair data development (SFAR No. 36); published 11-19-03

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Federal Acquisition Regulation (FAR):

Cost principles and penalties for unallowable costs; applicability; comments due by 1-27-04; published 11-28-03 [FR 03-29640]

Excluded Parties List System enhancement; comments due by 1-30-04; published 12-1-03 [FR 03-29819]

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LIST OF PUBLIC LAWS

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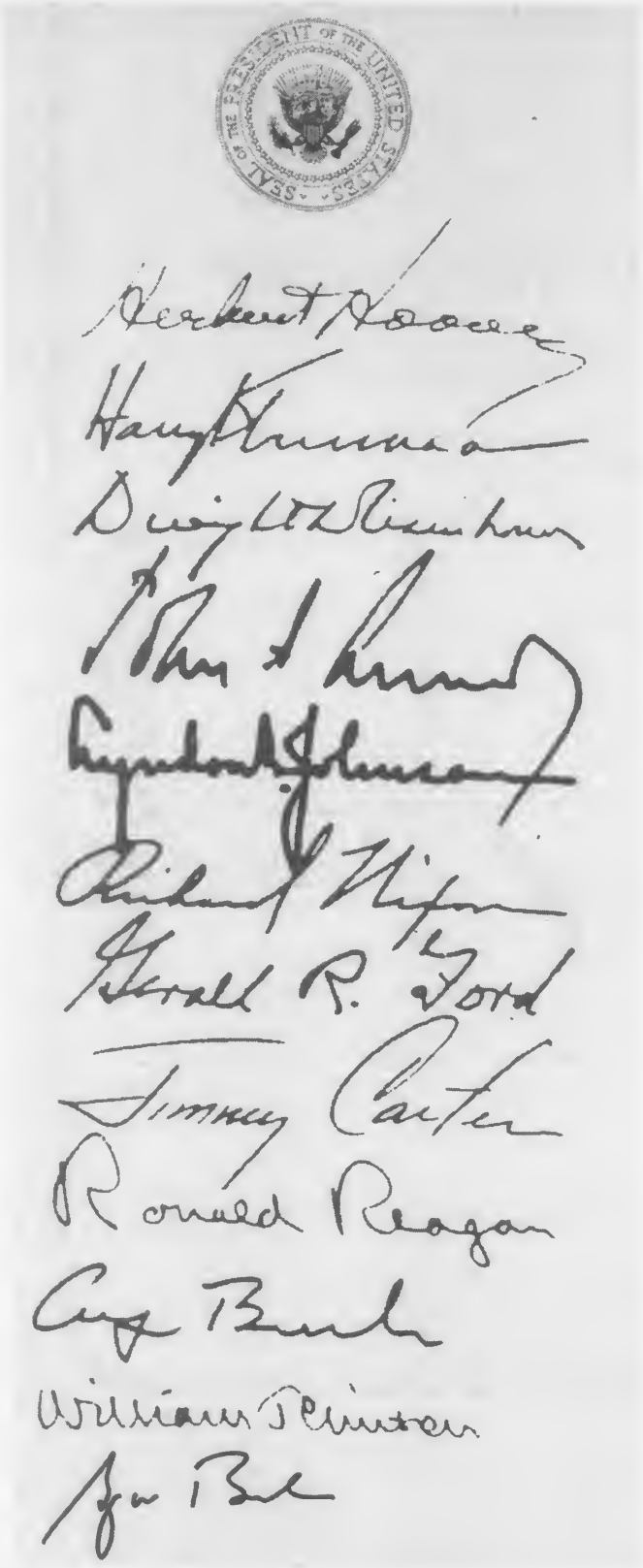

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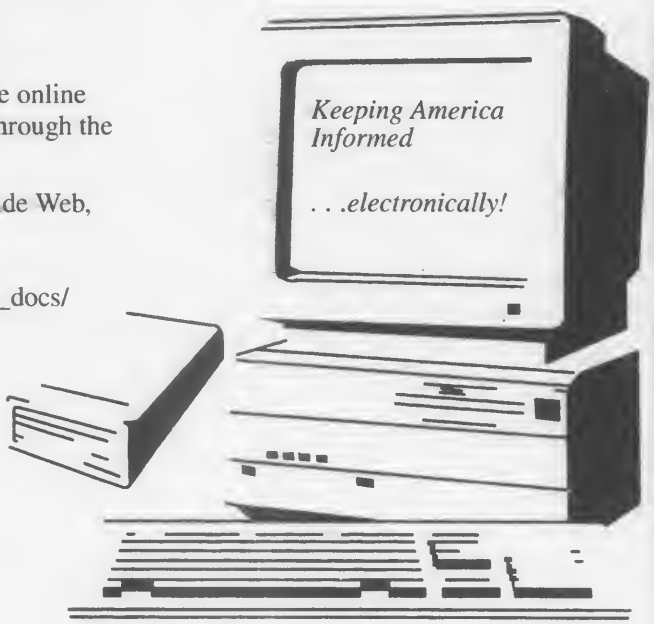

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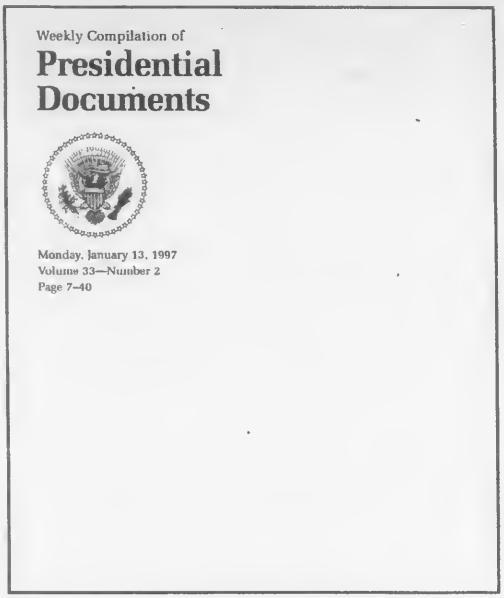

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